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Canada. Parliament.
Special Joint committee on divorce
Proceedings and report.



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First Session—Twenty-seventh Parliament
1966

PROCEEDINGS OF
THE SPECIAL JOINT COMMITTEE OF THE SENATE
AND HOUSE OF COMMONS ON

DIVORCE

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No. 1

TUESDAY, JUNE 28, 1966

Joint Chairmen

The Honourable A. W. Roebuck

and

Mr. A. J. P. Cameron, M.P.

WITNESSES:

Mr. E. Russell Hopkins, Senate Law Clerk and Parliamentary Counsel.

Mr. Justice A. A. M. Walsh, Senate Commissioner.

APPENDICES

1. Acts of the Parliament of Canada Relating to Divorce.
2. The New System of Parliamentary Divorce.
3. Acts of the Parliament of the United Kingdom Relating to Divorce as of July 15, 1870.
4. Contemporary Acts of the Parliament of the United Kingdom Relating to Divorce.

ROGER DUHAMEL, F.R.S.C.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1966

MEMBERS OF THE
SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS
ON DIVORCE

FOR THE SENATE

Hon. A. W. Roebuck, *Joint Chairman*

The Honourable Senators:

Aseltine
Baird
Belisle
Bourget
Burchill
Connolly (*Halifax North*)

Croll
Fergusson
Flynn
Gershaw
Haig
Roebuck—(12)

FOR THE HOUSE OF COMMONS

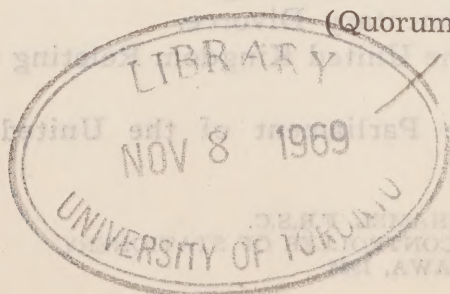
Mr. A. J. P. Cameron (*High Park*), *Joint Chairman*

Members of the House of Commons

Aiken
Baldwin
Brewin
Cameron (*High Park*)
Cantin
Choquette
Chrétien
Fairweather
Forest
Goyer
Honey
Laflamme

Langlois (*Megantic*)
MacEwan
Mandziuk
McCleave
McQuaid
Otto
Peters
Ryan
Stanbury
Trudeau
Wahn
Woolliams—(24).

(Quorum 10)



ORDERS OF REFERENCE

Extracts from the Votes and Proceedings of the House of Commons:

March 15, 1966:

"On motion of Mr. McIlraith, seconded by Mr. Hellyer, it was resolved—That a Special Joint Committee of the Senate and the House of Commons be appointed to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either House;

That 24 Members of the House of Commons, to be designated by the House at a later date, be members of the Special Joint Committee, and that Standing Order 67(1) of the House of Commons be suspended in relation thereto;

That the Committee have power to engage the services of such technical, clerical and other personnel as may be necessary for the purpose of the inquiry;

That the Committee have the power to send for persons, papers and records, to examine witnesses, to report from time to time, and to print such papers and evidence from day to day as may be ordered by the Committee, and that Standing Order 66 be suspended in relation thereto; and

That a Message be sent to the Senate requesting Their Honours to unite with this House for the above purpose, and to select, if the Senate deems it so advisable, some of its Members to act on the proposed Special Joint Committee."

"By unanimous consent, on motion of Mr. McIlraith, seconded by Mr. Hellyer, it was ordered—That the order of the House of Monday, February 21, 1966 referring the subject-matter of the following bills to the Standing Committee on Justice and Legal Affairs, namely:—

Bill C-16, An Act to provide in Canada for the Dissolution of Marriage (Additional Grounds for Divorce).

Bill C-19, An Act to provide in Canada for the Dissolution and the Annulment of Marriage.

Bill C-41, An Act to amend the British North America Acts, 1867 to 1965, (Provincial Marriage and Divorce Laws).

Bill C-44, An Act to provide in Canada for the Dissolution of Marriage.

Bill C-55, An Act to provide in Canada for the Dissolution of Marriage.

Bill C-58, An Act respecting Marriage and Divorce.

Bill C-79, An Act to amend the Dissolution and Annulment of Marriages Act (Additional Grounds for Divorce).

be discharged, and that the subject-matter of the same bill be referred to the Joint Committee of the Senate and the House of Commons on Divorce."

March 16, 1966:

"By unanimous consent, on motion of Mr. Stewart, seconded by Mr. Byrne, it was ordered—That the subject-matter of Bill C-133, An Act to extend the grounds upon which courts now have jurisdiction to grant divorces *a vinculo*

matrimonii may grant such relief, be referred to the Special Joint Committee on Divorce.”

“By unanimous consent, on motion of Mr. Stewart, seconded by Mr. Byrne, it was ordered—That the subject-matter of Notice of Motion No. 11 be referred to the Special Joint Committee on Divorce.”

March 22, 1966:

“On motion of Mr. Pilon, seconded by Mr. McNulty, it was ordered—That a Message be sent to the Senate to acquaint Their Honours that this House will unite with them in the formation of a Joint Committee of both Houses to inquire into and report upon divorce in Canada, and that the Members to serve on the said Committee, on the part of this House, will be as follows: Messrs. Aiken, Baldwin, Brewin, Cameron (*High Park*), Cantin, Choquette, Chrétien, Fairweather, Forest, Goyer, Honey, Laflamme, Langlois (*Mégantic*), MacEwan, Mandziuk, McCleave, McQuaid, Otto, Peters, Ryan, Stanbury, Trudeau, Wahn and Woolliams.”

LÉON-J. RAYMOND,

Clerk of the House of Commons.

Extracts from the Minutes of the Proceedings of the Senate:

March 23, 1966:

“Pursuant to the Order of the Day, the Senate proceeded to the consideration of the Message from the House of Commons requesting the appointment of a Special Joint Committee of the Senate and House of Commons on Divorce.

The Honourable Senator Connolly, P.C., moved, seconded by the Honourable Senator Roebuck:

That the Senate do unite with the House of Commons in the appointment of a Special Joint Committee of both Houses of Parliament to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either House;

That twelve Members of the Senate, to be designated at a later date, act on behalf of the Senate as members of the said Special Joint Committee;

That the Committee have power to engage the services of such technical, clerical and other personnel as may be necessary for the purpose of the inquiry;

That the Committee have the power to send for persons, papers and records, to examine witnesses, to report from time to time, and to print such papers and evidence from day to day as may be ordered by the Committee, and to sit during sittings and adjournments of the Senate; and

That a Message be sent to the House of Commons to inform that House accordingly.

After debate, and—

The question being put on the motion, it was—
Resolved in the affirmative.”

March 29, 1966:

“With leave of the Senate,

The Honourable Senator Beaubien (*Provencher*) moved, seconded by the Honourable Senator Inman:

That the following Senators be appointed to act on behalf of the Senate on the Special Joint Committee of the Senate and House of Commons to inquire

into and report upon divorce in Canada and the social and legal problems relating thereto, namely, the Honourable Senators Aseltine, Baird, Belisle, Bourget, Burchill, Connolly (*Halifax North*), Croll, Fergusson, Flynn, Gershaw, Haig, and Roebuck; and

That a Message be sent to the House of Commons to inform that House accordingly.

The question being put on the motion, it was—
Resolved in the affirmative.”

May 10, 1966:

“Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Roebuck, seconded by the Honourable Senator Croll, for the second reading of the Bill S-19, intituled: “An Act to extend the grounds upon which courts now having jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief”.

The question being put on the motion—

In amendment, the Honourable Senator Connolly, C.P., moved, seconded by the Honourable Senator Hugessen, that the Bill be not now read the second time, but that the subject-matter thereof be referred to the Special Joint Committee on Divorce.

After debate, and—

The question being put on the motion, it was—
Resolved in the affirmative.”

J. F. MACNEILL,
Clerk of the Senate.

MINUTES OF PROCEEDINGS

TUESDAY, June 28, 1966.

Pursuant to adjournment and notice the Special Joint Committee of the Senate and the House of Commons on Divorce met this day at 11.00 a.m.

Present: For the Senate: The Hon. Senators Aseltine, Baird, Burchill, Connolly (*Halifax North*), Croll, Fergusson, Flynn, Gershaw and Roebuck (*Joint Chairman*).

For the House of Commons: Messrs. Aiken, Brewin, Cameron (*High Park*) (*Joint Chairman*), Forest, Goyer, MacEwan, Mandziuk, McCleave, Peters, Trudeau and Wahn.

On motion of Mr. Wahn, seconded by Mr. McCleave, it was resolved to report recommending that the House of Commons section be granted leave to sit while the House is sitting.

The following were heard:

Mr. E. Russell Hopkins, Senate Law Clerk and Parliamentary Counsel.

Mr. Justice A. A. M. Walsh, Senate Commissioner.

The following documents, submitted by Mr. Hopkins, were ordered to be printed as appendices to these proceedings:

1. Acts of the Parliament of Canada Relating to Divorce.
2. The New System of Parliamentary Divorce.
3. Acts of the Parliament of the United Kingdom relating to Divorce as of July 15, 1870.
4. Contemporary Acts of the Parliament of the United Kingdom Relating to Divorce.

At 1.00 p.m. the Committee adjourned until Tuesday next, July 5th, 1966, at 3.30 p.m.

Attest.

John A. Hinds,
Assistant Chief Clerk of Committees.

THE SENATE
THE SPECIAL JOINT COMMITTEE OF THE SENATE AND
THE HOUSE OF COMMONS ON DIVORCE

EVIDENCE

TUESDAY, June 28, 1966.

The Special Committee of the Senate and the House of Commons on Divorce met this day at 11.00 a.m.

Honourable Senator Arthur W. Roebuck, Q.C. and Mr. A. J. P. Cameron, Q.C., M.P. (*High Park*), Co-Chairmen.

The CO-CHAIRMAN (*Senator Roebuck*): Ladies and gentlemen, this is the first meeting for the taking of evidence, and it might be wise to read the order of reference as an opening statement:

That the Senate do unite with the House of Commons in the appointment of a Special Joint Committee of both Houses of Parliament to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either house;

That twelve members of the Senate, to be designated at a later date, act on behalf of the Senate as members of the said Special Joint Committee;

That the committee have power to engage the services of such technical, clerical and other personnel as may be necessary for the purpose of the inquiry;

That the committee have the power to send for persons, papers and records, to examine witnesses, to report from time to time, and to print such papers and evidence from day to day as may be ordered by the committee, and to sit during sittings and adjournments of the Senate; and

That a message be sent to the House of Commons to inform that house accordingly.

That was carried. Now you have your resolution, Mr. Cameron.

The CO-CHAIRMAN (*Mr. Cameron*): Yes. This is slightly different, and reads as follows:

That a Special Joint Committee of the Senate and the House of Commons be appointed to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either house;

That 24 members of the House of Commons, to be designated by the house at a later date, be members of the Special Joint Committee, and that Standing Order 67(1) of the House of Commons be suspended in relation thereto;

That the committee have power to engage the services of such technical, clerical and other personnel as may be necessary for the purpose of the inquiry;

That the committee have the power to send for persons, papers and records, to examine witnesses, to report from time to time, and to print

such papers and evidence from day to day as may be ordered by the committee, and that Standing Order 66 be suspended in relation thereto.

The Co-CHAIRMAN (*Senator Roebuck*): What is Standing Order 66?

The Co-CHAIRMAN (*Mr. Cameron*): Standing Order 66 is in regard to the printing of papers, and so on.

The Co-CHAIRMAN (*Senator Roebuck*): What about ability to sit?

The Co-CHAIRMAN (*Mr. Cameron*): We have not that ability. I think you will need a motion, and I have one drawn up.

The Co-CHAIRMAN (*Senator Roebuck*): You are going to make that in the Commons?

The Co-CHAIRMAN (*Mr. Cameron*): If I can persuade some of my colleagues from the House of Commons to make this motion and second it, I think it will carry.

The Co-CHAIRMAN (*Senator Roebuck*): The general program of meetings that we have in mind—nothing is settled, of course, because we have just been thinking about it—is to meet once a week.

Mr. McCleave: Mr. Chairman, we have just seen the motion.

The Co-CHAIRMAN (*Mr. Cameron*): It is in the exact language of the Senate resolution.

The Co-CHAIRMAN (*Senator Roebuck*): Our proposal for your consideration is that we meet on Tuesday of each week at 3.30 p.m. That will give the members of the Commons an opportunity to stay in their chamber for the question period or the first questions at all events, and then attend here. It was thought by some of the Commons members of our committee that we would get a better attendance in that way. If we keep that program up after we come back we will get through a lot of work. In the meantime we have this meeting today, and we have a meeting planned for this day next week and then nothing more until the fall.

The Co-CHAIRMAN (*Mr. Cameron*): It is moved by Mr. McCleave, seconded by Mr. Wahn, that the members of the House of Commons on the Special Joint Committee on Divorce be authorized to sit during sittings and adjournments of the house. Is there any discussion on this motion? The committee has heard the motion. If there is no further discussion, is it carried?

MEMBERS OF THE COMMITTEE: Agreed.

The Co-CHAIRMAN (*Senator Roebuck*): We have an important program today in which we shall lay the foundation of legal knowledge for the work we have in hand. The Steering Committee has consented to this, and Mr. Cameron and I have been working on it. Naturally, the first thing we should consider in opening our discussion, and before hearing briefs and presentations, is the law as it stands now not only in Canada but in each of the provinces and also in England. Possibly there will be a reference to what is the situation in the republic to the south of us. For that purpose nobody is better fitted than the Law Clerk of the Senate, Mr. Hopkins, with whom I have worked for the last ten or twelve years in the closest association.

I have asked Mr. Hopkins to be present this morning to address us. Following his address the Senate Commissioner, Mr. Justice Walsh, will attend. He is hearing cases at the moment, but he promised me he would be here by 12 o'clock. The interval between now and then will be fully taken up, I think, by Mr. Hopkins in presenting his brief to us, and the questions which we may ask him at his conclusion.

With your permission, ladies and gentlemen, I will call on Mr. Hopkins.

Mr. E. Russell Hopkins, Law Clerk and Parliamentary Counsel, the Senate: Messrs. Chairmen, honourable members of the joint committee; I was at first somewhat apprehensive at being in the lead-off position, but then it occurred to me—and I derived some comfort from this fact—that the lead-off man in baseball is not expected to hit any home runs.

The Co-CHAIRMAN (*Mr. Cameron*): He is just expected to get on base.

Mr. HOPKINS: Yes, that is right. So my modest objective, whether through bunting, walking or getting hit by a pitched ball, is to get on first base. In a more serious vein may I say that I am impressed by the scope of this inquiry which appears to touch all phases of divorce in Canada, and by the collective experience and expertise which is obviously enjoyed by the committee and its joint chairmen. I know that the qualifications of Mr. Cameron are very high indeed, and I can speak from personal knowledge of Senator Roebuck.

The Co-CHAIRMAN (*Senator Roebuck*): Keep it quiet.

Mr. HOPKINS: He said that he has known me for ten or twelve years as his legal adviser, and I should point out that during all that time he has been my father confessor.

The product of the committee's work may well affect Canadians in the vital area of domestic affairs for a generation or more. It is not for me to say that the present law of divorce is outmoded or inadequate or to indicate to what extent, if any, it should be modified in the public interest. That, of course, is the function of the committee.

However, I think I may properly say that this planet has turned on its axis many times since 1857 when the grounds for divorce in most Canadian provinces were established. I might add that the present law of divorce in Canada is a curious and somewhat delicate mosaic which has been adjusted from time to time in a piecemeal, pragmatic and, perhaps, typically Anglo Saxon manner, and that any further improvement in its design will require not only a steady hand but a fine chisel indeed. There will be needed also a sort of liquid cement compounded of caution and confidence in equal parts.

I propose, therefore, to describe, first, the statutory mosaic in Canada, and to conclude with an account of the present position in the United Kingdom, in each case with special reference to the grounds for dissolution of marriage.

Perhaps I should also indicate what I do not propose to cover. It is my intention to leave some vacant ground. I will deal only incidentally with the constitutional issue, for example. My understanding is that a representative of the Department of Justice will appear before the committee, and he will discuss, presumably, the ambit of the legislative jurisdiction of Parliament and of the provincial legislatures respectively in relation to divorce, as to the grounds therefor, the defences to an action therefor, and the ancillary relief such as alimony, custody and education of children, property settlements, *et cetera*.

The Parliament of Canada is vested with exclusive legislative authority in respect of "marriage and divorce", by Head 26 of section 91. On the other hand, the provincial legislatures are vested with such authority, by section 92 of the Act, in respect of the following classes of subjects:

- (1) Head 12—"The Solemnization of Marriage in the Province."
- (2) Head 13—"Property and Civil Rights in the Province."
- (3) Head 14—"The Administration of Justice in the Province, including the Constitution, Maintenance and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts."

Nor do I propose to deal with the practice and procedure or the laws of evidence in force in the several provinces, and I shall not deal at this time with the divorce laws in the several states of the union to our south. That will require a separate effort by somebody, who I hope will not be me.

With those introductory remarks, I shall proceed with my submission, in which I deal first with Canada and then with the United Kingdom.

The Parliament of Canada, though it enjoys exclusive legislative jurisdiction over "marriage and divorce" by virtue of Head 26 of Section 91 of the British North America Act, 1867, has exercised that jurisdiction quite sparingly. It has not, for instance, provided a standard divorce code or even established divorce courts for Canada as a whole, although seemingly it might have done so under section 102 of the B.N.A. Act, 1867, which confers on Parliament power to establish courts with respect to matters within federal competence. It has contended itself with amending, in certain limited respects, the laws of divorce which, for reasons referred to later, had been held to be in force in all the provinces except Ontario, Quebec and Newfoundland. It has also introduced into the law of Ontario, subject to such aforementioned amendments, the English law as to dissolution and annulment of marriage as it stood on July 15, 1870—a magical date in this matter. In addition, it has recently conferred on the Senate of Canada power to dissolve or annul marriages by resolution, on the recommendation of a divorce commissioner to be appointed pursuant to the statute, on any ground recognized by the law of England, again as it stood as of July 15, 1870. In the result, the divorce law of Canada, like Canada itself, is in the nature of a mosaic.

Attached hereto as Appendix 1 are the texts of all the statutes relating to divorce thus far enacted by the Parliament of Canada.

The first of these statutes was the Marriage and Divorce Act of 1925, which put an end to the so-called "double standard" by providing that in any court having jurisdiction to grant a divorce *a vinculo matrimonii* a wife may sue for divorce on the ground of her husband's adultery only. Prior to this enactment, this right was limited to the husband's wife suing for divorce had to prove not merely adultery on the part of the husband but (1) incestuous adultery or (2) bigamy coupled with adultery or (3) adultery coupled with desertion for at least two years or (4) adultery coupled with such cruelty as, without adultery, would have entitled her to a divorce *a mensa et thoro* (judicial separation).

The Co-CHAIRMAN (*Senator Roebuck*): That is, null and void.

Mr. HOPKINS: Yes. The second statute was the Divorce jurisdiction Act of 1930. This act relaxed the rigidity of the law of domicile by providing that a wife whose husband has deserted and has been living apart from her for at least two years may sue for divorce in the province in which her husband was domiciled immediately prior to such desertion. This relaxed the rule, as stated in *A.G. for Alberta v Cook*, (1926) A.C. 444, to the effect that a wife may sue for divorce only in the province in which the husband is domiciled at the time of the petition.

The Supreme Court of Ontario derived its divorce jurisdiction from the federal Divorce Act (Ontario) of 1930, which introduced into Ontario the law of England as to dissolution and annulment as of July 15, 1870.

I think those words dissolution and annulment should be mentally underlined.

That date was selected because the decisions of *Board v Board*, (1919) A.C. 956, *Fletcher v Fletcher*, (1920) 50 D.L.R. 23, and *Walker v Walker*, (1919) A.C. 947, had held that the courts of Alberta, Saskatchewan and Manitoba possessed jurisdiction to administer the law of England as to matrimonial causes as it stood on that date. Alberta and Saskatchewan were held to have inherited such jurisdiction from the laws previously in force in the Northwest Territories, out of which those provinces were carved following Confederation. As to Manitoba, the law of England, as of July 15, 1870, was declared by a federal Act (chapter 33 of the statutes of 1888) to be applicable to that province.

The laws of England as of November 19, 1858, were proclaimed in force in British Columbia by a Royal Proclamation of that date, and an Ordinance of 1867 made the same provision after the union of Vancouver Island and British Columbia under the latter name. These provisions were continued in force by the terms of the Imperial Order in Council admitting that colony into the union on May 16, 1871.

This led to a curious result in British Columbia, which had to be corrected by an act of the Canadian Parliament. In 1857, petitions for divorce in England had to be heard by three judges, from whom there was an appeal to the House of Lords. But when the laws of England were introduced into British Columbia the powers granted to three judges were granted to a single judge, and no provision was made at the time for an appeal therefrom. Since provision for an appeal must be made by express enactment, it was held by the courts prior to 1937 that no appeal lay from a single judge in British Columbia either granting or refusing a divorce petition. However, in 1937, a federal Act (chapter 4 of the statutes of that year) conferred such a right of appeal to the court of appeal of British Columbia.

Nova Scotia, New Brunswick and Prince Edward Island each has a divorce law of its own, enacted prior to Confederation and continued thereafter in force in these provinces except as modified by the Acts of the Parliament of Canada reproduced as Appendix 1.

In 1758, and those who are from Nova Scotia may take a bow—one century before judicial divorces were obtainable in England, the first legislative assembly of Nova Scotia passed an act (chapter 17 of the statutes of that year) which provided that all matters related to prohibited marriage and divorce should be heard and determined by the Governor or Commander-in-Chief for the time being and His Majesty's Council for the province. It also provided that no marriage should be declared null and void except for impotence or consanguinity within the degrees prohibited by 32 Henry VIII, c. 38,—and now approximating those in the Anglican Book of Common Prayer. I have a note on consanguinity, but I do not need to go into that now, because it is not related to divorce but to nullity—and that no divorce should be granted except for either of those two causes, for adultery and desertion, without necessary maintenance, for three years.

In those days they did not draw the nice distinction between nullity and divorce which we do today; you could get a divorce on the same ground as for nullity.

In 1761 by an amending act (chapter 7 of the statutes of that year), "cruelty" was added and "desertion" dropped as a ground for divorce. Cruelty is thus a ground for divorce in Nova Scotia, and not in any other province. It is, however, a ground for judicial separation in those provinces where such an action lies, and is also a discretionary bar to such an action. There is thus a considerable body of jurisprudence in Canada with respect to cruelty. (See Kent Power on Divorce, chapter XXI). The latest amendment to the Nova Scotia Act prior to Confederation was that of 1866 when a new court, styled the "Court for Divorce and Matrimonial Causes" was established, and it was provided, *inter alia*, that the court would retain its pre-existing jurisdiction and that it would also have the same powers in respect of, or incidental to, divorce and matrimonial causes: and the custody, maintenance and education of children possessed by the divorce courts in England, as of that time.

The Co-CHAIRMAN (Senator Roebuck): Is a date given?

Mr. HOPKINS: I have not the precise date, but the year was 1866.

By virtue of section 129 of the B.N.A. Act, 1867, this act is still in force in Nova Scotia, except as subsequently modified by the Dominion Acts reproduced in Appendix 1.

New Brunswick, too, has its own pre-Confederation Divorce Act, dating from an act of 1791 (chapter 5 of the statutes of that year), which superseded an even earlier act of 1787, the text of which apparently cannot now be found but which was in any event repealed by the Act of 1791. (See *Rex v Vesey*, (1938) 2 D.L.R. 70.)

So presumably it does not make much difference whether the text was lost or not—it is gone in every sense of the word.

This act established a divorce court for New Brunswick and provided that the causes of divorce from the bond of matrimony and of dissolving and annulling marriage are frigidity or impotence, adultery and consanguinity within the degrees prohibited by 32 Henry VIII. Cruelty was not included as a ground for divorce. The provisions of the New Brunswick law relating to divorce, as amended from time to time, may be found in the Divorce Court Act (R.S. N.B., 1952, c. 63), as amended.

Prior to and at the time of its entry into Confederation, Prince Edward Island possessed a divorce court consisting of the lieutenant-governor or other administrator of the government and His Majesty's Council or any five members thereof, with power vested in the lieutenant-governor or administrator to appoint the Chief Justice of the Supreme Court of Judicature to preside in his stead.

However, the act of 1835 is said to have remained a "dead letter" until it was revived in 1946: concurrent jurisdiction was conferred on the Supreme Court of Prince Edward Island in 1949.

The laws of England introduced into Newfoundland prior to its joining Canada in 1949 were those of 1832, and it has been held by the Newfoundland Supreme Court (see *Hounsell v Hounsell* (1949) 3, D.L.R. 38, Nfld.) that the Newfoundland courts possessed at that time only the jurisdiction then possessed by the ecclesiastical courts in England, which could not decree divorces *a vinculo matrimonii*, but only divorces *a mensa et thoro*—"from bed and board". When Newfoundland became a province in 1949, these pre-existing laws were continued in force, by virtue of the Newfoundland Act, so that it appears that Newfoundland courts have no jurisdiction to decree divorces *a vinculo matrimonii*. The same is of course true in the Province of Quebec, the courts of which have no jurisdiction to dissolve marriages but have a substantial jurisdiction in respect of other forms of matrimonial relief, such as nullity and judicial separation.

I understand from my colleague, Dr. Maurice Ollivier, that he will speak on this and may have some comments on the interrelation and interaction of the matrimonial laws of Quebec and of statutory divorces obtained here in respect of persons domiciled in that province.

In the result, since Confederation, the Parliament of Canada has granted, by private act of Parliament, divorces *a vinculo matrimonii* on the petition of persons domiciled in Quebec, and also, since 1949, on the petition of persons domiciled in Newfoundland (or of persons whose provincial domicile is in reasonable doubt). The jurisdiction of Parliament is of course absolute as to the grounds upon which it may pass a bill of divorce. However, as a matter of policy it has generally granted such relief only on the grounds formerly recognized by the House of Lords and latterly by the courts in England as of July 15, 1870, the magic date. I will not elaborate further on this legislative jurisdiction since I understand subsequent witnesses may expand upon what has just been said. It is my understanding that I will be followed by the Divorce Commissioner, Mr. Justice Walsh, in this regard.

I must also refer, again in passing, to the Dissolution and Annulment of Marriages Act, chapter 10 of the statutes of 1963, whereby Parliament delegated to the Senate legislative authority to dissolve marriages, by resolution of that body, on any ground recognized by the courts in England, again as of the magic

date, July 15, 1870. Such resolutions must be founded upon a recommendation and report by a divorce commissioner appointed under that statute to conduct the hearing and upon a further report, under our Senate rules, by the Divorce Committee of the Senate to which the commissioner's recommendations are presented in the first instance. The act also provides for an appeal to Parliament as a whole by any person considering himself or herself aggrieved by a resolution of divorce adopted by the Senate. A 30-day delay takes place during which such an appeal might be made. I do not know that any appeals have been made.

The Co-CHAIRMAN (*Senator Roebuck*): None have been made.

Mr. HOPKINS: I will say no more on this matter, since I understand that Mr. Justice Walsh will deal with it in some depth. However, I have written an article for *The Canadian Banker* entitled "The New System of Parliamentary Divorce," which outlines the parliamentary history and background of this unique piece of legislation. The text of the article could be printed as an appendix.

The Co-CHAIRMAN (*Senator Roebuck*): I will have a resolution to that effect moved later.

Mr. HOPKINS: It might be interesting to have it so printed, as I see here two members of the House of Commons, Mr. Mandziuk and Mr. McCleave, and Senator Roebuck, all of whom played a prominent role in that connection.

To conclude this examination of the Canadian law of divorce, it should be added that the laws of divorce in force in the Northwest Territories are those of England, once more as of the magic date July 15, 1870, and that the procedure to be followed in the territorial courts is that obtaining in the Province of Alberta. I cite the acts concerned, and they are incorporated in the appendix. (See the Northwest Territories Act, R.S., c. 331, s. 17, as amended by the statutes of 1955 (Can.), c. 48, s. 9). When the act of 1886 originally conferred such jurisdiction, the present Yukon was still part of the Northwest Territories, so that the Yukon has the same basic jurisdiction, later confirmed by Dominion act. (See now R.S.C., c. 53, s. 31).

In view of the significance attaching to the statutory law of the United Kingdom relating to divorce and matrimonial causes as it stood on July 15, 1870, appendix 3 hereto contains the texts of the United Kingdom statutes applicable that date. Prior to January 1, 1858, when the Divorce and Matrimonial Causes Act of 1857 came into force, no court in England had jurisdiction to grant a decree of divorce in the modern sense of the word; that is a divorce *a vinculo matrimonii* which effectively dissolves the marriage tie for all purposes. Until then, matrimonial causes were under the jurisdiction of ecclesiastical courts administering the canon law of England—which is somewhat different from the canon law on the continent—whose authority in divorce was limited to the granting of divorces *a mensa et thoro* from bed and board. Prior to that time a marriage could be dissolved in England only by an act of Parliament obtainable only after expensive and formidable obstacles had been overcome.

I am about to quote something which is of interest here and which, among other things, was responsible for the amendment of the law of England in this matter, in much the same way as Uncle Tom's Cabin had an effect on slavery in the United States. The quotation is as follows:

(See *Sheppard v Sheppard* (1908) 13 BCR 486, at 515.)

The well known anecdote of Mr. Justice Maule gives a forcible illustration of the process. A hawker who had been convicted of bigamy urged in extenuation that his lawful wife had left her home and children to live with another man, that he had never seen her since, and that he married the second wife in consequence of the desertion of the first. The judge, in passing sentence, addressed the prisoner somewhat as follows:

"I will tell you what you ought to have done under the circumstances, and if you say you did not know, I must tell you that the law conclusively presumes that you did. You should have instructed your attorney to bring an action against the seducer of your wife for damages; that would have cost you about £100. Having proceeded thus far, you should have employed a proctor and instituted a suit in the Ecclesiastical Courts for a divorce *a mensa et thoro*, that would have cost you £200 or £300 more. When you obtained a divorce *a mensa et thoro*, you had only to obtain a private Act for a divorce *a vinculo matrimonii*. The bill might possibly have been opposed in all its stages in both Houses of Parliament, and altogether these proceedings would cost you £1,000. You will probably tell me that you never had a tenth of that sum, but that makes no difference. Sitting here as an English judge it is my duty to tell you that this is not a country in which there is one law for the rich and another for the poor. You will be imprisoned for one day."

These observations exposing the absurdity of the existing law, attracted much public attention, and probably did more than anything else to prove the need of its reform.

Then followed the Matrimonial Causes Act of 1857. The Act of 1857 terminated the jurisdiction of the ecclesiastical courts in all matrimonial matters and causes, and directed that all such jurisdiction conferred by the Act should henceforward be exercised in Her Majesty's name by a court of record to be called "The Court for Divorce and Matrimonial Causes". It substituted the expression "judicial separation" for divorce *a mensa et thoro*, and enacted that such a decree could be obtained "either by the husband or the wife, on the ground of adultery, or cruelty, or desertion without cause for two years and upwards".

The Act of 1857 also provided for the dissolution of marriage on the petition of a husband on the ground of his wife's adultery since the celebration of the marriage. On the other hand, it provided that a wife might petition for a dissolution on any of the following grounds: namely, that since the celebration of the marriage her husband had been guilty of: (1) incestuous adultery; or (2) bigamy with adultery; or (3) rape, sodomy or bestiality, or (4) adultery coupled with such cruelty as without adultery would have entitled her to a divorce *a mensa et thoro*, or (5) adultery coupled with desertion, without any reasonable excuse, for two years or upwards.

As mentioned earlier, this so-called "double standard" in respect of adultery has since been removed both in Canada and in the United Kingdom.

To complete the Canadian mosaic in respect of divorce, it becomes necessary to revert briefly to the law of Ontario. I do not know whether this happened while you were attorney general or not, Senator Roebuck, you can tell me when I read this.

The Co-CHAIRMAN (*Senator Roebuck*): I plead not guilty.

Mr. HOPKINS: As previously mentioned, the English law "as to the dissolution of marriage and as to the annulment of marriage" as that law existed on July 15, 1870, was incorporated into the law of Ontario by the federal Divorce Act (Ontario) of 1930. It is to be noted that this provision did not incorporate the whole of the matrimonial law of England but only that part of it related to "dissolution or annulment". One result of this limitation has been that the Ontario courts have held that an action for judicial separation does not lie in the Ontario courts since it is not an action for dissolution and annulment.

The Co-CHAIRMAN (*Senator Roebuck*): Dissolution does not lie?

Mr. HOPKINS: Dissolution lies, but judicial separation does not because it does not fall into the category of "dissolution" which was the only jurisdiction conferred.

Of equal interest is the circumstance that, in case any aspect of the federal act of 1930 was beyond the legislative capacity of Parliament, the Legislature of Ontario confirmed its provisions in the Marriage Act of 1933 (chapter 29 of the statutes of that year), which provided that "so many of the provisions of the Divorce Act (Ontario) as are or may be within the legislative competence of this Legislature are hereby enacted as if fully set out in this Act".

It is pretty difficult to get a constitutional lead out of that when it is covered both ways at the same time.

It is also of constitutional interest to note that the federal act of 1930 was "supplemented"—if that is the correct word—by an Ontario statute of 1931 (chapter 25 of the statutes of that year), which dealt with maintenance, alimony, property settlements, the custody of the children and the making of rules of procedure.

That deals with Canada as far as I propose to go. The second part is shorter, but I have tried to summarize the case law in England as to cruelty, desertion and insanity.

Mr. PETERS: When the Ontario Legislature passed the statute in 1931 deciding on the maintenance of children and custody, where did this come from? Is this an inherent part of the federal legislation transferred in 1930? Where did we lose the jurisdiction of the federal field over children?

Mr. HOPKINS: I remarked that the situation was interesting constitutionally in that it was working both ways. My opinion was this: That the Divorce Act of Ontario conferred on the Province of Ontario all the laws of England as to dissolution and annulment, and that in my opinion would include the ancillary forms of relief. Those are the actual words, and therefore I would say there was an assumption of jurisdiction over these ancillary forms of relief by the Parliament.

Mr. PETERS: Does the legislation conferred by Confederation in the British North America Act, carry with it in section 102 the custody and maintenance and other provisions relating to matrimony in England at that time?

Mr. HOPKINS: In Ontario at that time the United Province of Canada did enact parliamentary divorces, but there was no general law providing for judicial divorce in force at that time. There was no inherited body of law at all in Ontario on divorce.

Mr. PETERS: Then speaking of the law of England at that time, I am trying to ascertain where the power is that allows Ontario in passing the act of 1931 to include things not spelled out in the substantive legislation passed by the federal Government in the 1930s.

Mr. HOPKINS: I said that in my view the broadness of the language in the federal act would include in the law of Ontario all the ancillary forms of relief set out in the Matrimonial Causes Act of 1857. Therefore I stated it could be said that Ontario assumed jurisdiction over such ancillary forms.

The Co-CHAIRMAN (*Senator Roebuck*): Was not that because we had not occupied the field at that time?

Mr. HOPKINS: This all depends on the Divorce Act (Ontario) 1930. That conferred on the provincial courts all the law of England as to dissolution and annulment. It is arguable whether they occupied the field or not. As I say it is of constitutional interest. I hope when the officials from the Department of Justice appear before us a decision will be reached on this. I assure you, as in every area of constitutional law, that formulating an opinion is no more than a prediction, a studied speculation as to what the Supreme Court of Canada might say. It is very hard to control the opinions of a body that is the judicial sovereign in this country.

Senator CROLL: Is there any case law on the point?

Mr. HOPKINS: No, none that I know of. There is no Supreme Court case which has decided the hard constitutional problem. The grounds for divorce are exclusively federal. Procedures in the court might be covered federally, but are conceded to the provinces by the B.N.A. Act. The in-between areas, the *terra incognita*, of alimony, custody of children and maintenance—that is a different matter. I have neither the courage nor the capacity to predict what the Supreme Court of Canada would say about these.

Mr. PETERS: Not being a lawyer and not understanding all these terms, I would like to know if that means the answer to Senator Croll's question—would an appeal by someone who was charged damages, whatever the phrase is, where a man had to pay alimony and custody, if he had opposed this under the federal divorce legislation would this be the kind of case you have in mind?

Mr. HOPKINS: That would raise the issues very nicely. But I know of no case which has reached the Supreme Court, which is the only final court we have to settle the matter to anybody's real satisfaction.

Now, I will deal with the position in the United Kingdom including a summary of the case law relating to the added grounds for divorce; namely, cruelty, desertion and unsoundness of mind, and here I must disqualify myself as an expert witness—

Senator ASELTINE: Do these rules also cover avoidance? You remember the bill in 1938 and again in 1955 in which I was interested? Could you deal with that?

Mr. HOPKINS: I will indeed a little later. The grounds for divorce in England remained unchanged for the eighty years following the Matrimonial Causes Act of 1867. However, the Matrimonial Causes Act of 1937 (sometimes referred to as the "Herbert legislation" because of its advocacy by Sir Alan P. Herbert, author of *Holy Deadlock* and *Cases in the Uncommon Law*, and Member of Parliament for Oxford University)—and it so happened that I was a student at the time and I had a sort of nodding acquaintance with him—extended the pre-existing grounds so as include cruelty, desertion and unsoundness of mind. It also—and this deals with what Senator Aseltine was referring to—introduced certain new grounds for nullity; i.e., wilful refusal to consummate the marriage; that either party was at the time of the marriage of unsound mind or a mental defective or subject to recurrent fits of insanity or epilepsy; that the respondent was at the time of the marriage suffering from venereal disease of a communicable form, or was pregnant by some person other than the petitioner. The statutes relating to matrimonial causes were consolidated in the Matrimonial Causes Act, 1950. Attached to this brief as Appendix 4 is the text of the last-mentioned Act, and of certain other relevant statutes in force in the United Kingdom.

Presumably, in view of its terms of reference—and the terms of reference of this committee, as I understand them, do not seem to extend to nullity, if I may say so, and as I read them they seem to be limited to divorce—the committee will be particularly interested in the added grounds for divorce in England as of 1937, and I have attempted to summarize the English case law on these three grounds. None of these was defined in the Acts of 1937 or 1950—and I think this is important, and at some point in your deliberations undoubtedly you will be giving consideration to whether or not these terms might usefully be defined. My own opinion is that they should not be defined, and I point out now that they were not defined in England, and despite the fact they were not, a considerable body of jurisprudence has grown up as to what these expressions mean. As I said, none of these was defined in any English act, although some guidance was provided by the earlier use of the terms "cruelty" and "desertion" in connection with other matrimonial offences, but since 1937 a considerable body of jurisprudence has grown up in England as to the meanings to be assigned thereto.

The case law in England has been fully dealt with in Rayden's *Practice and Law of Divorce*, in its Ninth Edition published in London by Butterworths, 1964. I think it is pretty well up to date. This is the source of what I am now saying.

"Legal cruelty" has been broadly defined in England as conduct of such character as to have caused danger to life, limb or health (bodily or mental), or as to give rise to reasonable apprehension of such danger. Where conduct over a period of years is relied on, it is very difficult to prove to the satisfaction of the court that there was reasonable apprehension of danger to health where actual injury is not proved. The fact that a marriage has broken down is not of itself a sufficient reason for a finding of cruelty. Deliberately inducing a belief in an adulterous situation may constitute cruelty where there is injury, actual or apprehended, to the other spouse's health; and wilful neglect to maintain, wilful refusal to maintain, may constitute cruelty or an act of cruelty in a series of such acts sufficient to justify a finding of cruelty. See, inter alia, *Russell v Russell*, (1897) A.C. 395, 467; *Jamieson v Jamieson*, (1952) A.C. 525, 544; *Simpson v Simpson*, (1951) p. 320, 328; *Gollins v Gollins*, (1963) 2 All E.R., 966; *Williams v Williams*, (1963) 2 All E.R., 994. (*Gollins v Gollins*, read with *Williams v Williams*, has been said to be "the most important decision on cruelty in modern times".)

To find cruelty it is not necessary to show actual physical violence. The general rule in all questions of cruelty is that all of the matrimonial relations between the spouses must be considered, specially when the alleged cruelty consists not of violent acts but of persistent and injurious reproaches, complaints, accusations, taunts, or "nagging". The knowledge and intention of the respondent, the nature of his or her conduct, and the character and physical and mental weaknesses of the spouses, must all be fully considered. It has been said that the divorce acts were not intended to punish but "to afford a practical alleviation of intolerable situations with as little hardship as may be against the party against whom relief is sought". See, inter alia, *King v King*, (1953) A.C. 124, 129, and the leading cases cited under the preceding paragraph.

Senator CROLL: What is the year of that decision—*Gollins v Gollins*?

Mr. HOPKINS: 1963.

Senator BURCHILL: Is the phrase "mental cruelty" used there at all?

Mr. HOPKINS: The way they treat that is that, unless it results in physical or mental deterioration in the person by whom the cruelty is alleged, it is not cruelty.

The Co-CHAIRMAN (*Senator Roebuck*): By the victim?

Mr. HOPKINS: In *Gollins v Gollins*, to which I have already referred as a very recent leading case—and, if I may say so, a sensible sort of case—the House of Lords held that an actual or presumed intention to hurt is not a necessary element in cruelty, the real test being actual or probable injury to life, limb or health. Lord Pearce in that case stated that when reprehensible conduct or departure from the normal standards of conjugal kindness caused injury to health or an apprehension of it, it was cruelty if a reasonable person, after taking account of the temperament of the parties and all the other particular circumstances, would consider that the conduct complained of was such that "this spouse should not be called on to endure it".

It is pretty hard to go much further than that.

Senator BURCHILL: That is pretty wide.

Mr. HOPKINS: It is a question of fact in each case whether the conduct of this man or this woman, or vice versa, is cruelty.

It has been held that a single act of violence might be so grievous as to constitute cruelty of itself, but that this is seldom the case. However, a single blow followed by minor injurious acts may be sufficient. Cruelty may well

consist of a course of conduct, and the more grave the original offence the less grave need be the subsequent acts complained of. But mere incompatibility of temperament does not constitute cruelty. See, *inter alia*, *Frombold v Frombold*, (1952) 1 T.L.R. 1522; *King v King*, (1953) A.C., 124, 130.

It has been held to be cruelty for one spouse to infect the other with a venereal disease, and a successful attempt by a husband, who knows he is suffering from venereal disease, to have intercourse against her will with his wife, who knows that he is so suffering, may amount to cruelty although in fact the disease is not communicated. See, e.g., *Browning v Browning*, (1911) p. 161.

Moreover, refusal of sexual intercourse without good reason, or insistence on inordinate sexual demands or malpractices may be cruelty where injury results to the spouse by reason of the refusal or practice. See, *inter alia*, *Walsham v. Walsham*. (1949) p. 350, 352. Any unnatural or perverted practices by a wife with another woman may constitute cruelty and may certainly be taken into account as part of a course of conduct amounting to cruelty. See *Gardner v Gardner*, (1947) 1 All E.R. 630.

Cruelty to the children of the marriage may be cruelty to the other spouse. See *Wright v Wright*, (1960) 1 All E.R., 678; *Cooper v Cooper*, (1955) p. 99.

Threats of personal violence, the use of offensive language, false accusations of adultery or of unnatural practices, if persistence therein gives rise to injury to health or reasonable apprehension thereof, constitute cruelty. See *Nevill v Nevill*, (1959) 1 All E.R., 619.

I think this is interesting and important. Drunkenness, gambling and wilful neglect to maintain are not cruelty *per se*, but may become so if persisted in, particularly after warnings that such conduct may be injurious to the health of the other spouse. See *Hall v Hall*, (1962) 3 All E.R., 518.

A spouse who provokes the cruelty complained of is not entitled to relief, but the provocation must be such as to deprive a reasonable person of self-control; the party must be acting under the stress of such provocation and the mode of expressing resentment must not be unreasonable. See *King v King*, (1955) A.C. 124, 129; *Robinson v Robinson*, (1961), 105 Sol. Jo. 950.

Desertion was not an offence known to the ecclesiastical law or the common law as founding a decree of separation from bed and board (*a mensa et thoro*) but section 19(b) of the Matrimonial Causes Act, 1857, made "desertion without cause for two years and upwards" a ground whereon a husband or wife might obtain such a decree. Moreover, by section 27 of the same act, such desertion if coupled with adultery was made a ground whereon a wife might obtain a divorce *a vinculo matrimonii*. By the Matrimonial Causes Act, 1937, desertion without cause for a period of at least three years, immediately preceding the presentation of the petition, was made a ground for divorce *a vinculo matrimonii*. The Act of 1937 is now consolidated in the Matrimonial Causes Act, 1950, as modified by the Divorce (Insanity and Desertion) Act, (1958, c. 54) and the Matrimonial Causes Act, 1963 (1963, c. 45). Copies of these statutes are annexed hereto as Appendix 4.)

The English courts have been strangely reluctant to define desertion, but in its essence it is the separation of one spouse from the other, with an intention on the part of the deserting spouse of bringing cohabitation permanently to an end without reasonable cause and without the consent of the other spouse. However, the physical act of departure by one spouse does not necessarily make that spouse the deserting party. Desertion is not a withdrawal from a place, but from a state of things, for what the law seeks to enforce is the recognition and discharge of the common obligations of the married state: that state of things may be termed, for short, "the home". There can be desertion without previous cohabitation, or without the marriage having been consummated, and the fact that a husband makes an allowance to a wife he has abandoned is no answer to a charge of desertion. The question is, as one judge said: Has there been a

“forsaking and an abandonment”? See, for example, *Edwards v Edwards*, (1948), p. 268; *Kinname v Kinnane*, (1954), p. 41; *Ingram v Ingram*, (1956), 390, 411; *Phair v Phair*, (1963), 107 Sol Jo. 554.

In calculating the period for which the respondent has deserted the petitioner without cause, and in considering whether such desertion has been continuous, no account shall be taken of any one period, not exceeding three months, during which the parties resumed cohabitation with a view to reconciliation. Desertion as a ground for divorce differs from adultery and cruelty in that the offence of desertion is inchoate until the action is instituted. Desertion is a continuing offence. See, inter alia, *Jordan v Jordan*, (1939) 2 All E.R., 29, 33, 34; *Perry v Perry*, (1952), p. 203, 211, 212; *W. V W.* (No. 2), (1954), p. 486, 502.

Where a petitioner for divorce has at anytime been granted a decree of judicial separation or an order having that effect, and the petition for divorce is based on substantially the same facts, a period of desertion immediately preceding such decree or order must, if the parties have not resumed cohabitation and the decree or order has been continuously in force, be deemed immediately to precede the presentation of the petition for divorce. See *Turses v Turses*, (1958), p. 54.

Desertion commences from the time when the *factum* of separation and the *animus deserendi* coincide in point of time. But a *de facto* a separation may take place without the necessary *animus*, as where the separation is by mutual consent or is compulsory—such as being stationed in South Vietnam or something like that. On the other hand, the *animus deserendi* may arise first and the *factum* only when the other spouse is in fact driven out of cohabitation. It is immaterial that the other spouse has ostensibly consented to the separation on the fraudulent misrepresentation that it is only for a limited time: if the respondent intended at the time of the withdrawal that it should be permanent, desertion arises at the moment of withdrawal. See, inter alia, *Harrison v Harrison*, (1910) 54 Sol. Jo. 619; *Legere v Legere*, (1963) 2 All E.R., 49, 58; *Beaken v Beaken*, (1948), p. 302; *Ingram v Ingram*, (1956), 1 All E.R., 875, 797.

Desertion, like other matrimonial offences, must be clearly proved. Corroborative evidence is not required as an absolute rule of law, but is usually insisted on, particularly as to the circumstances and terms of the parting. See *Stone v Stone* (1949), p. 165, 167, 168; *Lawson v Lawson*, (1955), All E.R. 341; *Barron v Barron*, (1950), 1 All E.R., 215.

Desertion is not established merely by ascertaining which party left the matrimonial home first. If one spouse is forced by the conduct of the other to leave home, it may be that the spouse responsible for the “driving out” is guilty of desertion. This is the doctrine known as “constructive desertion”. See *Lawrence v Lawrence* (1950), p. 84, 86; *Gollins v Gollins*, above cited.

As to the relation between constructive desertion and cruelty, see *King v King*, (1953) A.C. 124; also *Gollins v Gollins*, above cited.

For further refinements and defences against charges of desertion, see *Rayden on Divorce*, pp: 183, 212.

Mr. PETERS: With respect to desertion, your wording indicated that it might be voluntary or involuntary. For instance, if a person becomes insane he has, in fact, deserted his spouse, but he has done so involuntarily. Would the same be true in respect of extreme alcoholism or drug addiction?

Mr. HOPKINS: Yes, that is correct.

Mr. PETERS: Have the courts in England decided any cases of that nature? Are there any cases that involve what I would call involuntary desertion?

Mr. HOPKINS: Yes, there have been such cases. The cases I have cited on that page of my submission are all cases of that type. The judgments I have

extracted were based on facts of that nature, and which called for such judgment.

Senator FERGUSON: Are there any cases involving desertion which have to do with the fact that one of the spouses was sent to prison?

Mr. HOPKINS: That would not be desertion.

Senator FERGUSON: Is there not any case where such was the fact?

Mr. HOPKINS: There might be states in the union where imprisonment itself, *per se*, is a ground for divorce. I have not gone through the laws of all the states in respect to this.

I have just one page left on unsoundness of mind, and that is my last contribution.

Unsoundness of Mind: Since the Matrimonial Causes Act, 1937, either the husband or the wife may petition for divorce (or judicial separation) on the ground that the respondent is incurably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition, but if the neglect—and here is something somebody raised—or other conduct of the petitioner has conducted to the insanity, a decree may be refused. See *Chapman v Chapman*, (1961) 3 All E.R., 1105. That is, if the other spouse caused the insanity by actions, reproaches, *et cetera*.

As to continuity of care and treatment, the statutory requirements relating to the detention of persons of unsound mind must have been strictly fulfilled and non-compliance may have the effect of breaking the continuity of the detention. It is not provided—and I think this might be noted—by statute (in s. 1(2) of the Divorce (Insanity and Desertion) Act, 1958) that any break in the continuity of detention for a period of less than 28 days may be disregarded. Even before that statutory qualification, continuity of detention was not broken by a removal of a patient from one mental hospital to another, or to a general hospital for needed physical treatment where mental care is continued. See *Murray v Murray*, (1941) p. 1, 8; *Sevyner v Sevyner*, (1955), p. 11.

The court is not concerned with the degree of insanity: the phrase “incurably of unsound mind” describes a mental state which, despite five years’ treatment, makes it impossible for the spouses to live a normal married life, with no prospect of improvement which would make it possible in the future. See *Whysall v Whysall*, (1960), p. 52; *Greer v Greer*, (1961) 605 Sol. Jo. 1011.

I thank you for your kind attention, and I apologize for going on for so long.

Senator CROLL: I have one question to ask. In Nova Scotia, where they have had a long tradition of divorce on the ground of cruelty, have they no case law of their own?

Mr. HOPKINS: Yes, but it is not very extensive or particularly helpful. There are a few cases, I think.

Senator CROLL: Have they followed the British precedent?

Mr. HOPKINS: Of course, they were ahead of the British.

The Co-CHAIRMAN (Senator Roebuck): Their reporting has been poor, has it not?

Mr. HOPKINS: Yes. If the committee would like me to provide it with such jurisprudence as I can dig up on cruelty as a ground in cases decided by the courts in Nova Scotia then I would be delighted to do so.

Mr. BREWIN: I was thinking of the fact that cruelty and desertion are both grounds recognized in other Canadian jurisdictions as a basis for granting alimony. In a study of divorce I think that those cases might well be looked at to see what they mean. Therefore, Messrs. Chairmen, it seems to me that it would be very helpful to have a few of the leading Canadian cases so that we

can see whether they vary in any way from the English jurisprudence. I suspect that our courts might prefer to look at their own decisions.

Mr. HOPKINS: Yes, it might be.

Senator ASELTINE: During the recess counsel might be able to do that.

Mr. HOPKINS: Yes. I am at the disposal of the committee. If cruelty, undefined, were enacted by Parliament as a ground then I think it would be optional to the courts to find their jurisprudence where they can. They might be guided more by the English precedents, because there it is a ground for divorce, rather than the Canadian precedents where it is not a ground for divorce but a ground for something else.

Mr. BREWIN: It is a ground for matrimonial judicial action.

Mr. MACEWAN: I think the ground in Nova Scotia is gross cruelty.

Mr. MCCLEAVE: In Nova Scotia they have tended to follow the practice or principles set out in the House of Lords case that was cited.

Senator CROLL: Mr. Chairman, it seems that we need some further enlightenment on the matter of insanity, because it may loom up as one of the things we should consider. The bones have been laid out for us, but in respect of divorce on the ground of insanity surely there must be more to it than that. I think that something should be presented to the committee in detail besides that which has been presented as to the law.

The Co-CHAIRMAN (*Senator Roebuck*): I suggest that we hear from Mr. Hopkins at a later date, after he has examined these several things that have been suggested. He can give us another brief on a later date.

Mr. HOPKINS: A supplementary brief.

The Co-CHAIRMAN (*Senator Roebuck*): Yes, a brief supplementary to this one.

Mr. MCCLEAVE: Mr. Chairman, I will ask the clerk of the Divorce Court in Nova Scotia to provide some decisions, and I will send them along to Mr. Hopkins.

The Co-CHAIRMAN (*Senator Roebuck*): That will be very useful.

Ladies and gentlemen, we have with us today, Mr. Justice Walsh, our own Commissioner, who was not only a lawyer of high standing before he came, but has since had wide experience in the handling of a very large number of the cases which we in the Senate have since made law.

Before Mr. Justice Walsh addresses us, I wish to express my appreciation for the labour, application and attention that our counsel gave to the address he presented to us. There is a vast amount of information in his words. I am glad they were reported, because I for one want to read them when they are in print, perhaps not just once, but many times. I am sure that the committee universally expresses this appreciation.

Senator ASELTINE: Hear, hear.

The Co-CHAIRMAN (*Senator Roebuck*): Ladies and gentlemen, we now have before us Mr. Justice Walsh. I cannot tell you what he is going to say, except that he will give us the benefit of his experiences as a distinguished lawyer and as the Senate Commissioner in the trial of a great series of both contested and uncontested cases.

The Honourable Mr. Justice Allison A. M. Walsh, Senate Commissioner: Mr. Chairman, ladies and gentlemen: I have not prepared a written brief for you today, but I have made a number of notes under certain headings with which I should like to deal.

Senator Roebuck mentioned my legal practice. While it was primarily of a commercial and corporation nature, I did do a certain amount of domestic work, in the course of which I handled a substantial number of legal separations in the Quebec courts, and probably four or five divorces a year through Parliament. Therefore, in some 20 to 25 years I appeared before the divorce committees 100 or 125 times under the old system. Since my appointment as Commissioner I have had an opportunity of dealing with some 2,000 petitions over a period of two and a half years. I am therefore in the position of looking at it from both sides of the picture, that of the practicing lawyer and the litigants, and from the point of view of someone sitting on the bench hearing the evidence.

The situation as to the existing law has been outlined for you by Mr. Hopkins, and he has dealt with the English law regarding possible enlargement of the grounds.

I understand that the terms of reference of this committee are quite wide, so I am going to confine myself to discussing possible new grounds for divorce, but will deal with the procedure generally and what I believe to be suggestions as to how it could be improved, and some of the problems that we encounter and will continue to encounter under whatever system we have. In doing so, I am going to be quite frank and I hope I shall not hurt anybody's sensibilities, because you may not all agree with some of the things I have to say.

In the first place, I believe that if any amendments are to be made so as to enlarge the grounds for divorce, Parliament by virtue of its jurisdiction over marriage and divorce should make such changes applicable throughout Canada, and not to certain provinces only. I think that as long as our Constitution remains unchanged and that power is vested in Parliament, it should be used for the whole of Canada and that the provinces of Quebec and Newfoundland should not be excluded. I think that would be a step backward.

The grounds at present are the same throughout Canada, with the exception of Nova Scotia which has the additional ground of cruelty. I think it is desirable that they should stay the same throughout Canada, whether extended or not, and I think from the practical point of view it is unrealistic to say, "Let Quebec and Newfoundland ask for the extended grounds if they want them."

There is a big difference between taking a positive step and merely riding with the tide. I do not believe any government in Quebec would wish to go on record passing a resolution asking for extended grounds for divorce. On the other hand, if Parliament by virtue of its authority did extend them I would be inclined to the view that there would not be any very serious outcry if this was legislation for all Canada at the same time. But if Parliament legislated for the other eight provinces and asked Quebec to pass a resolution, or some legislative body were asked to do so, to include Quebec in those extended grounds, I am sure that would never take place, at least, in the foreseeable future, and it would be a step in the wrong direction.

I do think that whatever body hears the cases on behalf of the Canadian Parliament, it has to, in the present state of our Constitution, confine itself merely to dissolving or annulling the marriage, as the case may be.

I know there are two schools of thought about whether the question of alimony and custody of the children is not an ancillary right arising out of the law of marriage and divorce. However, I myself belong to the school of thought that holds that it is a matter of property and civil rights, and that to attempt to give any federal court or federal body itself authority to make rulings dealing with custody of the children or alimony would be very offensive to Quebec and to the whole system of Quebec law.

In Quebec you have a system of community of property and alimony depends in part on the value of the community property and the assets the wife

is going to receive from it. It is all intertwined. I do not think any court except a Quebec court can deal with alimony or custody of the children in Quebec, but should confine itself to the dissolution or annulment of marriage.

Admittedly, that has certain practical difficulties, but they are not as bad as might be assumed under the present system. The question of custody of the children and alimony is frequently dealt with in the Superior Court of Quebec first, but even more frequently the parties simply agree on it. It is not too often, in an uncontested case, that there is any real dispute as to who is going to have the children. Normally young children would remain with the mother in any event, and more often the father does not want to have their custody, so I would say that in 60 or 70 per cent of the cases the custody of the children is not really in issue; and in about 20 or 25 per cent more cases it has already been settled in the courts of the province, and so also has the question of alimony.

It is unfortunate that under Quebec law a wife herself, following a divorce, has no right to alimony, but I do not think the Parliament of Canada can change that; I think that is a matter of provincial law.

The right to alimony in Quebec exists from the relationship between husband and wife, between parent and child, and when the husband and wife relationship ceases, the right to alimony ceases. However, that does not mean the wife cannot continue to receive alimony for the children, if there are children who are still dependent on her and in her custody.

Those are questions that we have now, and I do not think they can be altered. However, I think in practice the Quebec courts, or agreement between the parties—and the same would apply to Newfoundland—can still deal with them, while in Ottawa we should concern ourselves solely with the question of dissolution or annulment of the marriage, which the Quebec courts do not deal with—except for certain annulments—and, I would venture to submit, never will agree to deal with.

I should like to say a word about the present procedure. It is a great improvement over the old procedure. It does not have to go through both houses now, and has the advantage that the Commissioner can sit all the year round, save for holidays. The sittings are not dependent upon Parliament being in session. However, there are still a great many disadvantages. I am sure the Chairmen will agree with me. One disadvantage is that although the hearings can continue, the petitions cannot proceed any further unless the Senate is in session.

We had a situation last year where petitions heard in, say, the second week in June could not be dealt with before Parliament adjourned. Because of the prorogation and because of the election—which admittedly does not happen every year—it was January before Parliament met again and February before they could be dealt with by the Senate. Therefore, in some cases we had petitions which already waited eight months, although they had been heard, before Parliament could approve them.

That causes great hardship to many people, there may be adulterines or other children concerned, and there may be remarriages prevented. Although this long delay does not happen every year, it happens to a lesser extent.

There is not, as a rule, such a long delay between sessions, but this delay is one of the disadvantages.

The second disadvantage is that there is a great deal of paper work involved, which would not be necessary under another system.

There is a great loss of time involved. The Senate committee, very properly, if they are going to have to decide whether to agree with the commissioner's recommendation or not, must have a fairly complete summary of the evidence before them. They cannot be expected to agree with it blindly. This means that, after the hearing, the commissioner has to dictate a very

lengthy resumé, summarizing every item of the evidence that is at all relevant, and that has to be prepared and read and signed by him before it goes to the committee. So that only about half his time is spent in hearing evidence. If he were sitting as a court, as any other court he could say "granted" or "rejected", as the case may be, without the necessity of writing a lengthy judgment—unless it were a contested case or some particular point of law were involved. At present, even in the most simple and clear-cut case, it is necessary to write these lengthy judgments or reports.

After the committee has approved it, there is a great deal more paper work involved. There are five different stages it has to pass through before the Senate completes dealing with it. The report of the committee has to be drawn up and signed by the chairman. The formal resolution has to be drawn up, it is signed by the chairman of the committee and by the commissioner who heard the case.

Then the journals of the Senate contain the introduction of the petitions. Then they contain the reports. On the next day, the reports are approved. Then, the same day or the day after that, the resolution has to be introduced. Then, after 48 hours, the resolution has to be approved. That makes five separate steps, all of which involve a great deal of paper work and are time consuming.

The Co-CHAIRMAN (*Senator Roebuck*): I can confirm that.

Mr. Justice WALSH: The third problem that arises under the present system is—as I think the chairman will agree—the appeal provisions, which are really hopelessly inadequate. Within 30 days after a resolution has been passed, either party can appeal. Presumably the person who gets the resolution is not going to wish to have it reopened. To do so, a person has to proceed by introducing an act of Parliament. Then there is a new hearing which in this case would take place before the committee itself—and not, I take it, by the commissioner. It is a very cumbersome thing. Unless there were new and different evidence, you are really asking the committee to consider reversing itself, because it is the same committee which has already heard the commissioner's report and read and approved that report. Therefore, to a certain extent, unless there are new factors or evidence, it really is a case of asking the committee to reverse itself.

It provides no appeal whatsoever for the losing party—which is perhaps the most serious and unavoidable defect in the present system. There is an appeal within 30 days after the resolution is passed; but if the petition is dismissed there is never a resolution so in that case there is no appeal because the case never goes to the Senate in the form of a resolution.

The Co-CHAIRMAN (*Senator Roebuck*): He could still introduce his bill.

Mr. Justice WALSH: Yes, he could introduce a bill.

The Co-CHAIRMAN (*Senator Roebuck*): He has the same appeal as the present respondent has. He has not under the provisions of the new act but he has the old provisions that have always existed.

Mr. Justice WALSH: I see. Under the old procedure. Another problem is that there is not adequate provision—again, the chairman and I have discussed this—for defaulting witnesses. The procedure whereby they could be brought before the bar of the Senate by the Gentleman Usher of the Black Rod is simply not practical. It cannot be done out of session; and during sessions we have not used it because it is cumbersome. So it means that a witness can ignore a subpoena and there is nothing you can do about it.

Those, I think, are valid reasons why the present system, although it is working reasonably well, has serious objections.

I feel, though there are many who will not agree with me, that the sooner these cases are referred to the Exchequer Court as such, the better. You have there is a federal court which gets its jurisdiction from the federal Parliament. Parliament can give it the jurisdiction, in the same manner as they can amend the grounds for divorce. They can amend the Judges Act, to provide additional

judges, if necessary. They can provide the physical space requirements for the hearing of cases.

The provinces would not be involved in any way, if these cases were referred to the Exchequer Court.

Divorce would not be facilitated in any way in the sense that it would not be any easier to get a divorce.

I like to think that, in my hearings and in those of Mr. Justice Cameron, we make a very strict inquiry into all the facts put forward and watch for any attempt at perjury, and we believe that if these cases were transferred to the Exchequer Court, sitting as such, that court would continue to do the same under the new system. Therefore, I am not aware that Quebec Province would have any serious objection to that. The people in Quebec who object to the present system would still object to the new one, but those who do not object to the present system would have no reason to object to the cases being heard by the Exchequer Court sitting in Ottawa.

At present, these hearings are held by Exchequer Court judges sitting under the divorce rules. The step from there to having the cases heard by an Exchequer Court judge sitting in that capacity is a very minimal one and I doubt if it would cause any objection.

That system would have various advantages. One is that there would be a variety of judges who could hear these cases. It might be necessary to appoint additional judges but they would rotate on it and one person would not be left doing nothing but divorce work for his life, as it might be at present. I personally feel not only that it is not an assignment one would want to continue for life but that it is not good for any judge to hear just one type of case. After three, four or five years, inevitably he will become somewhat stale at it and a fresh approach would be better. I think it is more desirable that there should be three, four, five or six different judges contributing to the jurisprudence on the matter and hearing the cases, than that one or two judges should do nothing else indefinitely.

Secondly, this new proposal would avoid those difficulties that I raised about the delays when Parliament is not in session. If a court could have three or four terms a year, for divorce cases, it would mean that, except for the summer recesses, the judgments could be rendered and the divorce granted or rejected immediately after it was heard.

Thirdly, there would be a proper appeal, in that appeals from the Exchequer Court go to the Supreme Court. Some people have expressed alarm that the Supreme Court might be swamped with work as a result of this. My experience does not indicate that. About 800 cases are heard per year now. Only about 40 of them are contested, the other 760 are uncontested. Of those 40 contested cases, less than half are seriously contested. In the case of half of them the contestation is frivolous or to obtain delay and perhaps retain rights to alimony. In some cases the evidence is so weak that the petitioner's attorneys are unwilling to submit it to a hearing.

That means you get about 20 cases a year where there is serious contestation. Of those 20, 15 or 16 would involve questions of fact only. Only four or five would involve questions of law, and the higher courts will not interfere with the discretion of a lower court, properly exercised, on questions of fact alone. This means you may get down to the point where there might be four or five appeals a year to the Supreme Court from the Exchequer Court decision in divorce cases, and that those would all involve serious points of law which should be decided by higher courts, and then the decisions could be followed by other courts and a real jurisprudence would develop in Canada for our system. I think from that point of view alone it is very desirable.

Now as to the question of flexibility, I venture to suggest—and I know our Chairman would disagree with this point of view; in fact I think he has already stated so—but if the grounds are changed and extended, I believe there will be a substantial increase in the number of petitions presented. I think it is inevitable that of the people who cannot bring themselves within the existing grounds of adultery alone but have been waiting for an opportunity to dissolve their marriages if desertion and insanity are included and perhaps some other grounds, there will certainly at first be a number who will immediately take advantage of the extended grounds and instead of having 800 a year we will find that we will have 1,500. At the present time the Senate can barely cope with the 800 a year. With Mr. Justice Cameron hearing contested cases one day a week, and myself hearing the uncontested cases four days a week, we can just about keep abreast. If the number were doubled, you would need to double the number of Commissioners, the number of court clerks, the number of verbatim reporters and the number of staff generally. The paper work would become so colossal that I am afraid we would reach a bottleneck again. There would be a danger of that in any event.

There would, moreover, be historical precedent for referring cases to the Exchequer Court. In Great Britain it is the Exchequer Court which is the Court of Admiralty, Probate and Divorce. Here probate is a provincial matter, but the Exchequer Court has jurisdiction in admiralty and it could quite properly have jurisdiction in divorce. The arguments that Exchequer Court judges should not sully their hands with divorce are not valid. In England it is the higher courts which handle divorce. I frequently have cited decisions by Lord Denning who is Master of the Rolls, and decisions from the House of Lords. If it is not beneath them to deal with divorce it is not beneath any court to deal with it in a legal and proper manner.

Now as regards the possibility of extending the grounds for divorce with which this committee is perhaps primarily concerned, I shall not have too much to say because you will be hearing much about that from other witnesses. I want to say that if the objective or one of the objectives is to cut down on the amount of perjury being committed, I don't think a change would have that result. One often hears it said that most of the divorce evidence is fabricated. It would be adopting an ostrich-like attitude to say that no case ever approved by the Senate was approved on perjured evidence, but I would venture to suggest from my own experience that there is a great deal less than many people think.

I had occasion a few months ago to make a study for Senator Roebuck of the last 200 cases I happened to hear. In 134 cases there was a common law relationship and in another 33 the adultery had taken place on several occasions either in the respondent's home or in the co-respondent's home and there was every indication that it could not have been fabricated. Only 28 of these took place in hotels or motels with the husband being the respondent and only five took place in hotels or motels with the wife being the respondent. That is only 15 per cent which depended on hotel or motel evidence, and of that number a great many would undoubtedly be genuine. It is certainly not inconceivable that the man who goes out on the town and picks up a woman in a night club or some place like that would go to a hotel or a motel. The mere fact that the adultery took place in a hotel or a motel should not make us believe that it is not genuine. So we come down to the situation where 5 or 10 per cent of the total could be fabricated. Of course if it is found in a case that there is fabricated evidence, it is dismissed, and a prosecution taken.

Now I don't think that by extending the grounds to cruelty and desertion and so on, the what I might call immoral element will be gone and that nobody will commit perjury to get a divorce. Frankly I don't think you will get rid

of that. It is as easy to lie about cruelty as it is to lie about adultery. A petitioner can say that her husband has beaten her up four or five times and she may not be telling the truth. In the case of desertion, a wife may have left her husband for good and sufficient cause. Would this be a ground then for proceedings by him for desertion? There will still be some people, no matter what the law is, who will try to get around it. I don't think that would be a main reason for changing it. I think there are many things that can go wrong with a marriage that are as bad as if not worse than adultery. Constant physical cruelty can be as damaging to a marriage as adultery. But I am very much afraid of the undefined ground of cruelty. I do not like the idea of mental cruelty as a ground. If I were called to interpret cruelty I would interpret it very strictly. When you admit the ground of mental cruelty, you get into a situation where a wife sues for divorce because the husband forgot to get her flowers for her birthday and he did not take her out to dinner. We do not wish to go as far as the American courts have gone in that direction.

I recognize there can be such a thing as mental cruelty, but it would have to be extreme to be allowed as a ground for divorce.

The Co-CHAIRMAN (*Senator Roebuck*): You think it could be excluded entirely from cruelty?

Mr. JUSTICE WALSH: I think it is something the committee might consider. The committee might consider whether to define cruelty as something of a repeated and continuous physical nature.

The Co-CHAIRMAN (*Senator Roebuck*): That is injurious to health?

Mr. JUSTICE WALSH: Yes.

The Co-CHAIRMAN (*Senator Roebuck*): Would you exclude injury to mental health? For instance I heard of one case recently where a woman persistently called her husband up on the telephone at two, three or four o'clock in the morning and worried him to the extent that he became insane. This is the story as it was told to me, at all events. He was confined to a mental hospital. Would that be within your idea of cruelty?

Mr. JUSTICE WALSH: I would think in a case like that where there is corroborating evidence from a doctor to say that the cruelty had been injurious to health it would be acceptable. But you would have to make evidence other than that of the petitioner himself.

The Co-CHAIRMAN (*Senator Roebuck*): You would not exclude mental cruelty?

Mr. JUSTICE WALSH: No, I would not exclude it 100 per cent, but how would you define the nature of mental cruelty? Would you add the words "which has injured or tended to injure the health"?

The Co-CHAIRMAN (*Senator Roebuck*): Do you think we could leave a discretion in these matters to the common sense of Canadian judges?

An Hon. MEMBER: Or to commissioners?

Mr. JUSTICE WALSH: I would like to hope so, certainly. But it is a difficult matter to draw a dividing line in what gradually gets eroded away, and when it comes to a question as to what is mental cruelty I am afraid you reach the stage where witnesses who are quite prepared to embellish their story with perjury would get relief while those who are honest would not. Cruelty unless it is corroborated can very easily be fabricated in an uncontested action.

The Co-CHAIRMAN (*Senator Roebuck*): But you would leave the question of corroboration to the judge, would you not?

Mr. JUSTICE WALSH: Yes, definitely. One of the other grounds that have been suggested is that bona fide desertion would serve as a ground for divorce. I think it is up to the courts to try and separate out the cases of genuine desertion

from mere mutual agreement to separate. If two parties agree to live apart and intend to get a divorce, you are going to have divorce by consent after a three-year delay. I think it has to be real desertion and not mere separation. In the case of real desertion, inevitably you have to enter into the question of fault: who deserted whom?

The insanity ground, I think, is good.

The Co-CHAIRMAN (*Senator Roebuck*): Commissioner Walsh, if we drew the bill up saying desertion without due cause—something of that kind—could we not leave the interpretation of it to the courts?

Senator ASELTINE: I agree, Mr. Chairman.

Mr. JUSTICE WALSH: I would think so.

The Co-CHAIRMAN (*Senator Roebuck*): You would not attempt to define it in a particular way?

Mr. JUSTICE WALSH: No.

The Co-CHAIRMAN (*Senator Roebuck*): You would not bind judges in their decision as to what is desertion?

Mr. JUSTICE WALSH: No, I think we have to develop a Canadian jurisprudence on it.

Regarding the other grounds that have been dealt with lightly by Mr. Hopkins, insanity under the existing English jurisdiction is very restrictive. If a person has to be continuously in an institution for five years, well, under modern methods of treatment they normally let a person out for a month or two on parole, and then he has a relapse and has to go back again, and then is paroled out to the custody of relatives, and goes backwards and forwards. A person may be more or less constantly insane, but to require him, without intermission, to be committed to an institution for five years is perhaps too strict. A schizophrenic may be in an institution two or three times a year, but in between times is out. I think perhaps the British jurisprudence is too restrictive on that.

One of the things you have to watch for, in insanity in Quebec arises from the fact that the husband is not responsible to his ex-wife for alimony, so you would have to be careful, if it were the husband bringing divorce proceedings from Quebec on the basis of insanity of his wife, that he was not merely making her a charge on the state and doing it solely to avoid his financial obligation to support her. There might be the necessity to put in a requirement, in the case of a petition by her husband, that, if he is financially able to do so, he be required to make provision for his insane spouse.

The Co-CHAIRMAN (*Senator Roebuck*): That is something we should remember.

Senator ASELTINE: Mr. Chairman, I have to go, but I would like to make one suggestion to his lordship that would solve the problem entirely that he raised a short time ago with regard to the hearing of divorces from Quebec and Newfoundland, as we are hearing them now. All we have to do is to amend the Exchequer Court Act and give that court complete jurisdiction with regard to Quebec and Newfoundland, if they do not want to set up courts themselves. That would eliminate all this paper work you speak of, and I would be willing to bring in another bill like the bill I brought in in 1956 to that effect, if the committee decided that were the appropriate step to take.

Mr. PETERS: The Senate did not support us two years ago when we tried to do this.

The Co-CHAIRMAN (*Senator Roebuck*): That is two years ago.

Mr. JUSTICE WALSH: The ground of repeated imprisonment of a husband is another ground where certainly I can see the wife suffers greatly when the

husband is a repeated offender, but it has to be carefully drawn to make it apply only to the case of a person who is practically an incurable offender because certainly one of the factors which the parole board and criminologists consider important in the rehabilitation of criminals, is that it is important that they have a home to come back to. If the home is broken up while they are in prison there is not much chance of rehabilitating them. That has to be weighed in the balance, the wife who has suffered as a result of her husband's criminal career, as against the possibility of redeeming him. I think certainly the grounds for divorce should be extended. I like the English law. I think it goes far enough without going too far. I think it covers most of the genuine cases of marriage discord without falling into the weakness of some American states or Mexican divorces, or of giving a divorce by consent.

There are two other brief comments I would like to make. It has been suggested by some people that there be some form of compulsory counselling or reconciliation procedure effected before the final decree is entered. I hate to say it, but I think from the practical point of view that would be worthless. Marriage counselling can do a great deal for people when the marriage is beginning to break up; it can be very valuable before marriage as a preparation for marriage; and when the parties are still trying to make a go of it marriage counselling can help and very often does; but by the time they separate and they have evidence of adultery for a divorce and they have paid very substantial fees to attorneys for it, and the delays have gone by and they come to Ottawa to testify it is too late. We always ask if there is any chance of a reconciliation, and in 2,000 cases I have heard I have never had one where there has been a reconciliation at the hearing. I venture to suggest that if the decree were delayed for two or three months and they were ordered to go to a marriage counsellor you would still get the same result. Either the petitioner has become so embittered that he or she would not have the respondent back, or the respondent has no desire to come back, and, quite often, both.

Senator FERGUSON: This is just your opinion.

Mr. JUSTICE WALSH: Yes, this is just my opinion.

Senator FERGUSON: I think there are jurisdictions in which it has been used. I cannot give any particular statistics on it, but I think it has proven to be successful in some instances.

Mr. JUSTICE WALSH: Yes, it might be, but I think it would be minimal—perhaps one case in 500, or something. Now of course I have not seen the statistics.

Senator FERGUSON: No.

Mr. JUSTICE WALSH: Of course we have a considerable delay still. There is this 60-day delay after service before the time for hearing so that there is, at the very least, a delay of three months after the evidence has been obtained. I think the delay should be retained to give the parties the chance to get together, but I wonder whether a further delay after the hearing is going to prove beneficial.

The Co-CHAIRMAN (*Senator Roebuck*): There are quite a number of withdrawals.

Mr. JUSTICE WALSH: Yes, before the hearing. We have reconciliations where the parties get together and withdraw.

Mr. WAHN: Many of the specific grounds which have been mentioned by the witness have been cases of wrong-doing on the part of the defendant or respondent. In his view, would it be better to generalize and apply for a divorce where it is clear to the court there has been a complete breakdown of the marriage without any possibility of reconciliation, rather than to try to list a large number of specific instances which are merely probably evidence of a

marriage breakdown? In other words, would it be his view, based on his past experience, that it would be desirable to base findings for a divorce on the theory of marriage breakdown rather than list a large number of specific offences on the part of the defendant which would justify the petitioner in getting a divorce? For example, insanity is not really a question of fault on the part of the defendant or respondent, but does involve the breakdown of a marriage.

Mr. JUSTICE WALSH: I think the real problem is—and the committee is far better qualified to deal with that than I am—that when you eliminate the concept of fault altogether you reach a stage of divorce by consent after a period of time. It is true the breakdown has to be scrutinized to see whether there are grounds for it, but you would get the case where the petitioner says, “This marriage is hopelessly broken up. I cannot go ahead,” and the respondent agrees, and the court has to accept that conclusion. I think the danger is that if you eliminate grounds for a divorce and make it solely a question of the breakdown of the marriage you get divorce by consent and run into all sorts of theological and philosophical objections to the breakdown of the marriage.

Mr. AIKEN: Further to Mr. Wahn’s question, do you not now often find the court on the defensive? In other words, in these uncontested cases they will be just as much on the defensive against a divorce by consent as they are now against divorce by default. I am supporting Mr. Wahn’s view, that the court, even if the action was based on the breakdown of marriage, would still have to satisfy itself that there was a bona fide breakdown and that it was not just a matter of convenience. It would be a double protection, and not the single one that you have now.

Mr. JUSTICE WALSH: In answer to that I will say that I think there is some merit in the Queen’s Proctor system that they have in England. It would be helpful to the court if there were some official who could make an independent investigation in cases where there is doubt. If I feel there has been perjury committed, or something of that nature, I can refer the matter to the chairman, and he can refer it to the Minister of Justice, who refers it to the R.C.M.P. who will investigate it, but that is a cumbersome procedure and we have to be reasonably certain an offence has been committed before using it. Every day I hear cases in which I do not believe that a certain witness lives at a certain address, or that he signed the register at a certain hotel, and I think it would be useful if there were someone who could check those things.

If you were going to have a divorce depend upon a hopeless breakdown of the marriage rather than in a defined fault, then you would almost always have to have a third party witness, other than the parties themselves, and have an independent investigation which would involve a large investigative staff, whether it be done by an officer such as a Queen’s Proctor or someone else.

Mr. McCLEAVE: How many cases from Newfoundland do you hear?

Mr. JUSTICE WALSH: I would say from 12 to 15 a year. That is out of a total of 800.

Mr. McCLEAVE: Are some of these cases decided on evidence by affidavit?

Mr. JUSTICE WALSH: They can get permission to file affidavits in cases of financial need, and that very often happens. We will often hear the evidence of the petitioner by affidavit provided that other witnesses are present to prove the adultery, or conversely we will accept affidavit evidence as to the adultery if the petitioner is present. But, we will not decide cases solely upon affidavit evidence.

Mr. McCLEAVE: You make no recommendation in regard to divorces from Newfoundland? Newfoundland is a great distance from Ottawa. What do you

think of the idea of an *ad hoc* commissioner who could live in Newfoundland and hear cases in that province, or even of the idea of you going there?

Mr. JUSTICE WALSH: I did not speak about Newfoundland because I am not all familiar with the situation there. I would think that Newfoundland has the remedy in its own hands. It could set up its own divorce court quite readily. So far as having an *ad hoc* commisisoner going there is concerned, I am inclined to believe that as long as we have the present procedure under the Senate then the commissioner has to sit in Ottawa. I do not think he could sit elsewhere than in Ottawa. I think we had an opinion on that at the start.

The Co-CHAIRMAN (*Senator Roebuck*): Aside from the opinion—by the way, I do not agree with it—and from a practical standpoint, what do you say?

Mr. JUSTICE WALSH: I think it is desirable to go a step further, to my recommendation that it be referred to the Exchequer Court, although there I think you might run into serious objections from Quebec unless there were a proviso to the effect that it be the Exchequer Court sitting in Ottawa. Of course, the Exchequer Court can sit anywhere, but the moment you have it sitting in Quebec on divorce you will then be accused of setting up a federal divorce court in that province. As long as it sits in Ottawa I do not think there will be any great objection from Quebec. If you put in the proviso that the court has to sit in Ottawa on divorce then you eliminate the possibility of a judge going to Newfoundland, but there might be some way around that. Newfoundland might request that the hearings be held in that province. Perhaps it could be provided that the court would have to sit with respect to divorce in Ottawa unless a request were received from the Attorney General of the province, or some other official, that it sit in the province.

The Co-CHAIRMAN (*Senator Roebuck*): I think we have reached the end of our allotted time, but before we adjourn there is one matter that we must attend to. There were four appendices which Mr. Hopkins asked to be printed in the record of today's proceedings. Is it the wish of the committee that they be printed?

Senator BURCHILL: I so move.

Mr. McCLEAVE: I second the motion.

The Co-CHAIRMAN (*Senator Roebuck*): Then that is carried. I ask the members of the Steering Committee to stay for a few minutes.

The committee adjourned.

APPENDIX No. 1

ACTS OF THE PARLIAMENT OF CANADA RELATING TO DIVORCE

(1) ACTS OF GENERAL APPLICATION

MARRIAGE AND DIVORCE ACT

(R.S.C. 1952, c. 176)

1. This Act may be cited as the Marriage and Divorce Act.

MARRIAGE

2. A marriage is not invalid merely because the woman is a sister of a deceased wife of the man, or a daughter of a sister or brother of a deceased wife of the man.

3. A marriage is not invalid merely because the man is a brother of a deceased husband of the woman or a son of a brother or sister of a deceased husband of the woman.

DIVORCE

4. In any court having jurisdiction to grant divorce *a vinculo matrimonii* any wife may commence an action praying that her marriage may be dissolved on the ground that her husband has since the celebration thereof been guilty of adultery.

5. If the court is satisfied by the evidence that the case of the wife has been proved, and does not find that the wife has been in any manner accessory to or has connived at the adultery of her husband, or that she had condoned the adultery complained of, or that the action was commenced and is prosecuted in collusion with the husband or the woman with whom he is alleged to have committed adultery, then the court shall pronounce a decree declaring such marriage to be dissolved; but the court is not bound to pronounce such decree if it finds that the wife during the marriage has been guilty of adultery, or if the wife in the opinion of the court has been guilty of unreasonable delay in presenting or prosecuting such action or of cruelty towards the husband, or of having deserted or wilfully separated herself from the husband before the adultery complained of, and without reasonable excuse, or of such wilful neglect or misconduct as has conduced to the adultery.

6. Nothing in sections 4 and 5 affects, restricts, or takes away any right of any wife existing before the 27th day of June, 1925.

DIVORCE JURISDICTION ACT

(R.S.C. 1952 c. 84)

1. This Act may be cited as the Divorce Jurisdiction Act.

2. A married woman who either before or after the passing of this Act has been deserted by and has been living separate and apart from her husband for a period of two years and upwards and is still living separate and apart from her husband may, in any one of those provinces of Canada in which there is a court having jurisdiction to grant a divorce *a vinculo matrimonii*, commence in the court of such province having such jurisdiction proceedings for divorce *a vinculo matrimonii* praying that her marriage may be dissolved on any grounds

that may entitle her to such divorce according to the law of such province, and such court has jurisdiction to grant such divorce if immediately prior to such desertion the husband of such married woman was domiciled in the province in which such proceedings are commenced.

(2) ACTS FROM WHICH JURISDICTION IS DERIVED

NORTH-WEST TERRITORIES AMENDMENT ACT, 1886

(49 Vict. c. 25)

[Note: Section 3 is the only section applicable.]

3. Subject to the provisions of the next preceding section the laws of England relating to civil and criminal matters, as the same existed on the fifteenth day of July, in the year of our Lord one thousand eight hundred and seventy, shall be in force in the Territories, in so far as the same are applicable to the Territories, and in so far as the same have not been, or may not hereafter be, repealed, altered, varied, modified or affected by any Act of the Parliament of the United Kingdom applicable to the Territories, or of the Parliament of Canada, or by any ordinance of the Lieutenant-Governor in Council.

AN ACT RESPECTING THE APPLICATION OF CERTAIN
LAWS THEREIN MENTIONED TO THE PROVINCE OF
MANITOBA, 1888

(51 Vict. c. 33)

1. Subject to the provisions of the next following section the laws of England relating to matters within the jurisdiction of the Parliament of Canada, as the same existed on the fifteenth day of July, one thousand eight hundred and seventy, were from the said day and are in force in the Province of Manitoba, in so far as the same are applicable to the said Province and in so far as the same have not been or are not hereafter repealed, altered, varied, modified or affected by any Act of the Parliament of the United Kingdom applicable to the said Province, or of the Parliament of Canada.

2. [Not applicable.]

3. [Saving of existing rights.]

DIVORCE ACT (ONTARIO)

(R.S.C. 1952, c. 85)

1. This Act may be cited as the Divorce Act (Ontario).

2. The law of England as to the dissolution of marriage and as to the annulment of marriage, as the law existed on the 15th day of July, 1870, in so far as it can be made to apply in the Province of Ontario, and in so far as it has not been repealed, as to the Province, by any Act of the Parliament of the United Kingdom or by any Act of Parliament of Canada or by this Act, and as altered, varied, modified or affected, as to the Province by any such Act, is in force in the Province of Ontario.

3. The Supreme Court of Ontario has jurisdiction for all purposes of this Act.

BRITISH COLUMBIA DIVORCE APPEALS ACT

(R.S.C. 1952, c. 21)

1. This Act may be cited as the British Columbia Divorce Appeals Act.

2. The Court of Appeal of the Province of British Columbia shall have jurisdiction to hear and determine appeals from an order, judgment or decree of a court of the Province or a judge thereof having jurisdiction in divorce and matrimonial causes.

12 ELIZABETH II

CHAP. 10

An Act authorizing the Senate of Canada to
Dissolve or Annul Marriages.

[Assented to 2nd August, 1963.]

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

Short title.

1. This Act may be cited as the *Dissolution and Annulment of Marriages Act*.

Marriage dissolved or annulled.

2. (1) The Senate of Canada may, on the petition of either party to a marriage, by resolution declare that the marriage is dissolved or annulled, as the case may be, and, subject to the provisions of subsections (2) and (3), immediately on the expiration of thirty days from the date of the adoption of the resolution the marriage is dissolved or annulled, as the case may be, and shall be null and void, and thereafter either party thereto may marry any person whom he or she might lawfully marry if the said marriage had not been solemnized.

Operation of resolution suspended.

(2) If, before the expiration of the thirty days referred to in subsection (1), a petition to the Parliament of Canada by either party to a marriage in respect of which a resolution for its dissolution or annulment has been adopted by the Senate, together with a draft bill based thereon and the required fee, is filed with the Clerk of the Parliaments praying for the passage of an Act annulling or modifying such resolution, the operation of the resolution shall be suspended until an Act based upon the petition has received Royal Assent, whereupon the resolution shall have no force or effect or shall have such other force and effect as may be prescribed in that Act.

Resolution to have full force and effect.

(3) If the bill referred to in subsection (2) is disposed of otherwise than by becoming law or by reason of prorogation or dissolution of Parliament, the resolution dissolving or annulling the marriage shall have full force and effect on the date on which the bill has been so disposed of.

In case of prorogation or dissolution.

(4) Where a petition or a bill seeking the annulment or modification of a resolution of the Senate dissolving or annulling a marriage has been disposed of by reason of prorogation or dissolution of Parliament, and a new petition and a draft bill to the same effect are not filed with the Clerk of the Parliaments within thirty days of the commencement of the next ensuing session of Parliament, such resolution shall come into force on the expiration of such thirty days. If such petition and draft bill are so filed within such thirty days, the operation of such resolution shall be suspended in accordance with the provisions of subsection (2).

Officer's recommendation.

3. The Senate shall adopt a resolution for the dissolution or annulment of a marriage only upon referring the petition therefor to an officer of the Senate,

designated by the Speaker of the Senate, who shall hear evidence, and report thereon, but such officer shall not recommend that a marriage be dissolved or annulled except on a ground on which a marriage could be dissolved or annulled, as the case may be, under the laws of England as they existed on the 15th day of July, 1870, or under the *Marriage and Divorce Act*, Chapter 176 of the Revised Statutes of Canada, 1952.

Rules and orders.

4. The Senate may make such rules and orders respecting petitions for dissolution or annulment of marriages, the procedure at hearings thereon and all other matters as it considers necessary or desirable for the carrying out of the provisions of this Act.

Evidence of dissolution or annulment.

5. Evidence of a resolution of the Senate declaring that a marriage is dissolved or annulled may be given by the production of a copy of the resolution purporting to be under the seal of the Clerk of the Parliaments and signed by him or on his behalf.

Application of Act.

6. This Act shall apply in respect of any petition for the dissolution or annulment of marriage presented to the Senate of Canada, and not reported upon by the Senate Standing Committee on Divorce before the coming into force of this Act.

APPENDIX No. 2

THE NEW SYSTEM OF PARLIAMENTARY DIVORCE

E. Russell Hopkins

What follows is a general account, in historical context, of the system of parliamentary divorce inaugurated during the session of Parliament which concluded in December, 1963. The new system, both novel and experimental, has been in operation only since January, 1964. While it is difficult, as yet, to appreciate all its implications, the importance of the subject provides a plausible warrant for the present attempt. As will be seen, the new system makes a significant contribution to the conservation of the time and effort of the House of Commons, and thus to the streamlining of the procedures of Parliament as a whole.

In eight of the 10 provinces of Canada, and in the Territories, there exist courts having jurisdiction to dissolve marriages on the ground of adultery. (Cruelty constitutes, for historical reasons, an additional ground in Nova Scotia.) In the remaining two provinces, Quebec and Newfoundland, the courts have no jurisdiction to grant divorces, although they are empowered to afford certain other forms of matrimonial relief, such as judicial separation and nullity. These two provinces adhere, on religious grounds, to the principle of English canon law applied by the ecclesiastical courts before the establishment of divorce courts in England in 1857. This principle is that a marriage, once properly made and consummated, is indissoluble on any ground. There has been no attempt by the Parliament of Canada to confer an unwanted divorce jurisdiction on the courts of Quebec or Newfoundland, although by the British North America Act of 1867 it has sovereign and exclusive legislative power to make laws with reference to marriage and divorce.

However, it was not contemplated by the authors of Confederation that the people in those two provinces, who do not share the moral and religious objections to divorce entertained by the majority, should be denied that form of matrimonial relief. The legislative power of the Parliament of Canada includes power not only to pass general legislation relating to divorce but also to pass acts dissolving particular marriages. Ever since Confederation, Parliament has been prepared, in an appropriate case, to pass a private act dissolving a marriage, on the ground of adultery, on the petition of a person domiciled in Quebec or Newfoundland.

At present the grounds on which Parliament will grant a divorce are the same as those applied by the divorce courts in England in 1870. The one exception is that in England in that year, while a husband could obtain a divorce on the ground of his wife's adultery, a wife could obtain a divorce only on the ground of her husband's adultery if it was coupled with incest, bigamy, cruelty or desertion (she was also entitled to a divorce on the grounds of rape, sodomy or bestiality on the part of her husband). The Parliament of Canada, on the other hand, has always been prepared to grant a divorce to a wife on the ground of her husband's adultery alone.

Similarly, Parliament has always been empowered to grant a divorce at the instance of a petitioner domiciled anywhere in Canada. However, on the general theory that Parliament will not interfere when an alternative remedy is available, petitions for divorce have been heard only when the petitioner was

domiciled in Quebec or Newfoundland, or where there was at least a genuine doubt about his domicile.

The preamble to the British North America Act of 1867 declared that it was the desire of the federating provinces to have a constitution "similar in principle to that of the United Kingdom." The British Parliament, by virtue of its sovereign legislative power, had always possessed the authority to pass acts dissolving or annulling marriages, even before the establishment of divorce courts in 1857. It was not unnatural, therefore, that the Canadian Parliament should exercise the same jurisdiction following Confederation.

The enactment of bills of divorce by the Parliament of Canada was quite rare until about 1900. However, from that year onward these bills have been presented in increasing numbers; recently 400 or 500 have been passed in each session. Even this progressive increase did not cause undue concern among parliamentarians until 15 years ago. The system had operated tolerably well, without any noticeable public clamour for its reform or vocal objection from the two provinces concerned. Senators and members of Parliament from Quebec did not serve on the divorce committees of either House and regularly registered their opposition to divorce in principle by calling out "on division" whenever divorce bills were called for their readings. This did not prevent the bills from passing, but simply indicated, for the record, that they were not being passed unanimously. The principal work, including the hearing of actual evidence, was done by the Standing Committee of the Senate on Divorce, and large numbers of bills, on the recommendation of that Committee, went through their several readings in both Houses and were passed en masse. By this method, the minority in Quebec and Newfoundland was not denied the remedy of divorce, and the consciences of Quebec's parliamentarians were apparently sufficiently salved. There seemed to be a consensus among those primarily concerned that this system of divorce was perhaps the least offensive way of dealing with a knotty and distasteful legislative problem.

This acquiescent attitude began to wane noticeably about 15 years ago. By then, it was beginning to be felt that the time of parliamentarians was being increasingly and unnecessarily taken up with the consideration of individual petitions of divorce, whereas parliamentarians were sent or summoned to Ottawa primarily for the consideration of national policies and general legislation. There was also an increasing body of opinion that divorce was a matter for the courts, and that if the courts of Quebec and Newfoundland were not given jurisdiction in divorce, it should be given to a federal court. It was argued that this would relieve Parliament of an unwelcome chore for which it was neither specially designed nor particularly suited.

This feeling manifested itself in the introduction of private members' bills, both in the House of Commons and the Senate, providing for the delegation of the traditional divorce jurisdiction of Parliament to the Exchequer Court of Canada. Ever since 1949, when Stanley Knowles first introduced such a bill, there has been at least one on the order paper of the House of Commons. All, until 1962, were "talked out" and not allowed to come to a vote. Under the Standing Orders of the House, only a limited number of hours is allotted for the consideration of private members' business. Once the time is used up the bill under consideration drops to the bottom of the list of private bills and is unlikely to be reached again at the same session. Moreover, all bills not passed at one session die at prorogation or dissolution, and must be re-introduced and dealt with *de novo* at the next session.

By 1962, some members were getting so impatient with this situation that, in order to focus public attention on the problem, they undertook a blockade of individual divorce bills. A few members of the New Democratic Party, notably Frank Howard (Skeena) and Arnold Peters (Timiskaming), prevented the

passage of the bills by talking them out in the same way that private bills to reform divorce procedure had hitherto been talked out. That year 327 divorce bills passed the Senate but not the House of Commons.

In 1962, presumably by tacit all-party agreement and certainly with the consent of those who had been conducting the blockade, a general bill passed the House of Commons which provided that divorce bills could be passed by the Senate and receive royal assent without having to pass the House of Commons. The idea of making one House of Parliament solely responsible for a certain type of bill was probably suggested by the British system for passing money bills which become law without going to the House of Lords. Although the strict constitutionality of the bill was not questioned, no Senator could be found who was prepared to sponsor it and it died on the Senate order paper. The Senators seemed to regard it as a kind of constitutional monstrosity. The feeling was that the same result could be obtained by the simpler expedient of authorizing the Senate to grant divorces by resolution rather than by a truncated Act of Parliament.

In consequence, the blockade was continued in the session of 1962-63 at which no fewer than 494 additional divorce bills passed the Senate but not the House of Commons. At this session, Nicholas Mandziuk (PC—Marquette) introduced into the House another bill which delegated to the Senate the power to grant divorces by simple resolution, subject to an appeal to Parliament as a whole. Evidence in respect of divorce petitions would continue to be heard by the Standing Committee of the Senate on Divorce; the Committee would recommend to the Senate whether or not to pass a resolution of divorce. In introducing the bill, Mr. Mandziuk was careful to disclaim its authorship, pointing out that it had been conceived, by Robert McCleave (PC—Halifax) and Senator Arthur Roebuck, in conjunction with the Parliamentary Counsel of the House of Commons and the Senate. Although it seemed for a time that the bill was likely to pass both Houses, it did not even receive second reading in the Commons, presumably because it proved impossible to procure all-party agreement or the acquiescence of those who had been conducting the blockade.

The situation had become intolerable. There existed at this juncture 821 divorce applications which had been passed by the Senate, but which were being held up in the House of Commons. Several hundred more petitions had been received, but the Senate was reluctant to deal with them until the backlog had been cleared up and there was some assurance that the new bills stood a chance of passing both Houses. Almost a thousand people were being denied divorces, and thousands more—the families and relatives concerned—were being affected. Moreover, the absurdity of the situation was reflecting on Parliament, which had proved to be inadequate in the discharge of certain of its functions. The impasse could not continue much longer. Accordingly, a great deal of all-party negotiation took place behind the scenes. The result was that a second bill was introduced by Mr. Mandziuk. From all appearances this second bill, which passed both Houses without a dissenting voice, was based upon all-party agreement, including the acquiescence of Quebec parliamentarians and those who had been conducting the blockade. This is evidenced by the fact that all divorce bills previously held up rapidly passed both Houses. It is perhaps worthy of note that the sponsor of the second Mandziuk bill in the Senate was Senator Roebuck who had been one of the joint authors of the first Mandziuk bill.

The second Mandziuk bill—which is now law—was much like the first. Authority to adopt resolutions of divorce (as distinguished from bills) was conferred on the Senate. An appeal to Parliament against the resolution can be made within 30 days of its adoption by an aggrieved party petitioning Parliament for a bill annulling the resolution. In this event, the resolution will remain

in abeyance pending the enactment or rejection of the bill attacking the resolution. In the absence of such a petition, the divorce will take effect 30 days after the adoption by the Senate of the resolution.

No limitation was imposed on the Senate by the legislation either as to the grounds on which a divorce might be granted or as to the domicile of the petitioner. It was to have a jurisdiction in respect of individual divorces as ample as that of Parliament itself—except for one stipulation. Under the new Act, each petition is required to be referred to an officer of the Senate, designated by the Speaker, who is to hear evidence in each case and to report thereon to the Senate. However, this officer is not allowed to recommend that a marriage be dissolved or annulled except (in the words of the Act) “on a ground on which a marriage could be dissolved or annulled, as the case may be, under the laws of England as they existed on the 15th day of July, 1870, or under the Marriage and Divorce Act, Chapter 176 of the Revised Statutes of Canada, 1952.” The appointment of this officer and the restriction on his conduct is the only difference between the second Mandziuk bill which became law and the first which did not.

However, once there has been the required reference to this officer, and he has heard evidence and submitted his report, there remains a discretion on the part of the Senate to grant or refuse a resolution of divorce on any ground (subject as noted to an appeal to Parliament as a whole). Furthermore, the new Act does not derogate from the right of Parliament to pass divorce bills exactly as in the past. What has been given to the Senate is an extraordinary and additional jurisdiction in respect of divorce, but nothing either is or could be subtracted from the sovereign power of Parliament in matters relating to marriage and divorce.

Some Senators, in particular Hon. C. G. Power, were insistent that the Senate should not be subservient to the Commissioner, as the new officer was to be called, and that it should not be bound to rubber-stamp his recommendations. This was fully assured before the Senate finally approved the legislation, five amendments to the original draft having been made in the Senate prior to its passage.

A wide discretion as to the formulation of the new rules was given to the Senate by the Act, section 4 of which reads:

The Senate may make such rules and orders respecting petitions for dissolution or annulment of marriages, the procedure at hearings thereon and all other matters as it considers necessary or desirable for the carrying out of the provisions of this Act.

The Senators lost no time in getting the system in operation. On November 19, 1963, it was announced in the Senate by Hon. W. Ross Macdonald, then Government Leader, that Allison Arthur Mariotti Walsh had been appointed an officer of the Senate. Later the same day, the Speaker, Hon. Maurice Bourget, designated Mr. Walsh as the officer authorized to hear evidence on divorce and to report under the new Act.

On December 10, Senator Macdonald moved that the matter of formulating the new divorce rules be referred to the Standing Committee on Divorce. That Committee promptly recommended the adoption of an addition to Part IV to the Standing Rules and Orders of the Senate relating to Resolutions for the Dissolution or Annulment of Marriages. The new rules were adopted without debate on December 15. They were patterned on the existing Senate rules governing bills of divorce and, since the new procedure is an alternative to, not a substitute for, the older procedure, the rules for the latter were retained intact. The differences between the two sets of rules mainly concern the Commissioner. The new rules allow the Commissioner to sit continuously

(instead of only when the Senate is sitting—like the Divorce Committee which had hitherto performed his functions). They also define the relationships to exist among the Commissioner, the Divorce Committee and the Senate itself.

With regard to these relationships, it is now the responsibility of the Commissioner to hear the evidence and recommend to the Senate either for or against the adoption of a resolution of divorce. Responsibility for actually adopting the resolutions is vested in the Senate itself. In order that it might be in a position to discharge this responsibility effectively, it was provided in the new rules that the Divorce Committee would act as a buffer between the Commissioner and the Senate. The Commissioner's report on each case goes in the first instance to the Divorce Committee, which examines it and associated documents together with a transcript of the evidence it required, and recommends a course of action to the Senate. In conducting this examination the Committee may call upon the Commissioner to explain his report, to hear further witnesses or otherwise re-examine the situation.

Following receipt of the Commissioner's report with the Committee's recommendation, it becomes the duty of the Senate to decide whether or not to adopt a resolution dissolving or annulling the marriage. As we have seen, the resolutions become effective 30 days after their adoption by the Senate, unless, meanwhile, a bill is filed appealing the resolution. In that case the effect of the resolution is suspended pending the disposition of the bill.

It is too early to say how well the new system will work in practice: difficulties will certainly have to be resolved from time to time as they arise. At the same time, there will be some immediate advantage to petitioners for parliamentary divorce. Their petitions will be no longer subject to any blockade in the House of Commons and the sordid details of individual divorce applications will no longer be aired on the floor of that House. Moreover, the Commissioner will sit all year round, so that petitions may be heard whether or not Parliament is sitting, although the consequent resolutions obviously cannot be adopted by the Senate unless it is sitting.

Finally, there will be much less unpleasant publicity attaching both to applications for divorce and to their hearings. Formerly applications had to be published in local newspapers and in four successive issues of the *Canada Gazette*; the only public notice now required is publication in a single issue of the *Canada Gazette* at least one month before the hearing. Needless to say, there are elaborate precautions taken to ensure that all persons who might possibly be affected by a resolution of divorce, including any identified correspondents, are given adequate notice of the application and the hearing.

There are also manifest advantages to be gained by each House of Parliament. First, the time of the House of Commons will not, henceforth, be consumed by the consideration of evidence, occasionally in quite sordid detail, in respect of individual divorce applications. Second, the members of the Divorce Committee of the Senate, while they will serve henceforward as a reviewing and checking authority, will no longer be required to spend long hours hearing evidence—a task now performed by the Commissioner. On the final day of the last session, a bill to confer on the Commissioner the status of a judge of the Exchequer Court passed the Commons, but not the Senate, because insufficient notice had been given to enable the Senators to reach a mature judgment in the matter. A similar bill was introduced in the House at the beginning of the present session, but had not been disposed of at the time of writing.

The new machinery is both novel and experimental. It is constitutionally novel in that it represents the first occasion on which the Parliament of Canada

as a whole—a trinity made up of the Queen, the Senate and the House of Commons—has delegated specific legislative powers to one of its constituent elements, the Senate. It is experimental in that it remains to be seen whether the new system will in fact perpetuate itself, or whether it will prove to be merely a way-station leading to the final delegation of Parliament's jurisdiction in divorce to a federal court, whether it be the Exchequer Court or another.

APPENDIX No. 3

ACTS OF THE PARLIAMENT OF THE UNITED KINGDOM RELATING TO
DIVORCE AS OF JULY 15th, 1870.

MATRIMONIAL CAUSES ACT, 1857

(20 and 21 Vict. c. 85)

1 - 5. [Transitional provisions.]

6. As soon as this Act shall come into operation, all jurisdiction now vested in or exercisable by any Ecclesiastical Court or person in England in respect of divorces *a mensa et thoro*, suits of nullity of marriage, suits for restitution of conjugal rights, or jacitation of marriage, and in all causes, suits, and matters matrimonial, except in respect of marriage licences, shall belong to and be vested in Her Majesty, and such jurisdiction, together with the jurisdiction conferred by this Act, shall be exercised in the name of Her Majesty in a court of record to be called "The Court for Divorce and Matrimonial Causes".

7. No decree shall hereafter be made for a divorce *a mensa et thoro*, but in all cases in which a decree for divorce *a mensa et thoro* might now be pronounced the court may pronounce a decree for a judicial separation, which shall have the same force and the same consequence as a divorce *a mensa et thoro* now has.

8 - 15. [Practice and procedure.]

16. A sentence of judicial separation (which shall have the effect of a divorce *a mensa et thoro* under the existing law, and such other legal effect as herein mentioned), may be obtained, either by the husband or the wife, on the ground of adultery, or cruelty, or desertion without cause for two years and upwards.

17. Application for restitution of conjugal rights or for judicial separation on any one of the grounds aforesaid may be made by either husband or wife, by petition to the court, or to any judge of assize at the assizes held for the county in which the husband and wife reside or last resided together, and which judge of assize is hereby authorized and required to hear and determine such petition, according to the rules and regulations which shall be made under the authority of this Act; and the court or judge to which such petition is addressed, on being satisfied of the truth of the allegations therein contained, and that there is no legal ground why the same should not be granted, may decree such restitution of conjugal rights or judicial separation accordingly, and where the application is by the wife may make any order for alimony which shall be deemed just: [remainder of section purely procedural].

18 - 20. [Practice and procedure.]

21. [Protection of property of deserted wife.]

22. In all suits and proceedings, other than proceedings to dissolve any marriage, the said court shall proceed and act and give relief on principles and rules which in the opinion of the said court shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts have heretofore acted and given relief, but subject to the provisions herein contained and to the rules and orders under this Act.

23. Any husband or wife, upon application of whose wife or husband, as the case may be, a decree of judicial separation has been pronounced, may, at

any time thereafter, present a petition to the court praying for a reversal of such decree on the ground that it was obtained in his or her absence, and that there was reasonable ground for the alleged desertion, where desertion was the ground of such decree; and the court may, on being satisfied of the truth of the allegations of such petition, reverse the decree accordingly, but the reversal thereof shall not prejudice or affect the rights or remedies which any other person would have had in case such reversal had not been decreed in respect of any debts, contracts or acts of the wife incurred, entered into, or done between the times of the sentence of separation and of the reversal thereof.

24. In all cases in which the court shall make any decree or order for alimony, it may direct the same to be paid either to the wife herself or to any trustee on her behalf, to be approved by the court, and may impose any terms or restrictions which to the court may seem expedient, and may from time to time appoint a new trustee, if for any reason it shall appear to the court expedient so to do.

25. In every case of judicial separation the wife shall, from the date of the sentence and whilst the separation shall continue, be considered as a *feme sole* with respect to property of every description which she may acquire or which may come to or devolve upon her; and such property may be disposed of by her in all respects as a *feme sole*, and on her decease the same shall, in case she shall die intestate, go as the same would have gone if her husband had been then dead; provided, that if any such wife should again cohabit with her husband, all such property as she may be entitled to when such cohabitation shall take place shall be held to her separate use, subject, however, to any agreement in writing made between herself and her husband whilst separate.

26. In every case of a judicial separation the wife shall, whilst so separated, be considered as a *feme sole* for the purposes of contract, and wrongs and injuries, and suing and being sued in any civil proceeding; and her husband shall not be liable in respect of any engagement or contract she may have entered into, or for any wrongful act or omission by her, or for any costs she may incur as plaintiff or defendant; provided, that whereupon any such judicial separation alimony has been decreed or ordered to be paid to the wife, and the same shall not be duly paid by the husband he shall be liable for necessities supplied for her use; provided also, that nothing shall prevent the wife from joining, at any time during such separation, in the exercise at any joint power given to herself and her husband.

27. It shall be lawful for any husband to present a petition to the said court, praying that his marriage may be dissolved, on the ground that his wife has since the celebration thereof been guilty of adultery; and it shall be lawful for any wife to present a petition to the said court, praying that her marriage may be dissolved, on the ground that since the celebration thereof her husband has been guilty of incestuous adultery, or of bigamy with adultery, or of rape, or of sodomy or bestiality, or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce *a mensa et thoro*, or of adultery coupled with desertion, without any reasonable excuse, for two years or upwards; and every such petition shall state as distinctly as the nature of the case permits the facts on which the claim to have such marriage dissolved is founded: provided that for the purposes of this Act incestuous adultery shall be taken to mean adultery committed by a husband with a woman with whom if his wife were dead he could not lawfully contract marriage by reason of her being within the prohibited degrees of consanguinity or affinity; and bigamy shall be taken to mean marriage of any person, being married, to any other person during the life of the former husband or wife, whether the second marriage shall have taken place within the dominions of Her Majesty or elsewhere.

28. Upon any such petition presented by a husband the petitioner shall make the alleged adulterer a co-respondent to the said petition, unless on special grounds, to be allowed by the court, he shall be excused from so doing; and on every petition presented by a wife for dissolution of marriage the court, if it see fit, may direct that the person with whom the husband is alleged to have committed adultery be made a respondent; and the parties or either of them may insist on having the contested matters of fact tried by a jury as hereinafter mentioned.

29. Upon any such petition for the dissolution of a marriage, it shall be the duty of the court to satisfy itself, so far as it reasonably can, not only as to the facts alleged, but also whether or no the petitioner has been in any manner accessory to or conniving at the adultery, or has condoned the same, and shall also inquire into any countercharge which may be made against the petitioner.

30. In case the court, on the evidence in relation to any such petition, shall not be satisfied that the alleged adultery has been committed, or shall find that the petitioner has during the marriage been accessory to or conniving at the adultery of the other party to the marriage, or has condoned the adultery complained of, or that the petition is presented or prosecuted in collusion with either of the respondents, then and in any of the said cases the court shall dismiss the said petition.

31. In case the court shall be satisfied on the evidence that the case of the petitioner has been proved, and shall not find that the petitioner has been in any manner accessory to or conniving at the adultery of the other party to the marriage, or has condoned the adultery complained of, or that the petition is presented or prosecuted in collusion with either of the respondents, then the court shall pronounce a decree declaring such marriage to be dissolved: provided always, that the court shall not be bound to pronounce such decree if it shall find that the petitioner has during the marriage been guilty of adultery, or if the petitioner shall, in the opinion of the court, have been guilty of unreasonable delay in presenting or prosecuting such petition, or of cruelty towards the other party to the marriage, or of having deserted or wilfully separated himself or herself from the other party before the adultery complained of, and without reasonable excuse, or of such wilful neglect or misconduct as has conduced to the adultery.

32. The court may, if it shall think fit, on any such decree, order that the husband shall to the satisfaction of the court secure to the wife such gross sum of money, or such annual sum of money for any term not exceeding her own life, as having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties, it shall deem reasonable, and for that purpose may refer it to any one of the conveyancing counsel of the Court of Chancery to settle and approve of a proper deed or instrument to be executed by all necessary parties; and the said court may in such case, if it shall see fit, suspend the pronouncing of its decree until such deed shall have been duly executed; and upon any petition for dissolution of marriage the court shall have the same power to make interim orders for payment of money, by way of alimony or otherwise, to the wife, as it would have in a suit instituted for judicial separation.

33. Any husband may, either in a petition for dissolution of marriage or for judicial separation, or in a petition limited to such object only, claim damages from any person on the ground of his having committed adultery with the wife of such petitioner . . . (balance of section procedural only).

34. Whenever in any petition presented by a husband the alleged adulterer shall have been made a co-respondent, and the adultery shall have been

established, it shall be lawful for the court to order the adulterer to pay the whole or any part of the costs of the proceedings.

35. In any suit or other proceeding for obtaining a judicial separation or a decree of nullity of marriage, and on any petition for dissolving a marriage, the court may from time to time, before making its final decree, make such interim orders, and may make such provision in the final decree, as it may deem just and proper with respect to the custody, maintenance and education of the children the marriage of whose parents is the subject of such suit or other proceeding, and may, if it shall think fit, direct proper proceedings to be taken for placing such children under the protection of the Court of Chancery.

36. In questions of fact arising in proceedings under this Act it shall be lawful for, but, except as hereinbefore provided, not obligatory upon, the court to direct the truth thereof to be determined before itself, or before any one or more of the judges of the said court, by the verdict of a special or common jury.

37. Practice and procedure.

38. When any such question shall be so ordered to be tried such question shall be reduced into writing in such form as the court shall direct, and at the trial the jury shall be sworn to try the said question, and a true verdict to give thereon according to the evidence; and upon every such trial the court or judge shall have the same powers, jurisdiction, and authority as any judge of any of the said superior courts sitting at *nisi prius*.

39-44. [Practice and procedure.]

45. In any case in which the court shall pronounce a sentence of divorce or judicial separation for adultery of the wife, if it shall be made appear to the court that the wife is entitled to any property either in possession or reversion, it shall be lawful for the court, if it shall think proper, to order such settlement as it shall think reasonable to be made of such property or any part thereof, the benefit of the innocent party, and of the children of the marriage, or either or any of them.

46-54. [Practice and procedure.]

55. Either party dissatisfied with any decision of the court in any matter which, according to the provisions aforesaid, may be made by the judge ordinary alone, may, within three calendar months after the pronouncing thereof, appeal therefrom to the full court, whose decision shall be final.

56. [Appeal to House of Lords. Repealed by s. 2 of 1868 Act; see now s. 3 of that Act, *infra*.]

57. When the time hereby limited for appealing against any decree dissolving a marriage shall have expired, and no appeal shall have been presented against such a decree, or when any such appeal shall have been dismissed, or when in the result of any appeal any marriage shall be declared to be dissolved, but not sooner, it shall be lawful for the respective parties thereto to marry again, as if the prior marriage had been dissolved by death: provided always, that no clergyman in Holy Orders of the United Church of England and Ireland shall be compelled to solemnize the marriage of any person whose former marriage may have been dissolved on the ground of his or her adultery, or shall be liable to any suit, penalty, or censure for solemnizing or refusing to solemnize the marriage of any such person.

58. Provided always, that when any minister of any church or chapel of the United Church of England and Ireland shall refuse to perform such marriage service between any persons who but for the refusal would be entitled to have the same service performed in such church or chapel, such minister shall permit any other minister in Holy Orders of the said United Church, entitled to

officiate within the diocese in which such church or chapel is situate, to perform such marriage service in such church or chapel.

59. After this Act shall have come into operation no action shall be maintainable in England for criminal conversation.

60-68. [Practice and procedure.]

MATRIMONIAL CAUSES ACT, 1858

(21 & 22 Vict. c. 108)

1-4. [Practice and procedure.]

5. In every cause in which a sentence of divorce and separation from bed, board, and mutual cohabitation has been given by a competent Ecclesiastical Court before the Act of the twentieth and twenty-first Victoria, chapter eighty-five, came into operation, the evidence in the case in which such sentence was pronounced in such Ecclesiastical Court may, whenever from the death of a witness or from any other cause it may appear to the court reasonable and proper, be received on the hearing of any petition which may be presented to the said Court for Divorce and Matrimonial Causes.

6-10. [Protection of property of deserted wife.]

11. In all cases now pending, or hereafter to be commenced in which, on the petition of a husband for a divorce, the alleged adulterer is made a co-respondent, or in which, on the petition of a wife, the person with whom the husband is alleged to have committed adultery is made a respondent, it shall be lawful for the court, after the close of the evidence on the part of the petitioner, to direct such co-respondent or respondent to bed is missed from the suit, if it shall think there is not sufficient evidence against him or her.

12-16. [Practice and procedure.]

17. [Appeal to House of Lords in nullity suits. Repealed by s. 2 of 1868 Act; see now s. 3 of that Act, *infra*]

18-23. [Practice and procedure.]

MATRIMONIAL CAUSES ACT, 1859

(22 & 23 Vict. c. 61)

1-3. [Practice and procedure.]

4. The court after a final decree of judicial separation, nullity of marriage, or dissolution of marriage, may upon application (by petition) for this purpose make, from time to time, all such orders and provision with respect to the custody, maintenance, and education of the children the marriage of whose parents was the subject of the decree, or for placing such children under the protection of the Court of Chancery, as might have been made by such final decree or by interim orders in case the proceedings for obtaining such decree were still pending: [balance of section procedural only].

5. The court after a final decree of nullity of marriage or dissolution of marriage may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property settled either for the benefit of the children of the marriage or of their respective parents as to the court shall seem fit.

6. On any petition presented by a wife, praying that her marriage may be dissolved by reason of her husband having been guilty of adultery coupled with cruelty, or of adultery coupled with desertion, the husband and wife respectively shall be competent and compellable to give evidence of or relating to such cruelty or desertion.

7. [Appeals under Legitimacy Declaration Act, 1858.]

MATRIMONIAL CAUSES ACT, 1860

(23 and 24 Vict. c. 144)

1. It shall be lawful for the Judge Ordinary of the Court for Divorce and Matrimonial Causes alone to hear and determine all matters arising in the said court, and to exercise all powers and authority whatever which may now be heard and determined and exercised respectively by the full court or by three or more judges of the said court, the Judge Ordinary being one, or where the Judge Ordinary shall deem it expedient, in relation to any matter which he might hear and determine alone by virtue of this Act, to have the assistance of one other judge of the said court, it shall be lawful for the Judge Ordinary to sit and act with such one other judge accordingly, and, in conjunction with such other judge, to exercise all the jurisdiction, powers, and authority of the said court.

2. Provided always, that the Judge Ordinary may, where he shall deem it expedient, direct that any such matter as aforesaid shall be heard and determined by the full court; and in addition to the cases in which an appeal to the full court now lies from the decision of the Judge Ordinary, either party dissatisfied with the decision of such judge sitting alone in granting or refusing any application for a new trial which by virtue of this Act he is empowered to hear and determine may, within fourteen days after the pronouncing thereof, appeal to the full court, whose decision shall be final.

3. [Appeal to House of Lords. Repealed by s. 2 of 1868 Act; see now s. 3 of that Act, *infra*.]

4. [Practice and procedure.]

5. In every case of a petition for a dissolution of marriage it shall be lawful for the court, if it shall see fit, to direct all necessary paper in the matter to be sent to Her Majesty's Proctor, who shall, under the directions of the Attorney-General, instruct counsel to argue before the court any question in relation to such matter, and which the court may deem it necessary or expedient to have fully argued; and Her Majesty's Proctor shall be entitled to charge and be reimbursed the costs of such proceeding as part of the expense of his office.

6. And whereas by section forty-five of the Act of the session holden in the twentieth and twenty-first years of Her Majesty, chapter eighty-five, it was enacted that [see Act of 1857, s. 45]: be it further enacted, that any instrument executed pursuant to any order of the court made under the said enactment before or after the passing of this Act, at the time of or after the pronouncing of a final decree of divorce or judicial separation, shall be deemed valid and effectual in the law, notwithstanding the existence of the disability of coverture at the time of the execution thereof.

7. Every decree for a divorce shall in the first instance be a decree *nisi*, not to be made absolute till after the expiration of such time, not less than three months from the pronouncing thereof, as the court shall by general or special order from time to time direct; and during that period any person shall be at liberty, in such manner as the court shall by general or special order in that behalf from time to time direct, to show cause why the said decree should not be made absolute by reason of the same having been obtained by collusion or by reason of material facts not brought before the court; and, on cause being so shown, the court shall deal with the case by making the decree absolute, or by reversing the decree *nisi*, or by requiring further inquiry, or otherwise as justice may require; and at any time during the progress of the cause or before the decree is made absolute any person may give information to Her Majesty's Proctor of any matter material to the due decision of the case, who may thereupon take such steps as the Attorney-General may deem necessary or

expedient; and if from any such information or otherwise the said Proctor shall suspect that any parties to the suit are or have been acting in collusion for the purpose of obtaining a divorce contrary to the justice of the case, he may under the direction of the Attorney-General, and by leave of the court, intervene in the suit, alleging such case of collusion, and retain counsel and subpoena witnesses to prove it; and it shall be lawful for the court to order the costs of such counsel and witnesses, and otherwise, arising from such intervention, to be paid by the parties or such of them as it shall see fit, including a wife if she have separate property; and in case the said Proctor shall not thereby be fully satisfied his reasonable costs, he shall be entitled to charge and be reimbursed the difference as part of the expense of his office.

8. [Act to expire July 31, 1862, but note that the Act was made perpetual by 25 & 26 Vict. c. 81, and was in force on July 15, 1870.]

MATRIMONIAL CAUSES ACT, 1866

(29 & 30 Vict. c. 32)

1. In every such case [i.e. on a decree for dissolution against a husband who has no property on which a gross or annual sum for maintenance can be secured] it shall be lawful for the court to make an order on the husband for payment to the wife during their joint lives of such monthly or weekly sums for her maintenance and support as the court may think reasonable: provided always, that if the husband shall afterwards from any cause become unable to make such payments it shall be lawful for the court to discharge or modify the order, or temporarily to suspend same as to the whole or any part of the money so ordered to be paid, and again to revive the same order, wholly or in part, as to the court may seem fit.

2. In any suit instituted for dissolution of marriage, if the respondent shall oppose the relief sought on the ground in case of such a suit instituted by a husband of his adultery, cruelty, or desertion, or in case of such a suit instituted by a wife on the ground of her adultery or cruelty, the court may in such suit give to the respondent, on his or her application, the same relief to which he or she would have been entitled in case he or she had filed a petition seeking such relief.

3. No decree *nisi* for a divorce shall be made absolute until after the expiration of six calendar months from the pronouncing thereof unless the court shall under the power now vested in it fix a shorter time.

MATRIMONIAL CAUSES ACT, 1868

(31 & 32 Vict. c. 77)

[NOTE: Although, by s. 5 thereof, this Act is given the short title "The Divorce Amendment Act, 1868", by s. 2 of the Matrimonial Causes Act, 1873 (36 & 37 Vict. c. 31) it may, along with all the other Matrimonial Causes Acts passed to that date, be cited as shown above.]

1. Throughout this Act the expression "the court" shall mean the Court for Divorce and Matrimonial Causes.

2. [Repeals s. 56 of 1857 Act, s. 17 of 1858 Act, and s. 3 of 1860 Act.]

3. Either party dissatisfied with the final decision of the court on any petition for dissolution or nullity of marriage may, within one calendar month after the pronouncing thereof, appeal therefrom to the House of Lords, and on the hearing of any such appeal the House of Lords may either dismiss the appeal or reverse the decree, or remit the case to be dealt with in all respects as the House of Lords shall direct: provided always that in suits for dissolution of

marriage no respondent or co-respondent, not appearing and defending the suit on the occasion of the decree *nisi* being made, shall have any right of appeal to the House of Lords against the decree when made absolute, unless the court, upon application made at the time of the pronouncing of the decree absolute, shall see fit to permit an appeal.

4 Section fifty-seven of the said Act of twenty-first Victoria, chapter eighty-five, shall be read and construed with reference to the time for appealing as varied by this Act; and in cases where under this Act there shall be no right of appeal, the parties respectively shall be at liberty to marry again at any time after the pronouncing of the decree absolute.

5. [Short title.]

6. [Application to pending suits.]

APPENDIX No. 4

CONTEMPORARY ACTS OF THE PARLIAMENT OF THE UNITED KINGDOM RELATING TO DIVORCE.

MATRIMONIAL CAUSES ACT, 1950

(14 Geo. 6, c. 25)

An Act to consolidate certain enactments relating to matrimonial causes in the High Court in England and to declarations of legitimacy and of validity of marriage and of British nationality, with such corrections and improvements as may be authorised by the Consolidation of Enactments (Procedure) Act, 1949.

[28th July, 1950]

Divorce and Nullity of Marriage

1.—(1) Subject to the provisions of the next following section, a petition for divorce may be presented to the court either by the husband or the wife on the ground that the respondent—

- (a) has since the celebration of the marriage committed adultery; or
- (b) has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition; or
- (c) has since the celebration of the marriage treated the petitioner with cruelty; or
- (d) is incurably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition;

and by the wife on the ground that her husband has, since the celebration of the marriage, been guilty of rape, sodomy or bestiality.

This subsection replaces s. 176 of the Supreme Court of Judicature (Consolidation) Act, 1925, as substituted by s. 2 of the Matrimonial Causes Act, 1937 (p. 1303, *ante*).

For statutory exception to sub-s. (1) (b), see Divorce (Insanity and Desertion) Act, 1958, s. 3 (p. 1464, *post*). In calculating the period of desertion and in considering whether such desertion has been continuous, no account is to be taken of any one period (not exceeding three months) during which the parties resumed cohabitation with a view to a reconciliation: Matrimonial Causes Act, 1963, s. 2 (2) (p. 1504, *post*).

(2) For the purposes of this section a person of unsound mind shall be deemed to be under care and treatment—

- (a) while he is detained in pursuance of any order or inquisition under the Lunacy and Mental Treatment Act, 1890 to 1930, or of any order or warrant under the Army Act, the Air Force Act, the Naval Discipline Act, the Naval Enlistment Act, 1884, or the Yarmouth Naval Hospital Act, 1931, or is being detained as a Broadmoor patient or in pursuance of an order made under the Criminal Lunatics Act, 1884 [while he is liable to be detained in a hospital mental nursing home or place of safety under the Mental Health Act, 1959];

The words in square brackets replace the italicised words except so far as relates to any time before the commencement of the Mental Health Act, 1959: see the 7th Schedule of that Act (p.1479, *post*).

[(b) while he is liable to be detained in a hospital or place of safety under the Mental Health (Scotland) Act, 1960];

The words in square brackets were substituted for "while he is detained in pursuance of any order or warrant for his detention or custody as a lunatic under the Lunacy (Scotland) Acts, 1857 to 1919" by the Mental Health (Scotland) Act, 1960, Sched. IV, as from the 1st June, 1962.

- (c) while he is liable to be detained in pursuance of any order for his detention or treatment as a person of unsound mind or a person suffering from mental illness made under any law for the time being in force in Northern Ireland, the Isle of Man or any of the Channel Islands (including any such law relating to criminal lunatics);
- (d) while he is receiving treatment as a voluntary patient under *the Mental Treatment Act, 1930, or under any such law as is mentioned in paragraph (c) of this subsection, being treatment which follows without any interval a period during which he was detained as mentioned in paragraph (a), paragraph (b) or paragraph (c) of this subsection;*

The words "the Mental Treatment Act, 1930, of under", except so far as relates to any time before the commencement of the Mental Health Act, 1959, are omitted: see the 7th Schedule of the Act of 1959 (p. 1479, *post*). The words "being treatment. . .this subsection" were repealed by the Divorce (Insanity and Desertion) Act, 1958, s. 4 (p. 1465, *post*).

and not otherwise.

This subsection replaces s. 3 of the 1937 Act (p. 1303, *ante*), as added to by s. 3 of the Law Reform (Miscellaneous Provisions) Act, 1949 (p. 1376, *ante*), and has since been amended by the Divorce (Insanity and Desertion) Act, 1958, s. 4 (p. 1465, *post*), and by the Mental Health Act, 1959, 7th and 8th Schedules (pp. 1479, 1480, *post*).

2.—(1) No petition for divorce shall be presented to the court unless at the date of the presentation of the petition three years have passed since the date of marriage:

Provided that a judge of the court may, upon application being made to him in accordance with rules of court, allow a petition to be presented before three years have passed on the ground that the case is one of exceptional hardship suffered by the petitioner or of exceptional depravity on the part of the respondent, but if it appears to the court at the hearing of the petition that the petitioner obtained leave to present the petition by any misrepresentation or concealment of the nature of the case, the court may, if it pronounces a decree nisi, do so subject to the condition that no application to make the decree absolute shall be made until after the expiration of three years from the date of the marriage, or may dismiss the petition, without prejudice to any petition which may be brought after the expiration of the said three years upon the same, or substantially the same, facts as those proved in support of the petition so dismissed.

(2) In determining any application under this section for leave to present a petition before the expiration of three years from the date of the marriage, the judge shall have regard to the interests of any children of the marriage and to the question whether there is reasonable probability of a reconciliation between the parties before the expiration of the said three years.

The reference to "any children of the marriage" shall be construed as including a reference to any other child in relation to whom the Court would have jurisdiction by virtue of s. 26 (1) of the Matrimonial Causes Act, 1950 (p. 1390, *post*) in proceedings instituted by the petition: see Matrimonial Proceedings (Children) Act, 1958, s. 2 (3) (p. 1461, *post*).

(3) Nothing in this section shall be deemed to prohibit the presentation of a petition based upon matters which have occurred before the expiration of three years from the date of the marriage.

The first three subsections replace s. 1 of the 1937 Act (p. 1303, *ante*).

(4) This section shall not apply in the case of marriages to which section one of the Matrimonial Causes (War Marriages) Act, 1944, applies (being certain marriages celebrated on or after the third day of September, nineteen hundred and thirty-nine, and before the first day of June, nineteen hundred and fifty).

For s. 1(1) (b) of the 1944 Act, see p. 1316, *ante*.

3.—(1) On a petition for divorce presented by the husband on the ground of adultery or in the answer of a husband praying for divorce on the said ground, the petitioner or respondent, as the case may be, shall make the alleged adulterer a co-respondent unless he is excused by the court on special grounds from so doing.

(2) On a petition for divorce presented by the wife on the ground of adultery the court may, if it thinks fit, direct that the person with whom the husband is alleged to have committed adultery be made a respondent.

This section replaces s. 177 of the 1925 Act (p. 1266, *ante*).

4.—(1) On a petition for divorce it shall be the duty of the court to inquire, so far as it reasonably can, into the facts alleged and whether there has been any connivance or condonation on the part of the petitioner and whether any collusion exists between the parties, and also to inquire into any countercharge which is made against the petitioner.

(2) If the court is satisfied on the evidence that—

(a) the case for the petition has been proved; and

(b) where the ground of the petition is adultery, the petitioner has not in any manner been accessory to, or connived at, or condoned, the adultery, or, where the ground of the petition is cruelty, the petitioner has not in any manner condoned the cruelty; and

(c) *the petition is not presented or prosecuted in collusion with the respondent or either of the respondents;*

the court shall pronounce a decree of divorce, but if the court is not satisfied with respect to any of the aforesaid matters, it shall dismiss the petition:

Words in italics repealed by Matrimonial Causes Act, 1963, s. 4 (1) (a) (p. 1504, *post*). Any presumption of condonation which arises from the continuance or resumption of marital intercourse may be rebutted on the part of a husband, as well as on the part of a wife, by evidence sufficient to negative the necessary intent: see Matrimonial Causes Act, 1963, s. 1 (p. 1503, *post*). Adultery or cruelty is not to be deemed to have been condoned by reason only of a continuation or resumption of cohabitation between the parties for one period not exceeding three months, or of anything done during such cohabitation, if it is proved that cohabitation was continued or resumed, as the case may be, with a view to effecting a reconciliation: see Matrimonial Causes Act, 1963, s. 2(1) (p. 1503, *post*). Adultery which has been condoned is not capable of being revived: see Matrimonial Causes Act, 1963, s. 3 (p. 1504, *post*).

See also, as to the duty of the Court, Matrimonial Causes Act, 1963, s. 4 (2) (p. 1504, *post*), and, as to agreements made or proposed to be made, *ibid.* s. 4 (3) (p. 1504, *post*).

Provided that the court shall not be bound to pronounce a decree of divorce and may dismiss the petition if it finds [that the petition is presented or prosecuted in collusion with the respondent or either of the respondents or] that the petitioner has during the marriage been guilty of adultery or if, in the opinion of the court, the petitioner has been guilty—

- (i) of unreasonable delay in presenting or prosecuting the petition; or
- (ii) of cruelty towards the other party to the marriage; or
- (iii) where the ground of the petition is adultery or cruelty, of having without reasonable excuse deserted, or having without reasonable excuse wilfully separated himself or herself from, the other party before the adultery or cruelty complained of; or
- (iv) where the ground of the petition is adultery or unsoundness of mind or desertion, of such wilful neglect or misconduct as had conduced to the adultery or unsoundness of mind or desertion.

Words in square brackets inserted by the Matrimonial Causes Act, 1963, s. 4 (1) (b) (p. 1504, *post*).

This section replaces s. 178 of the 1925 Act (p. 1266, *ante*), as substituted by s. 4 of the 1937 Act (p. 1304, *ante*).

5. In any case in which, on the petition of a husband for divorce on the ground of adultery, the alleged adulterer is made a co-respondent or in which, on the petition of a wife for divorce on the ground of adultery, the person with whom the husband is alleged to have committed adultery is made a respondent, the court may, after the close of the evidence on the part of the petitioner, direct the co-respondent or the respondent, as the case may be, to be dismissed from the proceedings if the court is of opinion that there is not sufficient evidence against him or her.

This section replaces s. 179 of the 1925 Act (p. 1266, *ante*).

6. If in any proceedings for divorce the respondent opposes the relief sought on the ground of the petitioner's adultery, cruelty or desertion, the court may give to the respondent the same relief to which he or she would have been entitled if he or she had presented a petition seeking such relief.

This section replaces s. 180 of the 1925 Act (p. 1266, *ante*).

7.—(1) A person shall not be prevented from presenting a petition for divorce, or the court from pronouncing a decree of divorce, by reason only that the petitioner has at any time been granted a judicial separation or an order under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, upon the same or substantially the same facts as those proved in support of the petition for divorce.

(2) On any such petition for divorce, the court may treat the decree of judicial separation or the said order as sufficient proof of the adultery, desertion, or other ground on which it was granted, but the court shall not pronounce a decree of divorce without receiving evidence from the petitioner.

(3) For the purposes of any such petition for divorce, a period of desertion immediately preceding the institution of proceedings for a decree of judicial separation or an order under the said Acts having the effect of such a decree shall, if the parties have not resumed cohabitation and the decree or order has been continuously in force since the granting thereof, be deemed immediately to precede the presentation of the petition for divorce.

This section replaces s. 6 of the 1937 Act (p. 1305, *ante*).

8.—(1) In addition to any other grounds on which a marriage is by law void or voidable, a marriage shall be voidable on the ground—

- (a) that the marriage has not been consummated owing to the wilful refusal of the respondent to consummate the marriage; or
- (b) that either party to the marriage was at the time of the marriage of unsound mind or *a mental defective within the meaning of the Mental Deficiency Acts, 1913 to 1938* [was then suffering from mental disorder within the meaning of the Mental Health Act, 1959, of such a kind or to such an extent as to be unfitted for marriage and the procreation of children], or subject to recurrent *fits* [attacks] of insanity or epilepsy; or

The words in italics are replaced by those in square brackets by the Mental Health Act, 1959, 7th Schedule, except so far as related to a marriage celebrated before the commencement of that Act (see p. 1479, *post*).

- (c) that the respondent was at the time of the marriage suffering from venereal disease in a communicable form; or
- (d) that the respondent was at the time of the marriage pregnant by some person other than the petitioner:

Provided that, in the cases specified in paragraphs (b), (c) and (d) of this subsection, the court shall not grant a decree unless it is satisfied—

- (i) that the petitioner was at the time of the marriage ignorant of the fact alleged;
- (ii) that proceedings were instituted within a year from the date of the marriage; and
- (iii) that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the grounds for a decree.

This subsection replaces s. 7 (1) of the 1937 Act (p. 1306, *ante*).

(2) Nothing in this section shall be construed as validating any marriage which is by law void, but with respect to which a decree of nullity has not been granted.

This subsection replaces s. 7 (3) of the 1937 Act (p. 1306, *ante*).

9. Where a decree of nullity is granted in respect of a voidable marriage, any child who would have been the legitimate child of the parties to the marriage if it had been dissolved, instead of being annulled, at the date of the decree shall be deemed to be their legitimate child notwithstanding the annulment.

This section replaces s. 7 (2) of the 1937 Act (p. 1306, *ante*), as amended by s. 4 of the 1949 Act (p. 1376, *ante*).

10. In the case of any petition for divorce or for nullity of marriage—

- (1) the court may, if it thinks fit, direct all necessary papers in the matter to be sent to His Majesty's Proctor, who shall under the directions of the Attorney-General instruct counsel to argue before the court any question in relation to the matter which the court deems to be necessary or expedient to have fully argued, and His Majesty's Proctor shall be entitled to charge the costs of the proceedings as part of the expenses of his office;
- (2) any person may at any time during the progress of the proceedings or before the decree nisi is made absolute give information to His Majesty's Proctor of any matter material to the due decision of the

case, and His Majesty's Proctor may thereupon take such steps as the Attorney-General considers necessary or expedient;

- (3) if in consequence of any such information or otherwise His Majesty's Proctor suspects that any parties to the petition are or have been acting in collusion for the purpose of obtaining a decree contrary to the justice of the case, he may, under the direction of the Attorney-General, after obtaining the leave of the court, intervene and retain counsel and subpoena witnesses to prove the alleged collusion.

This section replaces s. 181 of the 1925 Act (p. 1266, *ante*).

11.—(1) Where His Majesty's Proctor intervenes or shows cause against a decree nisi in any proceedings for divorce or for nullity of marriage, the court may make such order as to the payment by other parties to the proceedings of the costs incurred by him in so doing or as to the payment by him of any costs incurred by any of the said parties by reason of his so doing, as may seem just.

(2) So far as the reasonable costs incurred by His Majesty's Proctor in so intervening or showing cause are not fully satisfied by any order made under this section for the payment of his costs, he shall be entitled to charge the difference as part of the expenses of his office, and the Treasury may, if they think fit, order that any costs which under any order made by the court under this section His Majesty's Proctor pays to any parties shall be deemed to be part of the expenses of his office.

This section replaces s. 182 of the 1925 Act (p. 1267, *ante*).

12.—(1) Every decree for a divorce or for nullity of marriage shall, in the first instance, be a decree nisi not to be made absolute until after the expiration of six months from the pronouncing thereof, unless the court by general or special order from time to time fixes a shorter time.

(2) After the pronouncing of the decree nisi and before the decree is made absolute, any person may, in the prescribed manner, show cause why the decree should not be made absolute by reason of the decree having been obtained by collusion or by reason of material facts not having been brought before the court, and in any such case the court may make the decree absolute, reverse the decree nisi, require further inquiry or otherwise deal with the case as the court thinks fit.

(3) Where a decree nisi has been obtained and no application for the decree to be made absolute has been made by the party who obtained the decree, then, at any time after the expiration of three months from the earliest date on which that party could have made such an application, the party against whom the decree nisi has been granted shall be at liberty to apply to the court and the court shall, on such application, have power to make the decree absolute, reverse the decree nisi, require further inquiry or otherwise deal with the case as the court thinks fit.

This section replaces s. 183 of the 1925 Act (p. 1267, *ante*), as added to by s. 9 of the 1937 Act (p. 1306, *ante*).

13.—(1) Where a decree of divorce has been made absolute and either there is no right of appeal against the decree absolute or, if there is such a right of appeal, the time for appealing has expired without an appeal having been presented or an appeal has been presented but has been dismissed, either party to the marriage may marry again.

(2) No clergyman of the Church of England or of the Church in Wales shall be compelled to solemnize the marriage of any person whose former marriage has been dissolved on any ground and whose former husband or wife

is still living, or to permit the marriage of any such person to be solemnized in the Church or Chapel of which he is the minister.

This section replaces s. 184 of the 1925 Act (p. 1267, *ante*), as amended by s. 12 of the 1937 Act (p. 1308, *ante*).

Judicial Separation and Restitution of Conjugal Rights

14.—(1) A petition for judicial separation may be presented to the court either by the husband or the wife on any grounds on which a petition for divorce might have been presented, or on the ground of failure to comply with a decree for restitution of conjugal rights, or on any ground on which a decree for divorce a mensa et thoro might have been pronounced immediately before the commencement of the Matrimonial Causes Act, 1857, and the foregoing provisions of this Act relating to the duty of the court on the presentation of a petition for divorce, and the circumstances in which such a petition shall or may be granted or dismissed, shall apply in like manner to a petition for judicial separation.

(2) Where the court in accordance with the said provisions grants a decree for judicial separation, it shall no longer be obligatory for the petitioner to cohabit with the respondent.

(3) The court may, on the application by petition of the husband or wife against whom a decree for judicial separation has been made, and on being satisfied that the allegations contained in the petition are true, reverse the decree at any time after the making thereof, on the ground that it was obtained in the absence of the person making the application, or, if desertion was the ground of the decree, that there was reasonable cause for the alleged desertion.

This section replaces s. 185 (1), (2), (3) of the 1925 Act (p. 1268, *ante*), as amended by s. 5 of the 1937 Act (p. 1304, *ante*).

15.—(1) A petition for restitution of conjugal rights may be presented to the court either by the husband or the wife, and the court, on being satisfied that the allegations contained in the petition are true, and that there is no legal ground why a decree for restitution of conjugal rights should not be granted, may make the decree accordingly.

This subsection replaces s. 186 of the 1925 Act (p. 1268, *ante*).

(2) A decree for restitution of conjugal rights shall not be enforced by attachment.

This subsection replaces part of s. 187 (1) of the 1925 Act (p. 1268, *ante*).

Presumption of death and dissolution of marriage

16.—(1) Any married person who alleges that reasonable grounds exist for supposing that the other party to the marriage is dead may, if he is domiciled in England, present a petition to the court to have it presumed that the other party is dead and to have the marriage dissolved, and the court, if satisfied that such reasonable grounds exist, may make a decree of presumption of death and of dissolution of the marriage.

(2) In any such proceedings the fact that for a period of seven years or upwards the other party to the marriage has been continually absent from the petitioner, and the petitioner has no reason to believe that the other party has been living within that time, shall be evidence that he or she is dead until the contrary is proved.

(3) Sections ten to thirteen of this Act shall apply to a petition and a decree under this section as they apply to a petition for divorce and a decree of divorce respectively.

(4) In determining for the purposes of this section whether a woman is domiciled in England, her husband shall be treated as having died immediately after the last occasion on which she knew or had reason to believe him to be living.

This section replaces s. 8 of the 1937 Act (p. 1306, *ante*), as amended by s. 1 (3) of the 1949 Act (p. 1375, *ante*).

Declaration of Legitimacy, etc.

17.—(1) Any person who is a British subject, or whose right to be deemed a British subject depends wholly or in part on his legitimacy on the validity of any marriage, may, if he is domiciled in England or Northern Ireland or claims any real or personal estate situate in England, apply by petition to the court for a decree declaring that the petitioner is the legitimate child of his parents, *and* [or] that the marriage of his father and mother or of his grandfather and grandmother was a valid marriage or that his own marriage was a valid marriage.

This subsection replaces s. 188 (1) of the 1925 Act (p. 1067, *ante*), as amended by the British Nationality Act, 1948, Sched. IV. The word “and” was replaced by the word “or” by the Legitimacy Act, 1959, s. 2 (6) (p. 1481, *post*).

(2) Any person claiming that he or his parent or any remoter ancestor became or has become a legitimated person may apply [to the court by petition or to a county court] for a decree declaring that he or his parent or remoter ancestor, as the case may be, became or has become a legitimated person.

In this subsection the expression “legitimated person” means a person legitimated by the Legitimacy Act, 1926, and includes a person recognised under section eight of that Act as legitimated.

This subsection replaces s. 2 (1) of the Legitimacy Act, 1926 (p. 1284, *ante*), and Administration of Justice Act, 1928, s. 19 (3) and Sched. I, Part III. the words in square brackets were substituted for “by petition to the court” by Administration of Justice Act, 1956, s. 31 (2) (p. 1428, *post*).

(3) [Where an application under the last foregoing subsection is made to a county court] the county court, if it considers that the case is one which owing to the value of the property involved or otherwise ought to be dealt with by the High Court, may, and if so ordered by the High Court shall, transfer the matter to the High Court, and on such transfer the proceeding shall be continued in the High Court as if it had been originally commenced [by a petition presented to the High Court].

This subsection replaces s. 2 (2) of the Legitimacy Act, 1926 (p. 1284, *ante*).

The words in the first set of square brackets were substituted for the words “A petition under the last foregoing subsection may be presented to a county court instead of to the High Court. Provided that, where a petition is presented to a county court” and the words in the second set of square brackets were substituted for the word “therein” by the Administration of Justice Act, 1956; see ss. 31 (2), 57 and Second Schedule (pp. 1428, 1432, *post*).

(4) Any person who is domiciled in England or Northern Ireland or claims any real or personal estate situate in England may apply to the court for a decree declaring his right to be deemed a British subject.

(5) Applications to the court (but not to a county court) under the foregoing provisions of this section may be included in the same petition, and on any application under the foregoing provisions of this section (including an application to a county court) the court shall make such decree as the court

thinks just, and the decree shall be binding on His Majesty and all other persons whatsoever:

Provided that the decree of the court shall not prejudice any person—

- (a) if it is subsequently proved to have been obtained by fraud or collusion; or
- (b) unless that person has been cited or made a party to the proceedings or claims through a person so cited or made a party.

(6) A copy of every petition [or other application] under this section and of any affidavit accompanying the petition [or other application] shall be delivered to the Attorney-General at least one month before the petition [or other application] is presented [or made], and the Attorney-General shall be a respondent on the hearing of the petition [or other application] and on any subsequent proceedings relating thereto.

Words in square brackets added by Administration of Justice Act, 1956, s. 31 (2) (p. 1428, *post*).

(7) In any application under this section such persons shall, subject to rules of court, be cited to see proceedings or otherwise summoned as the court shall think fit, and any such persons may be permitted to become parties to the proceedings and to oppose the application.

(8) No proceedings under this section shall affect any final judgment or decree already pronounced or made by any court of competent jurisdiction.

Sub-ss (4) to (8) replace s. 188 (1) to (5), (7) of the 1925 Act (p. 1269, *ante*).

Additional jurisdiction in proceedings by a wife

18.—(1) Without prejudice to any jurisdiction exercisable by the Additional court apart from this section, the court shall by virtue of this section have jurisdiction to entertain proceedings by a wife in any of the following cases, notwithstanding that the husband is not domiciled in England, that is to say:—

- (a) in the case of any proceedings under this Act other than proceedings for presumption of death and dissolution of marriage, if the wife has been deserted by her husband, or the husband has been deported from the United Kingdom under any law for the time being in force relating to *the deportation of aliens*, and the husband was immediately before the desertion or deportation domiciled in England;

The words in italics were repealed by virtue of the Commonwealth Immigrants Act, 1962, s. 20.

- (b) in the case of proceedings for divorce or nullity of marriage, if the wife is resident in England and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings, and the husband is not domiciled in any other part of the United Kingdom or in the Channel Islands or the Isle of Man.

(2) Without prejudice to the jurisdiction of the court to entertain proceedings under section sixteen of this Act in cases where the petitioner is domiciled in England, the court shall by virtue of this section have jurisdiction to entertain any such proceedings brought by a wife, if the wife is resident in England and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings.

(3) In any proceedings in which the court has jurisdiction by virtue of this section, the issues shall be determined in accordance with the law which would be applicable thereto if both parties were domiciled in England at the time of the proceedings.

This section replaces s. 13 of the 1937 Act (p. 1308, *ante*) and s. 1 of the 1949 Act (p. 1375, *ante*), except so much of s. 1 (4) of the 1949 Act as relates to the 1944 Act.

Alimony, Maintenance and Custody of Children

19.—(1) On any petition for divorce or nullity of marriage, the court may make such interim orders for the payment of alimony to the wife as the court thinks just.

This subsection replaces in part s. 190 (3) of the 1925 Act (p. 1270, *ante*).

(2) *On any decree for divorce or nullity of marriage* [Subject to the provisions of section twenty-nine of this Act, on pronouncing a decree nisi for divorce or nullity of marriage or at any time thereafter, whether before or after the decree has been made absolute], the court may, if it thinks fit, order that the husband shall, to the satisfaction of the court, secure to the wife such gross sum of money or annual sum of money for any term, not exceeding her life, as, having regard to her fortune, if any, to the ability of her husband and to the conduct of the parties, the court may deem to be reasonable; and the court may for that purpose order that it shall be referred to one of the conveyancing counsel of the court to settle and approve a proper deed or instrument to be executed by all the necessary parties, and may, if it thinks fit, suspend the pronouncing of the decree until the deed or instrument has been duly executed.

This subsection replaces s. 190 (1) of the 1925 Act (p. 1270, *ante*). The words in italics were replaced by the words in square brackets by the Matrimonial Causes (Property and Maintenance) Act, 1958, s. 1 and Schedule (pp. 1437, 1443, *post*).

As to power to order a lump sum payment, see Matrimonial Causes Act, 1963, s. 5 (1) (p. 1504, *post*).

(3) *On any decree for divorce or nullity of marriage* [Subject to the provisions of the said section twenty-nine, on pronouncing a decree nisi for divorce or nullity of marriage or at any time thereafter, whether before or after the decree has been made absolute], the court may, if it thinks fit, by order direct the husband to pay to the wife, during their joint lives, such monthly or weekly sum for the maintenance and support of the wife as the court may think reasonable, and any such order may either be in addition to or be instead of an order made under the last foregoing subsection.

This subsection replaces s. 190 (2) of the 1925 Act (p. 1270, *ante*). The words in italics were replaced by the words in square brackets by the Matrimonial Causes (Property and Maintenance) Act, 1958, s. 1 and Schedule (pp. 1437, 1443, *post*).

As to power to order a lump sum payment, see Matrimonial Causes Act, 1963, s. 5 (1) (p. 1504, *post*).

(4) The foregoing provisions of this section shall have effect, in any case where a petition for divorce is presented by a wife on the ground of her husband's insanity, as if for the references to the husband there were substituted references to the wife, and for the references to the wife there were substituted references to the husband.

This subsection replaces s. 10(2) of the 1937 Act (p. 1307, *ante*).

20.—(1) On any petition for judicial separation, the court may make such interim orders for the payment of alimony to the wife as the court thinks just.

This subsection replaces in part s. 190 (3) of the 1925 Act (p. 1270, *ante*).

(2) *On any decree* [On or at any time after a decree] for judicial separation, the court may make such order for the payment of alimony to the wife as the court thinks just.

This subsection replaces in part s. 190 (4) of the 1925 Act (p. 1270, *ante*). The words in italics were replaced by the words in square brackets by the Matrimonial Causes (Property and Maintenance) Act, 1958, s. 1 and Schedule, pp. 1437, 1443, *post*.

As to power to order a lump sum payment, see Matrimonial Causes Act, 1963, s. 5 (1) (p. 1504, *post*).

(3) The foregoing provisions of this section shall have effect, in any case where a petition for judicial separation is presented by a wife on the ground of her husband's insanity, as if for the references to the wife there were substituted references to the husband.

This subsection replaces in part s. 10 (2) of the 1937 Act (p. 1307, *ante*).

21.—(1) In every case of judicial separation—

- (a) any property which is acquired by or devolves upon the wife on or after the date of the decree whilst the separation continues shall, if she dies intestate, devolve as if her husband had been then dead;
- (b) if alimony has been ordered to be paid and has not been duly paid by the husband, he shall be liable for necessities supplied for the use of the wife.

(2) In any case where the decree for judicial separation is obtained by the wife, any property to which she is entitled for an estate in remainder or reversion at the date of the decree shall be deemed to be property to which this section applies.

This subsection replaces s. 194 of the 1925 Act (p. 1271, *ante*), as amended by Law Reform (Married Women and Tortfeasors) Act, 1935, Schedule (p. 1300, *ante*).

22.—(1) On any petition for restitution of conjugal rights, the court may make such interim order for the payment of alimony to the wife as the court thinks just.

This subsection replaces in part s. 190 (3) of the 1925 Act (p. 1270, *ante*).

(2) Where any decree for restitution of conjugal rights is made on the application of the wife, the court may make such order for the payment of alimony to the wife as the court thinks just.

This subsection replaces in part s. 190 (4) of the 1925 Act (p. 1270, *ante*).

(3) Where any decree for restitution of conjugal rights is made on the application of the wife, the court, at the time of the making of the decree or at any time afterwards may, in the event of the decree not being complied with within any time limited in that behalf by the court, order the respondent to make to the petitioner such periodical payments as the court thinks just, and the order may be enforced in the same manner as an order for alimony.

This subsection replaces in part s. 187 (1) of the 1925 Act (p. 1268, *ante*).

(4) Where the court makes an order under the last foregoing subsection, the court may, if it thinks fit, order that the husband shall, to the satisfaction of the court, secure to the wife the periodical payments, and for that purpose may direct that it shall be referred to one of the conveyancing counsel of the court to settle and approve a proper deed or instrument to be executed by all the necessary parties.

This subsection replaces in part s. 187 (2) of the 1925 Act (p. 1269, *ante*).

23.—(1) Where a husband has been guilty of wilful neglect to provide reasonable maintenance for his wife or the infant children of the marriage, the court, if it would have jurisdiction to entertain proceedings by the wife for judicial separation, may, on the application of the wife, order the husband to

make to her such periodical payments as may be just; and the order may be enforced in the same manner as an order for alimony in proceedings for judicial separation.

The words "infant children of the marriage" include a reference to an illegitimate child of both parties to the marriage: Matrimonial Proceedings (Children) Act, 1958 s. 1 (4) (p. 1461, *post*). Under s. 4 (1) of the Matrimonial Proceedings (Children) Act, 1958 (p. 1262, *ante*), the Court has jurisdiction to make custody orders in respect of any child referred to in s. 23 (1) of the Matrimonial Causes Act, 1950 (and, as in a case under s. 26 of the Act of 1950) for the period of the duration of an order in force under s. 23. Payments for the children may be made to the child or to any other person for the benefit of the child: Matrimonial Proceedings (Children) Act, 1958, s. 4 (2) (p. 1262, *ante*).

(2) Where the court makes an order under this section for periodical payments it may, if it thinks fit, order that the husband shall, to the satisfaction of the court, secure to the wife the periodical payments, and for that purpose may direct that a proper deed or instrument to be executed by all necessary parties shall be settled and approved by one of the conveyancing counsel of the court.

This section replaces s. 5 of the 1949 Act (p. 1377, *ante*).

24.—(1) If it appears to the court in any case in which the court pronounces a decree for divorce or for judicial separation by reason of the adultery, desertion or cruelty of the wife that the wife is entitled to any property either in possession or reversion, the court may, if it thinks fit, order such settlement as it thinks reasonable to be made of the property, or any part thereof, for the benefit of the innocent party, and of the children of the marriage or either or any of them.

(2) Where a decree for restitution of conjugal rights is made on the application of the husband, and it appears to the court that the wife is entitled to any property, either in possession or reversion, or is in receipt of any profits of trade or earnings, the court may, if it thinks fit, order a settlement to be made to the satisfaction of the court of the property or any part thereof for the benefit of the petitioner and of the children of the marriage or either or any of them, or may order such part of the profits of trade or earnings as the court thinks reasonable to be periodically paid by the respondent to the petitioner for his own benefit, or to the petitioner or any other person for the benefit of the children of the marriage or either or any of them.

This section replaces s. 191 of the 1925 Act (p. 1270, *ante*), as amended by s. 10 (3) of the 1937 Act (p. 1307, *ante*).

25. The court may after pronouncing a decree for divorce or for nullity of marriage enquire into the existence of ante-nuptial or postnuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or any part of the property settled either for the benefit of the children of the marriage or of the parties to the marriage, as the court thinks fit, and the court may exercise the powers conferred by this section notwithstanding that there are no children of the marriage.

This section replaces s. 192 of the 1925 Act (p. 1271, *ante*).

26.—(1) In any proceedings for divorce or nullity of marriage or judicial separation, the court may from time to time, either before or by or after the final decree, make such provision as appears just with respect to the custody, maintenance and education of the children the marriage of whose parents is the subject of the proceedings, or, if it thinks fit, direct proper proceedings to be taken for placing the children under the protection of the court.

(2) On an application made in that behalf, the court may, in any proceedings for restitution of conjugal rights, at any time before final decree, or, if the respondent fails to comply therewith, after final decree, make from time to time all such orders and provisions with respect to the custody, maintenance and education of the children of the petitioner and respondent as might have been made by interim orders if proceedings for judicial separation had been pending between the same parties.

(3) *On any decree of divorce or nullity of marriage* [Subject to the provisions of section twenty-nine of this Act, on pronouncing a decree nisi of divorce or nullity of marriage or at any time thereafter, whether before or after the decree has been made absolute], the court shall have power to order the husband, and *on a decree of divorce*, [where the decree is a decree of divorce and is] made on the ground of the husband's insanity, shall also have power to order the wife, to secure for the benefit of the children such gross sum of money or annual sum of money as the court may deem reasonable, and the court may for that purpose order that it shall be referred to one of the conveyancing counsel of the court to settle and approve a proper deed or instrument to be executed by all necessary parties:

The words in italics were replaced by the words in square brackets by the Matrimonial Causes (Property and maintenance) Act, 1958, s. 1 and Schedule (pp. 1437, 1443, *post*).

Provided that the term for which any sum of money is secured for the benefit of a child shall not extend beyond the date when the child will attain twenty-one years of age.

This section replaces s. 103 of the 1925 Act (p. 1271, *ante*), as amended by s. 10 (4) of the 1937 Act (p. 1307, *ante*). For extended jurisdiction in regard to children, see Matrimonial Causes (Children) Act, 1958, ss. 1, 3, 5 and 6 (pp. 1461, 1462, 1463, *post*).

27.—(1) In any case where the court makes an order for alimony, the court may direct the alimony to be paid either to the wife or the husband, as the case may be, or to a trustee approved by the court on her or his behalf, and may impose such terms or restrictions as the court thinks expedient, and may from time to time appoint a new trustee if for any reason it appears to the court expedient so to do.

(2) In any case where—

- (a) a petition for divorce or judicial separation is presented by a wife on the ground of her husband's insanity; or
- (b) a petition for divorce, nullity or judicial separation is presented by a husband on the ground of his wife's insanity or mental deficiency [or disorder],

and the court orders payments of alimony or maintenance under section nineteen or section twenty of this Act in favour of the respondent, the court may order the payments to be made to such persons having charge of the respondent as the court may direct.

This section replaces s. 190 (5) of the 1925 Act (p. 1270, *ante*), as amended by s. 10 (2) of the 1937 Act (p. 1307, *ante*). The words in square brackets are added by the Mental Health Act, 1959, 7th Schedule (p. 1479, *post*) as from the date of the commencement of that Act.

28.—(1) Where the court has made an order under section nineteen, section twenty, section twenty-two, section twenty-three or subsection (2) of section twenty-four of this Act, the court shall have power to discharge or vary the

order or to suspend any provision thereof temporarily and to revive the operation of any provisions so suspended:

Provided that in relation to an order made before the sixteenth day of December, nineteen hundred and forty-nine, being an order which by virtue of subsection (2) of section thirty-four of this Act, is deemed to have been made under subsection (2) of section nineteen of this Act, the powers conferred by this section shall not be exercised unless the court is satisfied that the case is one of exceptional hardship which cannot be met by the discharge variation or suspension of any order made, or deemed as aforesaid to have been made, under subsection (3) of the said section nineteen.

(2) The powers exercisable by the court under this section in relation to any order shall be exercisable also in relation to any deed or other instrument executed in pursuance of the order.

(3) In exercising the powers conferred by this section, the court shall have regard to all the circumstances of the case, including any increase or decrease in the means of either of the parties to the marriage.

This section replaces s. 14 of the Administration of Justice (Miscellaneous Provisions) Act, 1938 (p. 1310, *ante*), as amended by s. 6 of the 1949 Act (p. 1376, *ante*).

29. (When a petition for divorce or nullity of marriage has been presented, proceedings under section nineteen, twenty-four, twenty-five or subsection (3) of section twenty-six of this Act may, subject to and in accordance with rules of court, be commenced at any time after the presentation of the petition:

Provided that no order under any of the said sections or under the said subsection (other than an interim order for the payment of alimony under section nineteen) shall be made unless and until a decree nisi has been pronounced, and no such order, save in so far as it relates to the preparation, execution or approval of a deed or instrument, and no settlement made in pursuance of any such order, shall take effect unless and until the decree is made absolute.

This section replaces s. 10 of the 1937 Act (p. 1306, *ante*).

Miscellaneous

30.—(1) A husband may, on a petition for divorce or for judicial separation or for damages only, claim damages from any person on the ground of adultery with the wife of the petitioner.

(2) A claim for damages on the ground of adultery shall, subject to the provisions of any enactment relating to trial by jury in the court, be tried on the same principles and in the same manner as actions for criminal conversation were tried immediately before the commencement of the Matrimonial Causes Act, 1857, and the provisions of this Act with reference to the hearing and decision of petitions shall so far as may be necessary applied to the hearing and decision of petitions on which damages are claimed.

(3) The court may direct in what manner the damages recovered on any such petition are to be paid or applied, and may direct the whole or any part of the damages to be settled for the benefit of the children, if any, of the marriage, or as a provision for the maintenance of the wife.

This section replaces s. 189 of the 1925 Act (p. 1269, *ante*).

31. In every case in which any person is charged with adultery with any party to a suit or in which the court may consider, in the interest of any person not already a party to the suit, that that person should be made a party to the suit, the court may, if it thinks fit, allow that person to intervene upon such terms, if any, as the court thinks just.

This section replaces s. 197 of the 1925 Act (p. 1273, *ante*).

32.—(1) Notwithstanding any rule of law, the evidence of a husband or wife shall be admissible in any proceedings to prove that marital intercourse did or did not take place between them during any period.

(2) Notwithstanding anything in this section or any rule of law, a husband or wife shall not be compellable in any proceedings to give evidence of the matters aforesaid.

(3) The parties to any proceedings instituted in consequence of adultery and the husbands and wives of the parties shall be competent to give evidence in the proceedings, but no witness in any such proceedings, whether a party thereto or not, shall be liable to be asked or be bound to answer any question tending to show that he or she has been guilty of adultery unless he or she has already given evidence in the same proceedings in disproof of the alleged adultery.

(4) In any proceedings for nullity of marriage, evidence on the question of sexual capacity shall be heard in camera unless in any case the judge is satisfied that in the interests of justice any such evidence ought to be heard in open court.

This section replaces s. 7 of the 1949 Act (p. 1377, *ante*), amending s. 198 of the 1925 Act (p. 1273, *ante*) and s. 198A added by s. 4 of the Supreme Court of Judicature (Amendment) Act, 1935 (p. 1298, *ante*).

Interpretation, Repeal and Short Title

33. In this Act the expression “the court” means the High Court, except that in section seventeen, where the context so requires, it means or includes a county court, and the expression “prescribed” means prescribed by rules of court.

34.—(1) The enactments set out in the Schedule to this Act are hereby repealed to the extent specified in the third column of that Schedule.

(2) without prejudice to the provisions of section thirty-eight of the Interpretation Act, 1889—

- (a) nothing in this repeal shall affect any order made, direction given or thing done, under any enactment repealed by this Act or the Supreme Court of Judicature (Consolidation) Act, 1925, or deemed to have been made, given or done respectively under any such enactment, and every such order, direction or thing shall if in force at the commencement of this Act continue in force, and, so far as it could have been made, given or done under this Act, shall be deemed to have been made, given or done respectively under any such of this Act;
- (b) any other order in force at the commencement of this Act which could have been made under any provision of this Act shall be deemed to have been so made;
- (c) any document referring to any Act or enactment repealed by this Act or the said Act of 1925 shall be construed as referring to this Act or to the corresponding enactment in this Act;
- (d) for the purposes of the India (Consequential Provision) Act, 1949 this Act shall be deemed to have been in force on the twenty-sixth day of January, nineteen hundred and fifty.

35.—(1) This Act may be cited as the Matrimonial Causes Act, 1950.

(2) This Act shall come into operation on the first day of January, nineteen hundred and fifty-one.

(3) This Act shall not extend to Scotland or Northern Ireland.

MATRIMONIAL CAUSES (PROPERTY AND MAINTENANCE) ACT, 1958

(6 & 7 Eliz. 2, c. 35)

An Act to enable the power of the court in matrimonial proceedings to order alimony, maintenance or the securing of a sum of money to be exercised at any time after a decree; to provide for the setting aside of dispositions of property made for the purpose of reducing the assets available for satisfying such an order; to enable the court after the death of a party to a marriage which has been dissolved or annulled to make provision out of his estate in favour of the other party; and to extend the powers of the court under section seventeen of the Married Women's Property Act, 1882.

[7th July, 1958]

1.—(1) Any power of the court, under the enactments mentioned in the next following subsection, to make an order on a decree for divorce, nullity of marriage or judicial separation shall (subject as mentioned in subsection (3) of this section) be exercisable either on pronouncing such a decree or at any time thereafter.

(2) The said enactments are the following provisions of the Matrimonial Causes Act, 1950 (in this Act referred to as "the Act of 1950"), that is to say,—

- (a) subsections (2) and (3) of section nineteen (whereby, on a decree for divorce or nullity of marriage, the court may order the husband to make a secured provision for the wife or to pay her a monthly or weekly sum), and those subsections as extended by subsection (4) of that section (whereby the like provision or payments may be ordered for a husband where a petition for divorce is presented by his wife on the ground of insanity);
- (b) subsection (3) of section twenty-six (whereby, on a decree of divorce or nullity of marriage, the court may order the husband, and, on a decree of divorce made on the ground of the husband's insanity, may order the wife, to make a secured provision for the benefit of the children); and
- (c) subsection (2) of section twenty (whereby, on a decree for judicial separation, a husband may be ordered to pay alimony to his wife), and that subsection as extended by subsection (3) of that section (whereby the like payments may be ordered to be made by a wife where a petition for judicial separation is presented by her on the ground of her husband's insanity)

For ss. 19 (2), (3), 26 (3), 20 (2), (3) of the Matrimonial Causes Act, 1950 see pp. 1388, 1391, and 1389, *ante*.

(3) In relation to the provisions of the Act of 1950 specified in paragraphs (a) and (b) of the last preceding subsection,—

- (a) any reference in subsection (1) of this section to a decree shall be construed as a reference to a decree nisi, and the reference to any time after a decree shall be construed as a reference to any such time whether before or after the decree has been made absolute; but
- (b) nothing in subsection (1) of this section shall be construed as affecting the provisions of section twenty-nine of the Act of 1950 as to the commencement of proceedings for an order under the provisions specified in those paragraphs or as to the making or effect of such an order.

For s. 29 of the Matrimonial Causes Act, 1960, p. 1392, *ante*.

(4) In accordance with the preceding provisions of this section, the provisions of the Act of 1950 specified in the Schedule to this Act shall have effect subject to the amendments specified in that Schedule.

(5) Nothing in this section, or in any amendment made by this section in any of the enactments referred to therein, shall be construed as requiring the court, in determining any application for an order under any of those enactments, to disregard any delay in making or proceeding with the application.

2.—(1) Where under any of the relevant provisions of the Act of 1950 proceedings are brought against a man (in this section referred to as “the husband”) by his wife or former wife (in this section referred to as “the wife”) for financial relief, the wife may make an application under this section to the court in those proceedings with respect to any disposition made by the husband within the period of three years ending with the date of the application under this section, whether the disposition was made before or after the commencement of those proceedings.

(2) Subject to the following provisions of this section, if on an application by the wife under this section it appears to the court—

- (a) that the disposition to which the application relates was made by the husband with the intention of defeating the wife’s claim for financial relief, and
- (b) that, if the disposition were set aside, financial relief, or, as the case may be, different financial relief, would be granted to her,

the court may by order set aside the disposition and may give such consequential directions (including directions requiring the making of any payment or the disposal of any property) as the court thinks fit for the purpose of giving effect to the order under this subsection.

(3) The power conferred by the last preceding subsection shall not be exercisable in respect of a disposition made for valuable consideration to a person who, at the time of the disposition, acted in relation thereto in good faith and without notice of any intention on the part of the husband to defeat the wife’s claim for financial relief.

(4) Where an application is made under this section with respect to a disposition, not being a disposition falling within the last preceding subsection, and the court is satisfied that the disposition would (apart from this section) have the consequence of defeating the wife’s claim for financial relief, the disposition, not being a disposition falling within the last preceding subsection, by the husband with the intention of defeating the wife’s claim for financial relief.

See also Matrimonial Causes Act, 1963, s. 6 (3) (p. 1505, *post*).

5. The preceding provisions of this section shall have effect for enabling an application to the High Court to be made thereunder by a woman after she has obtained an order against her husband or former husband under any of the relevant provisions of the Act of 1950 as they apply for enabling an application to be made in proceedings for such an order:

Provided that for the purposes of the application of those provisions in accordance with this subsection—

- (a) subsection (2) of this section shall apply as if paragraph (b) thereof were omitted, and
- (b) the presumption mentioned in the last preceding subsection shall apply (in the case of a disposition not falling within subsection (3) of this section) if the court is satisfied that in consequence of the disposition the wife’s claim for financial relief was defeated.

(6) The provisions of this section do not apply to a disposition made before the commencement of this Act.

(7) In this section any reference to defeating the wife's claim for financial relief is a reference to preventing financial relief from being granted to her, or reducing the amount of any such relief which might be so granted, or frustrating or impeding the enforcement of any order which might be made on her application under any of the relevant provisions of the Act of 1950.

See also Matrimonial Causes Act, 1963, s. 6 (3) (p. 1505, *post*).

(8) In this section—

“financial relief” means relief under any of the relevant provisions of the Act of 1950;

For the purposes of this section, “financial relief” includes relief under s. 26 (1), (3) of the Matrimonial Causes Act, 1950 (p. 1390, *ante*) and relief under s. 5 (1) of the Matrimonial Causes Act, 1963 (p. 1504, *post*): see Matrimonial Causes Act, 1963, s. 6 (4) (p. 1505, *post*).

“the relevant provisions of the Act of 1950” means the following provisions of that act, that is to say,—

- (a) subsections (2) and (3) of section nineteen;
- (b) subsection (2) of section twenty;
- (c) subsections (2) to (4) of section twenty-two (whereby, in connection with a decree for restitution of conjugal rights, a husband may be ordered to pay alimony to his wife, or to make or secure periodical payments to her); and
- (d) section twenty-three (which confers additional power on the court to make orders for maintenance);

“valuable consideration” does not include marriage.

For ss. 19, 20, 22, 23 of the Matrimonial Causes Act, 1950, see pp. 1388, 1389, 1390, *ante*.

3.—(1) Where after the commencement of this Act a person dies domiciled in England and is survived by a former wife of his who has not re-married, the former wife may apply to the High Court for an order under this section on the ground that the deceased has not made reasonable provision for her maintenance after his death:

Provided that an application under this section shall not be made except—

- (a) before the end of the period of six months beginning with the date on which representation in regard to the estate of the deceased is first taken out, or
- (b) that the deceased has made no provision, or has not made reasonable before the administration and distribution of the estate have been completed.

(2) If on an application by a former wife under this section the court is satisfied—

- (a) that it would have been reasonable for the deceased to make provision for her maintenance, and
- (b) that the deceased has made no provision, or has not made reasonable provision, for her maintenance,

the court may order that such reasonable provision for her maintenance as the court thinks fit shall be made out of the net estate of the deceased, subject to such conditions or restrictions (if any) as the court may impose.

(3) Where the court makes an order under this section requiring provision to be made for the maintenance of a former wife, the order shall require that

provision to be made by way of periodical payments terminating not later than her death and, if she re-marries, not later than her re-marriage:

Provided that if the value of the net estate of the deceased does not exceed five thousand pounds the order may require the provision for her maintenance to be made, wholly or in part, by way of a lump sum payment.

(4) On any application under this section, the court shall have regard—

- (a) to any past, present or future capital of the applicant and to any income of hers from any source;
- (b) to her conduct in relation to the deceased and otherwise;
- (c) to any application made by her during the lifetime of the deceased, under the Act of 1950 or the enactments repealed by that Act, for such an order as is mentioned in subsection (2) or subsection (3) of section nineteen of that Act, and to the order (if any) made on any such application, or (if no such application was made by her, or such an application was made by her and no such order was made thereon) the circumstances appearing to the court to be the reasons why no such application was made, or no such order was made, as the case may be; and
- (d) to any other matter of thing which, in the circumstances of the case, the court may consider relevant or material in relation to her, to persons interested in the estate of the deceased, or otherwise.

For s. 19 (2), (3) of the Matrimonial Causes Act, 1950, see p. 1388, *ante*.

(5) In determining whether, and in what way, and as from what date, provision for maintenance ought to be made by an order under this section, the court shall have regard to the nature of the property representing the net estate of the deceased, and shall not order any such provision to be made as would necessitate a realisation that would be improvident having regard to the interests of the dependants of the deceased, of the applicant, and of the persons who, apart from the order, would be entitled to that property.

(6) In this and the next following section “former wife”, in relation to a deceased person, means a woman whose marriage with him was during his lifetime dissolved or annulled by a decree made under the Act of 1950 or under any of the enactments repealed by that Act, and “net estate” and “dependant” have the same meanings respectively as in the Inheritance (Family Provision) Act, 1938.

By s. 1 of the Inheritance (Family Provision) Act, 1938 (as amended by the Intestate’s Estates Act, 1952) (32 Halsbury’s Statutes (2nd Edn.) 139) it is enacted that the word “dependant” in that Act shall include

- (i) a wife or husband,
- (ii) a daughter who has not been married, or who is, by reason of some mental or physical disability, incapable of maintaining herself,
- (iii) an infant son, or
- (iv) a son who is, by reason of some mental or physical disability incapable of maintaining himself.

“Net estate” is defined by s. 5 of the same Act as follows:—

“‘net estate’ means all the property of which a deceased person had power to dispose by his will (otherwise than by virtue of a special power of appointment) less the amount of his funeral, testamentary and administration expenses, debts and liabilities and estate duty payable out of his estate on his death.”

4.—(1) Subject to the following provisions of this section, where an order (in this section referred to as “the original order”) has been made under the

last preceding section, the High Court, on an application under this section, shall have power by order to discharge or vary the original order or to suspend any provision thereof temporarily and to revive the operation of any provision so suspended.

(2) an application under this section may be made by or on behalf of any of the following persons, that is to say,—

- (a) the former wife on whose application the original order was made;
- (b) any other former wife of the deceased;
- (c) any dependant of the deceased;
- (d) the trustees of any relevant property;
- (e) any person who, under the will of the deceased or under the law relating to intestacy, is beneficially interested in any relevant property.

(3) An order under this section varying the original order, or reviving any suspended provision thereof, shall not be made so as to affect any property which, at the time of the application for the order under this section, is not relevant property.

(4) In exercising the powers conferred by this section, the court shall have regard to all the circumstances of the case, including any change in the circumstances to which the court was required to have regard in determining the application for the original order.

(5) In this section “relevant property” means property the income of which, in accordance with the original order or any consequential directions given by the court in connection therewith, is applicable (wholly or in part) for the maintenance of the former wife on whose application the original order was made.

5.—(1) Subject to the next following subsection, the provisions of section two of this Act shall have effect for enabling an application thereunder to be made by a man with respect to a disposition made by his wife or former wife, as those provisions have effect for enabling an application thereunder to be made by a woman with respect to a disposition made by her husband or former husband.

For the purposes of this section, “financial relief” in section 2 of this Act (to which reference is made in this sub-section) includes relief under s. 26 (1), (3) of the Matrimonial Causes Act, 1950 (p. 1390, *ante*) and relief under s. 5 (1) of the Matrimonial Causes Act, 1963 (p. 1504, *post*): see Matrimonial Causes Act, 1963, s. 5 (4) (p. 1504, *post*).

(2) For the purposes of the application of those provisions in accordance with the preceding subsection—

- (a) for references to a man and to a wife or former wife there shall be substituted respectively references to a woman and to a husband or former husband, and for references to a woman and to a husband or former husband there shall be substituted respectively references to a man and to a wife or former wife;
- (b) “the relevant provisions of the Act of 1950” (instead of having the meaning assigned to it by subsection (8) of section two of this Act) means the following provisions of that Act, that is to say—
 - (i) subsections (2) and (3) of section nineteen as extended by subsection (4) of that section,
 - (ii) subsection (2) of section twenty as extended by subsection (3) of that section,
 - (iii) subsection (1) of section twenty-four (which, in a case where the court pronounces a decree for divorce or judicial separation

by reason of the adultery, desertion or cruelty of the wife, enables the court to order a settlement of property to which she is entitled), and

- (iv) subsection (2) of section twenty-four (which enables the court, where a decree for restitution of conjugal rights is made on the application of the husband, to make an order for the settlement of property to which the wife is entitled or for periodical payments in respect of profits or earnings received by her).

For ss. 19, 20 and 24 of the Matrimonial Causes Act, 1950, see pp. 1388-1390, *ante*.

(3) The provisions of sections three and four of this Act shall have effect in relation to a former husband of a deceased woman as they have effect in relation to a former wife of a deceased man, as if any reference in those sections to a former wife were a reference to a former husband:

Provided that, for the purposes of those provisions as applied by this subsection, the reference in paragraph (c) of subsection (4) of section three of this Act to such an order as is mentioned in subsection (2) or subsection (3) of section nineteen of the Act of 1950 shall be construed as a reference to any such order as could be made either—

- (a) under the said subsection (2) or subsection (3) as extended by subsection (4) of the said section nineteen, or
- (b) under subsection (1) of section twenty-four of that Act.

For ss. 19 and 24 of the Matrimonial Causes Act, 1950, see pp. 1388, 1390, *ante*.

(4) In the last preceding subsection (but without prejudice to the generality of any reference to a former husband in subsection (1) or subsection (2) of this section) “former husband”, in relation to a deceased woman, means a man whose marriage with her was during her lifetime dissolved or annulled by a decree made under the Act of 1950 or under any of the enactments repealed by that Act.

6.—(1) The provisions of sections three and four of this Act shall not render the personal representatives of a deceased person liable for having distributed any part of the estate of the deceased after the end of the period of six months referred to in subsection (1) of section three of this Act, on the ground that they ought to have taken into account the possibility that the court might permit an application under that section after the end of that period, or that an order under that section might be varied under section four of this Act; but this subsection shall be without prejudice to any power to recover any part of the estate so distributed arising by virtue of the making of an order under section three or section four of this Act.

(2) In considering, under subsection (1) of section three of this Act, the question when representation was first taken out, a grant limited to settled land or to trust property shall be left out of account, and a grant limited to real estate or to personal estate shall be left out of account unless a grant limited to the remainder of the estate had previously been made or is made at the same time.

(3) For the purposes of subsection (1) of section one hundred and sixty-two of the Supreme Court of Judicature (Consolidation) Act, 1925 (which relates to the discretion of the court as to the persons to whom administration is to be granted), a person by whom or on whose behalf an application under section three or section four of this Act is proposed to be made shall be deemed to be a person interested in the estate of the deceased.

For the Supreme Court of Judicature (Consolidation) Act, 1925, s. 162 (1), see 9 Halsbury's Statutes (2nd Edn.) 777.

(4) Section three of the Inheritance (Family Provision) Act, 1938 (which relates to the effect and form of orders under that Act) shall have effect in relation to orders under sections three and four of this Act as it has effect in relation to orders under that Act.

For the Inheritance (Family Provisions) Act, 1938, see 9 Halsbury's Statutes (2nd Edn.) 795.

(5) In this section any reference to any of the provisions of section three or section four of this Act shall be construed as including a reference to those provisions as applied by the last preceding section.

7.—(1) Any right of a wife, under section seventeen of the Married Women's Property Act, 1882, to apply to a judge of the High Court or of a county court, in any question between husband and wife as to the title to or possession of property, shall include the right to make such an application where it is claimed by the wife that her husband has had in his possession or under his control—

- (a) money to which, or to share of which, she was beneficially entitled (whether by reason that it represented the proceeds of property to which, or to an interest in which, she was beneficially entitled, or for any other reason), or
- (b) property (other than money) to which, or to an interest in which, she was beneficially entitled,

and that either that money or other property has ceased to be in his possession or under his control or that she does not know whether it is still in his possession or under his control.

For s. 17 of the Married Women's Property Act, 1882, see p. 1231, *ante*.

(2) Where, on an application made to a judge of the High Court or of a county court under the said section seventeen, as extended by the preceding subsection, the judge is satisfied—

- (a) that the husband has had in his possession or under his control money or other property as mentioned in paragraph (a) or paragraph (b) of the preceding subsection, and
- (b) that he has not made to the wife, in respect of that money or other property, such payment or disposition as would have been appropriate in the circumstances,

the power to make orders under that section shall be extended in accordance with the next following subsection.

(3) Where the last preceding subsection applies, the power to make orders under the said section seventeen shall include power for the judge to order the husband to pay to the wife—

- (a) in a case of falling within paragraph (a) of subsection (1) of this section, such sum in respect of the money to which the application relates, or the wife's share thereof, as the case may be, or
- (b) in a case falling within paragraph (b) of the said subsection (1), such sum in respect of the value of the property to which the application relates, or the wife's interest therein, as the case may be,

as the judge may consider appropriate.

(4) Where on an application under the said section seventeen as extended by this section it appears to the judge that there is any property which—

- (a) represents the whole or part of the money or property in question, and

- (b) is property in respect of which an order could have been made under that section if an application had been made by the wife thereunder in a question as to the title to or possession of that property,

the judge (either in substitution for or in addition to the making of an order in accordance with the last preceding subsection) may make any order under that section in respect of that property which he could have made on such an application as is mentioned in paragraph (b) of this subsection.

(5) The preceding provisions of this section shall have effect in relation to a husband as they have effect in relation to a wife, as if any reference to the husband were a reference to the wife and any reference to the wife were a reference to the husband.

(6) Any power of a judge under the said section seventeen to direct inquiries or give any other directions in relation to an application under that section shall be exercisable in relation to an application made under that section as extended by this section; and the provisos to that section (which relate to appeals and other matters) shall apply in relation to any order made under the said section seventeen as extended by this section as they apply in relation to an order made under that section apart from this section.

(7) For the avoidance of doubt it is hereby declared that any power conferred by the said section seventeen to make orders with respect to any property includes power to order a sale of the property.

8.—(1) In this Act, except in so far as the context otherwise requires, the following expressions have the meanings hereby assigned to them respectively, that is to say:—

“disposition” does not include any provision contained in a will, but, with that exception, includes any conveyance, assurance or gift of property of any description, whether made by an instrument or otherwise;

“property” means any real or personal property, any estate or interest in real or personal property, any money, any negotiable instrument, debt or other chose in action, and any other right or interest whether in possession or not;

“will” includes a codicil.

(2) Except in so far as the context otherwise requires, any reference in this Act to an enactment shall be construed as a reference to that enactment as amended by or under any other enactment.

9.—(1) This Act may be cited as the Matrimonial Causes (Property and Maintenance) Act, 1958.

(2) This Act shall come into operation on such day as may be appointed by the Lord Chancellor by an order made by statutory instrument.

The Act was brought into operation by the Matrimonial Causes (Property and Maintenance) Act (Commencement) Order, 1958 (1958 No. 2080 (C.15)), on the 1st January, 1959.

(3) This Act shall not extend to Scotland or to Northern Ireland.

SCHEDULE

Amendments of Matrimonial Causes Act, 1950

In section nineteen, in subsection (2), for the words “On any decree for divorce or nullity of marriage” there shall be substituted the words “Subject to the provisions of section twenty-nine of this Act, on pronouncing a decree nisi

for divorce or nullity of marriage or at any time thereafter, whether before or after the decree has been made absolute"; and in subsection (3), for the words "On any decree for divorce or nullity of marriage", there shall be substituted the words "Subject to the provisions of the said section twenty-nine, on pronouncing a decree nisi for divorce or nullity of marriage or at any time thereafter, whether before or after the decree has been made absolute".

In section twenty, in subsection (2), for the words "On any decree" there shall be substituted the words "On or at any time after a decree".

In section twenty-six, in subsection (3), for the words "On any decree of divorce or nullity of marriage", there shall be substituted the words "Subject to the provisions of section twenty-nine of this Act, on pronouncing a decree nisi of divorce or nullity of marriage or at any time thereafter, whether before or after the decree has been made absolute" and for the words "on a decree of divorce" there shall be substituted the words "where the decree is a decree of divorce and is".

For ss. 19, 20 and 26 of the Matrimonial Causes Act, 1950, see pp. 1389-1390, *ante*.

MAINTENANCE ORDERS ACT, 1958

(6 & 7 Eliz. 2, c. 39)

An Act to make provision for the registration in the High Court or a magistrates' court of certain maintenance orders made by the other of those courts or a county court and with respect to the enforcement and variation of registered orders; to make provision for the attachment of sums falling to be paid by way of wages, salary or other earnings or by way of pension for the purpose of enforcing certain maintenance orders; to amend section seventy-four of the Magistrates' Courts Act, 1952; to make provision for the review of commitments to prison by magistrates' courts for failure to comply with maintenance orders; to enable Orders in Council under section twelve of the Maintenance Orders (Facilities for Enforcement) Act, 1920, to be revoked or varied; and for purposes connected with the matters aforesaid. [7th July, 1958]

PART I

REGISTRATION ENFORCEMENT AND VARIATION OF CERTAIN MAINTENANCE ORDERS

1.—(1) The provisions of this Part of this Act shall have effect for the purposes of enabling maintenance orders to which this Part of this Act applies to be registered—

- (a) in the case of an order made by the High Court or a county court, in a magistrates' court; and
- (b) in the case of an order made by a magistrates' court, in the High Court,

and, subject to those provisions, while so registered—

- (i) to be enforced in like manner as an order made by the court of registration; and
- (ii) in the case of an order registered in a magistrates' court, to be varied by a magistrates' court.

(2) This Part of this Act applies to maintenance orders made by the High Court, a county court or a magistrates' court, other than orders registered under Part II of the Maintenance Orders Act, 1950.

For Part II of the Maintenance Orders Act, 1950, see pp. 1397 *et seq.*, *ante*.

(3) Without prejudice to the provisions of section twenty-one of this Act, in this Part of this Act, unless the context otherwise requires, the following expressions have the following meanings—

“High Court order”, “county court order” and “magistrates' court order” means an order made by the High Court, a county court or a magistrates' court, as the case may be;

“order” means a maintenance order to which this Part of this Act applies;

“original court” and “court of registration”, in relation to an order, mean the court by which the order was made or, as the case may be, the court in which the order is registered;

“registered” means registered in accordance with the provisions of this

Part of this Act, and “registration” shall be construed accordingly; and for the purposes of this Part of this Act an order for the payment by the defendant of any costs incurred in proceedings relating to a maintenance order, being an order for the payment of costs made while the maintenance order is not registered, shall be deemed to form part of that maintenance order.

2.—(1) A person entitled to receive payments under a High Court or county court order may apply for the registration of the order to the original court, and the court may, if it thinks fit, grant the application.

(2) Where an application for the registration of such an order is granted—

(a) no proceedings shall be begun, and no writ, warrant or other process shall be issued, for the enforcement of the order before the registration of the order or the expiration of the prescribed period from the grant of the application, whichever first occurs; and

(b) the original court shall, on being satisfied within the period aforesaid by the person who made the application that no such proceedings or process begun or issued before the grant of the application remain pending or in force, cause a certified copy of the order to be sent to the clerk of the magistrates' court acting for the petty sessions area in which the defendant appears to be;

but if at the expiration of the period aforesaid the original court has not been so satisfied, the grant of the application shall become void.

(3) A person entitled to receive payments under a magistrates' court order who considers that the order could be more effectively enforced if it were registered may apply for the registration of the order to the original court, and the court shall grant the application on being satisfied in the prescribed manner that, at the time when the application was made, an amount equal to not less, in the case of an order for weekly payments, than four or, in any other case, than two of the payments required by the order was due thereunder and unpaid.

(4) Where an application for the registration of a magistrates' court order is granted—

(a) no proceedings for the enforcement of the order shall be begun before the registration takes place and no warrant or other process for the enforcement thereof shall be issued in consequence of any such proceedings begun before the grant of the application;

(b) any warrant of commitment issued for the enforcement of the order shall cease to have effect when the person in possession of the

warrant is informed of the grant of the application, unless the defendant has then already been detained in pursuance of the warrant; and

- (c) the original court shall, on being satisfied in the prescribed manner that no process for the enforcement of the order issued before the grant of the application remains in force, cause a certified copy of the order to be sent to the prescribed officer of the High Court.

(5) The officer or clerk of a court who receives a certified copy of an order sent to him under this section shall cause the order to be registered in that court.

(6) Subsections (1) to (4) of section nineteen of the Maintenance Orders Act, 1950 (which provide for the suspension, while a magistrates' court order is registered under Part II of that Act, of any provision of the order requiring payments to be made through a third party, for ordering payments under an order so registered in a magistrates' court to be paid through a collecting officer, and for authorising a person to make payments otherwise than in accordance with the requirements of that section until he has notice of those requirements) shall have effect for the purposes of this Part of this Act as if for any reference in that section to the said Part II and a maintenance order there were substituted a reference to this Part of this Act and a maintenance order to which this Part of this Act applies.

For s. 19 of the Maintenance Orders Act, 1950, see p. 1,399, *ante*.

(7) In this section "certified copy" in relation to an order of a court means a copy certified by the proper officer of the court to be a true copy of the order or of the official record thereof.

3.—(1) Subject to the provisions of this section, a registered order shall be enforceable in all respects as if it had been made by the court of registration and as if that court had had jurisdiction to make it; and proceedings for or with respect to the enforcement of a registered order may be taken accordingly.

(2) Subject to the provisions of the next following subsection, an order registered in a magistrates' court shall be enforceable as if it were an affiliation order; and the provisions of any enactment with respect to the enforcement of affiliation orders (including enactments relating to the accrual of arrears and the remission of sums due) shall apply accordingly.

In this subsection "enactment" includes any order, rule or regulation made in pursuance of any Act.

(3) Where an order remains or becomes registered after the discharge of the order, no proceedings shall be taken by virtue of that registration except in respect of arrears which were due under that order at the time of the discharge and have not been remitted.

(4) Except as provided by this section, no proceedings shall be taken for or with respect to the enforcement of a registered order.

4.—(1) The provisions of this section shall have effect with respect to the variation of orders registered in magistrates' courts, and references in this section to registered orders shall be construed accordingly.

(2) Subject to the following provisions of this section—

- (a) the court of registration may exercise the same jurisdiction to vary any rate of payments specified by a registered order (other than jurisdiction in a case where a party to the order is not present in England when the application for variation is made) as is exercisable, apart from this subsection, by the original court; and

- (b) a rate of payments specified by a registered order shall not be varied except by the court of registration or any other magistrates' court to

which the jurisdiction conferred by the foregoing paragraph is extended by rules of court.

(3) A rate of payments specified by a registered order shall not be varied by virtue of the last foregoing subsection so as to exceed whichever of the following rates is the greater, that is to say—

- (a) the rate of payments specified by the order as made or last varied by the original court; or
- (b) in the case of payments for the maintenance of a person as a party to a marriage (including a marriage which has been dissolved or annulled) [seven pounds ten shillings] a week and, in the case of payments for the maintenance of a child or children [fifty] shillings a week in respect of each child.

The words in square brackets are substituted for the former figures “five pounds” and “thirty shillings” by the Matrimonial Proceedings (Magistrates, Courts) Act, 1960, s. 15 (b) (p. 1496, *post*).

(4) If it appears to the court to which an application is made by virtue of subsection (2) of this section for the variation of a rate of payments specified by a registered order that, by reason of the limitations imposed on the court's jurisdiction by the last foregoing subsection or for any other reason, it is appropriate to remit the application to the original court, the first-mentioned court shall so remit the application and the original court shall thereupon deal with the application as if the order were not registered.

(5) Nothing in subsection (2) of this section shall affect the jurisdiction of the original court to vary a rate of payment specified by a registered order if an application for the variation of that rate is made to that court—

- (a) in proceedings for a variation of provisions of the order which do not specify a rate of payments; or
- (b) at a time when a party to the order is not present in England.

(6) No application for any variation of a registered order shall be made to any court while proceedings for any variation of the order are pending in any other court.

(7) Where a magistrates' court, in exercise of the jurisdiction conferred by subsection (2) of this section, varies or refuses to vary a registered order, an appeal from the variation or refusal shall lie to the High Court; and so much of subsection (1) of section sixty-three of the Supreme Court of Judicature (Consolidation) Act, 1925, as requires an appeal from any court to the High Court to be heard and determined by a divisional court shall not apply to appeals under this subsection.

For appeals to High Court, see R.S.C., Ord. 41 D, p. 1509, *post*. For sub-s. (1) of s. 63 of the Supreme Court of Judicature (Consolidation) Act, 1925, see 18 Halsbury's Statutes (2nd Edn.) 796.

5.—(1) If a person entitled to receive payments under a registered order desires the registration to be cancelled, he may give notice under this section.

(2) Where the original court varies or discharges an order registered in a magistrates' court, the original court may, if it thinks fit, give notice under this section.

(3) Where a magistrates' court discharges an order registered in the High Court and it appears to the magistrates' court, whether by reason of the remission of arrears by that court or otherwise, that no arrears under the order remain to be recovered, the magistrates' court shall give notice under this section.

(4) Notice under this section shall be given to the court of registration; and where such notice is given—

- (a) no proceedings for the enforcement of the registered order shall be begun before the cancellation of the registration and no writ, warrant or other process for the enforcement thereof shall be issued in consequence of any such proceedings begun before the giving of the notice;
- (b) where the order is registered in a magistrates' court, any warrant of commitment issued for the enforcement of the order shall cease to have effect when the person in possession of the warrant is informed of the giving of the notice, unless the defendant has then already been detained in pursuance of the warrant; and
- (c) the court of registration shall cancel the registration on being satisfied in the prescribed manner—
 - (i) that no process for the enforcement of the registered order issued before the giving of the notice remains in force; and
 - (ii) in the case of an order registered in a magistrates' court, that no proceedings for the variation of the order are pending in a magistrates' court.

(5) On the cancellation of the registration of a High Court or county court order, any order made in relation thereto under subsection (2) of section nineteen of the Maintenance Orders Act, 1950, as applied by subsection (6) of section two of this Act, shall cease to have effect, but until the defendant receives the prescribed notice of the cancellation he shall be deemed to comply with the High Court or county court order if he makes payments in accordance with any order under the said subsection (2) as so applied which was in force immediately before the cancellation and of which he has notice.

For s. 19 (2) of the Maintenance Orders Act, 1950, see p. 1400, *ante*.

PART II

ATTACHMENT OF EARNINGS ORDERS

6.—(1) If, on the application of a person entitled to receive payments under a maintenance order, it appears to a court by which payment of any arrears under the order is enforceable—

- (a) that, at the time when the application was made, there was due under the order and unpaid an amount equal to not less, in the case of an order for weekly payments, than four or, in any other case, than two of the payments required by the order; and
- (b) that the defendant is a person to whom earnings fall to be paid, then, subject to the next following subsection, the court may, if it thinks fit, by an order or orders require the person to whom the order in question is directed, being a person appearing to the court to be the defendant's employer in respect of those earnings or a part thereof, to make out of those earnings or that part thereof payments in accordance with the Schedule to this Act; and any such order is in this Act referred to as an "attachment of earnings order".

(2) The court shall not make an attachment of earnings order if it appears to the court that the failure of the defendant to make payments in accordance with the maintenance order in question was not due to his wilful refusal or culpable neglect.

(3) An attachment of earnings order shall—

- (a) specify the normal deduction rate, that is to say, the rate at which, after taking into account any right or liability of the defendant to deduct income tax from payments made under the related maintenance order, the court making or varying the attachment of earnings order thinks it reasonable that the earnings to which that order relates should be applied from time to time in satisfying the requirements of the maintenance order, not exceeding the rate appearing to that court to be necessary for the purpose of—
 - (i) securing payment of the sums falling due from time to time under the maintenance order; and
 - (ii) securing payment within a reasonable period of any sums already due and unpaid under the maintenance order and any costs incurred in proceedings relating to the maintenance order which are payable by the defendant;
- (b) specify the protected earnings rate, that is to say, the rate below which, having regard to the resources and needs of the defendant and the needs of persons for whom he must or reasonably may provide, the court aforesaid thinks it reasonable that the relevant earnings within the meaning of the Schedule to this Act should not be reduced by a payment made in pursuance of the attachment of earnings order;
- (c) designate the officer to whom any payment under the said Schedule is to be made, being—
 - (i) if the order is made by the High Court, the registrar of such county court as may be specified by the order or, if the High Court thinks fit so to provide, the proper officer of the High Court;
 - (ii) if the order is made by a county court, the registrar of that court;
 - (iii) if the order is made by a magistrates' court and payments under the related maintenance order are for the time being required by an order under subsection (1) of section fifty-two of the Magistrates' Courts Act, 1952, to be made to the clerk of a magistrates' court, that clerk;
 - (iv) in any other case where the order is made by a magistrates' court, the clerk of that court; and
- (d) contain, so far as they are known to the court making the order, such particulars as may be prescribed for the purpose of enabling the defendant to be identified by the person to whom the order is directed.

(4) An attachment of earnings order shall not come into force until the expiration of seven days from the date when a copy of the order is served on the person to whom the order is directed.

(5) For the avoidance of doubt it is hereby declared that, in relation to a maintenance order made by the High Court, the reference in subsection (1) of this section to a court by which payment of any arrears under the order is enforceable includes a reference to a county court.

7. Without prejudice to the powers to make attachment of earnings orders conferred by the last foregoing section, where proceedings are brought—

- (a) in the High Court or a county court under section five of the Debtors Act, 1869 (which authorises the committal to prison of persons refusing or neglecting to pay certain debts which that have had the

means to pay) in respect of a default in making payments under a maintenance order; or

- (b) under the Magistrates' Courts Act, 1952, to enforce the payment of any sum ordered to be paid by a maintenance order,

and it appears to the court that, at the date when the proceedings were begun, such an amount as is mentioned in paragraph (a) of subsection (1) of the last foregoing section was due under the maintenance order and unpaid and that the defendant is a person to whom earnings fall to be paid, then, subject to subsection (2) of that section, the court may, if it thinks fit, make an attachment of earnings order instead of making any other order to enforce the making of payments under the maintenance order.

For s. 5 of the Debtors Act, 1869, see 2 Halsbury's Statutes (2nd Edn.) 294. For the Magistrates' Courts Act, 1952, see pp. 1408 *et seq.*, *ante*, and 32 Halsbury's Statutes (2nd Edn.) 416.

8. Where an attachment of earnings order is made, no order or warrant of commitment shall be issued in consequence of any proceedings for the enforcement of the related maintenance order begun before the making of the attachment of earnings order.

9.—(1) The court by which an attachment of earnings order has been made may if it thinks fit, on the application of the defendant or a person entitled to receive payments under the related maintenance order, make an order discharging or varying the attachment of earnings order.

(2) An attachment of earnings order shall cease to have effect—

- (a) upon the grant of an application under section two of this Act for the registration of the related maintenance order under Part I of this Act, notwithstanding that, in the case of an application under subsection (1) of that section, the grant may subsequently become void under subsection (2) thereof;
- (b) where the related maintenance order is registered under the said Part I, upon the giving of notice with respect thereto under section five of this Act;
- (c) upon the making of an order of commitment or the issue of a warrant of commitment, for the enforcement of the related maintenance order, or upon the exercise for that purpose of the power conferred on a magistrates' court by subsection (2) of section sixty-five of the Magistrates' Courts Act, 1952, to postpone the issue of such a warrant;
- (d) upon the discharge of the related maintenance order while it is not registered under Part I of this Act;
- (e) upon the related maintenance order ceasing to be registered in a court in England, or becoming registered in a court in Scotland or Northern Ireland, under Part II of the Maintenance Orders Act, 1950;

and where an attachment of earnings order ceases to have effect as aforesaid the proper officer of the prescribed court shall give notice of the cessation to the person to whom the order was directed:

Provided that where the related maintenance order is discharged as mentioned in paragraph (d) of this subsection and it appears to the court discharging the order that arrears thereunder will remain to be recovered after the discharge, that court may, if it thinks fit, direct that this subsection shall not apply.

For Part II of the Maintenance Orders Act, 1950, see pp. 1397 *et seq.*, *ante*.

For Magistrates' Courts Act, 1952, see pp. 1408 *et seq.*, *ante*, and 32 Halsbury's Statutes (2nd Edn.) 416.

(3) Where notice is given to a court in pursuance of subsection (4) of the next following section, the court shall discharge the attachment of earnings order to which the notice relates.

(4) Where at any time it appears to the officer designated in pursuance of paragraph (c) of subsection (3) of section six of this Act by an attachment of earnings order made by the High Court or a county court that—

- (a) the aggregate of the payments made for the purposes of the related maintenance order by the defendant (whether under the attachment of earnings order or otherwise) exceeds the aggregate of the payments required up to that time by the maintenance order; and
- (b) the normal deduction rate specified by the attachment of earnings order (or where two or more such orders are in force in relation to the maintenance order, the aggregate of the normal deduction rates specified by those orders) exceeds the rate of payments required by the maintenance order; and
- (c) no proceedings for the variation or discharge of the attachment of earnings order are pending.

the said officer shall give the prescribed notice to the person to whom he is required to pay sums received under the attachment of earnings order and to the defendant, and the court which made that order—

- (i) shall make the appropriate variation order unless the defendant requests the court in the prescribed manner and before the expiration of the prescribed period to proceed under the following paragraph and the court decides to proceed thereunder;
- (ii) if the court decides to proceed under this paragraph, shall make an order either discharging the attachment of earnings order or varying that order in such manner as the court thinks fit.

In this and the next following subsection "the appropriate variation order" means an order varying the attachment of earnings order in question by reducing the normal deduction rate specified thereby so as to secure that that rate (or, in the case mentioned in paragraph (b) of this subsection, the aggregate of the rates therein mentioned) is the same as the rate of payments required by the maintenance order or is such lower rate as the court thinks fit having regard to the amount of the excess mentioned in paragraph (a) of this subsection.

(5) Where at any time it appears to the officer designated as aforesaid by an attachment of earnings order made by a magistrates' court that the conditions specified in paragraphs (a) to (c) of the last foregoing subsection are satisfied, that officer shall make an application to that court for the appropriate variation order, and the court—

- (a) shall grant the application unless the defendant appears at the hearing thereof and requests the court to proceed under the following paragraph and the court decides to proceed thereunder;
- (b) if the court decides to proceed under this paragraph, shall make an order either discharging the attachment of earnings order or varying that order in such manner as the court thinks fit.

(6) An order varying an attachment of earnings order shall not come into force until the expiration of seven days from the date when a copy of the first-mentioned order is served on the person to whom the attachment of earnings order is directed; and where an attachment of earnings order ceases to have effect under subsection (2) of this section, or is discharged otherwise than

under subsection (3) thereof, the said person shall not incur any liability in consequence of his treating the order as still in force at any time before the expiration of seven days from the date when the notice required by the said subsection (2) or, as the case may be, a copy of the discharging order is served on him.

10.—(1) A person to whom an attachment of earnings order is directed shall, notwithstanding anything in any other enactment but subject to the following provisions of this Act, comply with the order or, if the order is subsequently varied under the last foregoing section, with the order as so varied.

(2) Where on any occasion on which earnings fall to be paid to a defendant there are in force two or more attachment of earnings orders relating to those earnings, then, for the purpose of complying with the Schedule to this Act, the employer shall—

- (a) deal with those orders according to the respective dates on which they came into force, disregarding any later order until any earlier order has been dealt with;
- (b) deal with any later order as if the earnings to which it relates were the residue of the defendant's earnings after the making of any payment under the said Schedule in pursuance of any earlier order.

(3) An employer who, in pursuance of an attachment of earnings order, makes a payment under the said Schedule shall give to the defendant a statement in writing specifying the amount of that payment.

(4) a person to whom an attachment of earnings order is directed who, at the time when a copy of the order is served on him or at any time thereafter, has on no occasion during the period of four weeks immediately preceding that time been the defendant's employer shall forthwith give notice in writing in the prescribed form to the court which made the order.

11.—(1) Where proceedings relating to an attachment of earnings order are brought in any court, the court may, either before or at the hearing and, in the case of proceedings brought in a magistrates' court, any justice of the peace acting for the same petty sessions area as that court may before the hearing—

- (a) order the defendant to give to the court, within such period as may be specified by the order, a statement signed by him of—
 - (i) the name and address of his employer, or of each of his employers if he has more than one;
 - (ii) such particulars as to the defendant's earnings as may be so specified; and
 - (iii) such prescribed particulars as may be so specified for the purpose of enabling the defendant to be identified by any employer of his;
- (b) order any person appearing to the court or justice to be an employer of the defendant to give to the court, within such period as may be specified by the order, a statement signed by him or on his behalf of such particulars as may be specified by the order of all earnings of the defendant which fell to be paid by that person during such period as may be so specified.

(2) A document purporting to be such a statement as is mentioned in the foregoing subsection shall, in any such proceedings as are so mentioned, be received in evidence and be deemed to be such a statement without further proof unless the contrary is shown.

12.—(1) The court by which an attachment of earnings order has been made shall, on the application of the person to whom the order is directed or of the

defendant or of the person in whose favour the order was made, determine whether payments to the defendant of a particular class or description specified by the application are earnings for the purpose of that order; and the person to whom the order is directed shall be entitled to give effect to any determination for the time being in force under this subsection.

(2) A person to whom an attachment of earnings order is directed who makes an application under the foregoing subsection shall not incur any liability for failing to comply with the order as respects any payments of the class or description specified by the application which are made by him to the defendant while the application, or any appeal in consequence thereof, is pending:

Provided that this subsection shall not apply as respects such payments if the said person subsequently withdraws the application or, as the case may be, abandons the appeal.

13.—(1) The officer to whom an employer pays any sum in pursuance of an attachment of earnings order shall pay that sum in accordance with rules of court to such person entitled to receive payments under the related maintenance order as is specified by the attachment of earnings order.

(2) Any sums received by virtue of an attachment of earnings order by the person aforesaid shall be deemed to be payments made by the defendant, with such deductions (if any) in respect of income tax as he is entitled or required to make, so as to discharge first any sums for the time being due and unpaid under the related maintenance order (a sum due at an earlier date being discharged before a sum due at a later date) and secondly any costs incurred in proceedings relating to the maintenance order which were payable by the defendant when the attachment of earnings order was made or last varied.

(3) On any occasion on which an employer makes a payment under the Schedule to this Act in respect of a defendant, the employer may, notwithstanding anything in any other enactment, retain for his own use out of any balance of the defendant's earnings remaining after the making of that payment the sum of sixpence or, if on that occasion the employer makes such payments in pursuance of two or more attachment of earnings orders relating to the defendant, the sum of sixpence in respect of each such payment.

14.—(1) In relation to earnings falling to be paid by the Crown or a Minister of the Crown or out of the public revenue of the United Kingdom, this Part of this Act shall have effect subject to the following modifications, that is to say—

- (a) the earnings shall be treated as falling to be paid by the chief officer for the time being of the department, office or other body concerned; and
- (b) the next following section shall not apply except in relation to a failure by the defendant to comply with an order under section eleven of this Act.

(2) If any question arises, in connection with any proceedings relating to an attachment of earnings order, as to what department, office or other body is concerned for the purposes of this section, or as to who for those purposes is the chief officer thereof, that question shall be referred to and determined by the Treasury, but the Treasury shall not be under any obligation to consider a reference under this subsection unless it is made by a court.

(3) A document purporting to set out a determination of the Treasury under the last foregoing subsection and to be signed by an official of the Treasury shall, in any such proceedings as are mentioned in that subsection, be admissible in evidence and deemed to contain an accurate statement of such a determination unless the contrary is shown.

(4) Subsection (2) of section two hundred and three of the Army Act, 1955, and subsection (2) of section two hundred and three of the Air Force Act, 1955 (which restrict the powers of courts to make orders attaching, among other things, pension payable in respect of service in Her Majesty's military and air forces) shall not apply to the making or variation of attachment of earnings orders.

For s. 203 of the Army Act, 1955, see 35 Halsbury's Statutes (2nd Edn.) 575; for s. 203 of the Air Force Act, 1955, see 35 Halsbury's Statutes (2nd Edn.) 735.

15.—(1) A person who—

- (a) fails to comply with subsection (1) or subsection (4) of section ten of this Act or an order of a magistrates' court or justice of the peace under section eleven thereof; or
- (b) gives such a notice as is mentioned in the said subsection (4), or a statement in pursuance of such an order as aforesaid, which he knows to be false in a material particular; or
- (c) recklessly gives such a notice or statement which is false in a material particular,

shall, subject to the following subsection, be liable on summary conviction to a fine not exceeding ten pounds and in the case of a second or subsequent conviction (being, in the case of a failure to comply with the said subsection (1), a second or subsequent conviction relating to the same attachment of earnings order) to a fine not exceeding twenty-five pounds.

(2) It shall be a defence for a person charged with failing to comply with the said subsection (1) to prove that he took all reasonable steps to comply with the attachment of earnings order to which the failure relates.

PART III

MISCELLANEOUS AND SUPPLEMENTAL

Miscellaneous

16.—(1) Section seventy-four of the Magistrates' Courts Act, 1952 (which relates to the enforcement of payments under affiliation orders and orders enforceable as affiliation orders) shall have effect, in relation to complaints under that section made on or after the date on which this section comes into operation and to proceedings in pursuance of such complaints, as if for subsections (3) to (7) thereof there were substituted the following subsections that is to say—

“(3) In relation to complaints under this section, section forty-seven of this Act shall not apply and section forty-eight thereof shall have effect as if the words ‘if evidence has been received on a previous occasion’ were omitted.

(4) Where at the time and place appointed for the hearing or adjourned hearing of a complaint under this section the complainant appears but the defendant does not, the court may proceed in his absence:

Provided that the court shall not begin to hear the complaint in the absence of the defendant unless either it is proved to the satisfaction of the court, on oath, or in such other manner as may be prescribed, that the summons was served on him within what appears to the court to be a reasonable time before the hearing or adjourned hearing or the defendant has appeared on a previous occasion to answer the complaint.

(5) If a complaint under this section is substantiated on oath, any justice of the peace acting for the same petty sessions area as a court having jurisdiction to hear the complaint may issue a warrant for the defendant's arrest, whether or not a summons has been previously issued.

(6) A magistrates' court shall not impose imprisonment in respect of a default to which a complaint under this section relates unless the court has inquired in the presence of the defendant whether the default was due to the defendant's wilful refusal or culpable neglect, and shall not impose imprisonment as aforesaid if it is of opinion that the default was not so due; and, without prejudice to the foregoing provisions of this subsection, a magistrates' court shall not impose imprisonment as aforesaid—

(a) in a case in which the court has power to make an attachment of earnings order under the Maintenance Orders Act, 1958, unless the court is of opinion that it is inappropriate to make such an order;

(b) in any case, in the absence of the defendant.

(7) Notwithstanding anything in subsection (3) of section sixty-four of this Act, the period for which a defendant may be committed to prison under a warrant of commitment issued in pursuance of a complaint under this section shall not exceed six weeks.

(8) The imprisonment or other detention of a defendant under a warrant of commitment issued as aforesaid shall not operate to discharge the defendant from his liability to pay the sum in respect of which the warrant was issued."

For s. 74 of the Magistrates' Courts Act, 1952, see p. 1416, *ante*.

(2) Subsections (7) and (8) of the said section seventy-four as amended by the foregoing subsection shall have effect in relation to a warrant of commitment issued on or after the date on which this section comes into operation in pursuance of a complaint under that section made before that date (not being a warrant of which the issue was postponed before that date by virtue of section sixty-five of the said Act of 1952) as those subsections have effect in relation to a warrant of commitment issued in pursuance of such a complaint made after that date.

For s. 65 of the Magistrates' Courts Act, 1952, see p. 1414, *ante*.

17. Where a defendant has been imprisoned or otherwise detained under an order or warrant of commitment issued in respect of his failure to pay a sum due under a maintenance order, then, notwithstanding anything in this Act, no such order or warrant (other than a warrant of which the issue has been postponed under paragraph (ii) of subsection (5) of the next following section) shall thereafter be issued in respect of that sum or any part thereof.

18.—(1) Where, for the purpose of enforcing a maintenance order, a magistrates' court has exercised its power under subsection (2) of section sixty-five of the Magistrates' Courts Act, 1952, or this section to postpone the issue of a warrant of commitment and under the terms of the postponement the warrant falls to be issued, then—

(a) the warrant shall not be issued except in pursuance of subsection (2) or paragraph (a) of subsection (3) of this section; and

(b) the clerk of the court shall give notice to the defendant stating that if the defendant considers there are grounds for not issuing the warrant he may make an application to the court in the prescribed manner requesting that the warrant shall not be issued and stating those grounds.

For s. 65 of the Magistrates' Courts Act, 1952, see p. 1414, *ante*.

(2) If no such application is received by the clerk of the court within the prescribed period, any justice of the peace acting for the same petty sessions area as the court may issue the warrant of commitment at any time after the expiration of that period; and if such an application is so received any such justice may, after considering the statements contained in the application—

- (a) if he is of opinion that the application should be further considered, refer it to the court;
- (b) if he is not of that opinion, issue the warrant forthwith;

and when an application is referred to the court under this subsection, the clerk of the court shall give to the defendant and the person in whose favour the maintenance order in question was made notice of the time and place appointed for the consideration of the application by the court.

(3) On considering an application referred to it under the last foregoing subsection the court shall, unless in pursuance of subsection (6) of this section it remits the whole of the sum in respect of which the warrant could otherwise be issued, either—

- (a) issue the warrant; or
- (b) further postpone the issue thereof until such time and on such conditions, if any, as the court thinks just; or
- (c) if in consequence of any change in the circumstances of the defendant the court considers it appropriate so to do, order that the warrant shall not be issued in any event.

(4) A defendant who is for the time being imprisoned or otherwise detained under a warrant of commitment issued by a magistrates' court for the purpose of enforcing a maintenance order, and who is not detained otherwise than for the enforcement of such an order, may make an application to the court in the prescribed manner requesting that the warrant shall be cancelled and stating the grounds of the application; and thereupon any justice of the peace acting for the same petty sessions area as the court may, after considering the statements contained in the application—

- (a) if he is of opinion that the application should be further considered, refer it to the court;
- (b) if he is not of that opinion, refuse the application;

and when an application is referred to the court under this subsection, the clerk of the court shall give to the person in charge of the prison or other place in which the defendant is detained and the person in whose favour the maintenance order in question was made notice of the time and place appointed for the consideration of the application by the court.

(5) On considering an application referred to it under the last foregoing subsection, the court shall, unless in pursuance of the next following subsection it remits the whole of the sum in respect of which the warrant was issued or such part thereof as remains to be paid, either—

- (a) refuse the application; or
- (b) if the court is satisfied that the defendant is unable to pay, or to make any payment or further payment towards the sum aforesaid and if it is of opinion that in all the circumstances of the case the defendant ought not to continue to be detained under the warrant, order that the warrant shall cease to have effect when the person in charge of the prison or other place aforesaid is informed of the making of the order;

and where the court makes an order under paragraph (b) of this subsection, it may if it thinks fit also—

- (i) fix a term of imprisonment in respect of the sum aforesaid or such part thereof as remains to be paid, being a term not exceeding so much of the term of the previous warrant as, after taking into account any reduction thereof by virtue of the next following subsection, remained to be served at the date of the order; and
- (ii) postpone the issue of a warrant for the commitment of the defendant for that term until such time and on such conditions, if any, as the court thinks just.

(6) On considering an application under this section in respect of a warrant or a postponed warrant, the court may, if the maintenance order in question is an affiliation order or an order enforceable as an affiliation order, remit the whole or any part of the sum due under the order; and where the court remits the sum or part of the sum in respect of which the warrant was issued or the postponed warrant could have been issued, section sixty-seven of the Magistrates' Courts Act, 1952 (which provides that on payment of the sum for which imprisonment has been ordered by a magistrates' court the order shall cease to have effect and that on payment of part of that sum the period of detention shall be reduced proportionately) shall apply as if payment of that sum or part had been made as therein mentioned.

For s. 67 of the Magistrates' Court Act, 1952, see p. 1415, *ante*.

(7) Where notice of the time and place appointed for the consideration of an application is required by this section to be given to the defendant or the person in whose favour the maintenance order in question was made and the defendant or, as the case may be, that person does not appear at that time and place, the court may proceed with the consideration of the application in his absence.

(8) A notice required by this section to be given by the clerk of a magistrates' court to any person shall be deemed to be given to that person if it is sent by registered post addressed to him at his last known address, notwithstanding that the notice is returned as undelivered or is for any other reason not received by that person.

19. Her Majesty may by Order in Council revoke or vary any Order in Council made under section twelve of the Maintenance Orders (Facilities for Enforcement) Act, 1920 (which provides for the extension of that Act by Order in Council to certain oversea territories), and an Order under this section may contain such incidental, consequential and transitional provisions as Her Majesty considers expedient for the purposes of that Act.

For s. 12 of the Maintenance Orders (Facilities for Enforcement) Act, 1920, see p. 1245, *ante*.

Supplemental

20.—(1) Notwithstanding anything in this Act, the clerk of a magistrates' court who is entitled to receive payments under a maintenance order for transmission to another person shall not—

- (a) apply for the registration of the maintenance order under Part I of this Act or give notice in relation to the order in pursuance of subsection (1) of section five thereof; or
- (b) apply for an attachment of earnings order, or (except as required by subsection (5) of section nine of this Act) an order discharging or varying an attachment of earning order, in respect of those payments,

unless he is requested in writing to do so by a person entitled to receive the payments through him; and where the clerk is requested as aforesaid—

- (i) he shall comply with the request unless it appears to him unreasonable in the circumstances to do so;
- (ii) the person by whom the request was made shall have the same liabilities for all the costs properly incurred in or about any proceedings taken in pursuance of the request as if the proceedings had been taken by that person;

and for the purposes of paragraph (ii) of this subsection any application made by the clerk as required by the said subsection (5) shall be deemed to be made on the request of the person in whose favour the attachment of earnings order in question was made.

(2) An application to a magistrates' court by virtue of subsection (2) of section four of this Act for the variation of a maintenance order and an application to a magistrates' court for an attachment of earnings order, or an order discharging or varying an attachment of earnings order, shall be made by complaint.

(3) It is hereby declared that a magistrates' court has jurisdiction to hear a complaint by or against a person residing outside England for the discharge or variation of an attachment of earnings order made by a magistrates' court; and where such a complaint is made against a person residing outside England, then—

- (a) if he resides in Scotland or Northern Ireland, section fifteen of the Maintenance Orders Act, 1950 (which relates to the service of process on persons residing in those countries) shall have effect in relation to the complaint as it has effect in relation to the proceedings therein mentioned; and
- (b) if the said person resides outside the United Kingdom and does not appear at the time and place appointed for the hearing of the complaint but it is proved to the satisfaction of the court, on oath or in such other manner as may be prescribed, that the complainant has taken such steps as may be prescribed to give to the said person notice of the complaint and of the time and place aforesaid, the court may, if it thinks it reasonable in all the circumstances to do so, proceed to hear and determine the complaint at the time and place appointed for the hearing or for any adjourned hearing in like manner as if the said person had then appeared.

For s. 15 of the Maintenance Orders Act, 1950, see p. 1396, *ante*.

(4) For the purposes of section forty-three of the Magistrates' Courts Act, 1952 (which provides for the issue of a summons directed to the person against whom an order may be made in pursuance of a complaint)—

- (a) the power to make an order in pursuance of a complaint by the defendant for the discharge or variation of an attachment of earnings order shall be deemed to be a power to make an order against person in whose favour the attachment of earnings order was made; and
- (b) the power to make an attachment of earnings order, or an order discharging or varying an attachment of earnings order, in pursuance of a complaint by any other person (including a complaint in proceedings to which paragraph (b) of section seven of this Act applies) shall be deemed to be a power to make an order against the defendant.

For s. 43 of the Magistrates' Courts Act, 1952, see p. 1409, *ante*.

(5) Where the court referred to in subsection (1) of section twelve of this Act is a magistrates' court—

- (a) the power conferred by subsection (2) of section one hundred and twenty-two of the Courts Act, 1952, to provide by rules for jurisdiction expressly conferred on a magistrates' court to hear a complaint to be extended to any other magistrates' court shall be exercisable, and
- (b) subsection (1) of section seventy-seven of that Act (which relates to the attendance of witnesses) shall apply,

as if subsection (1) of the said section twelve required an application thereunder to be made by complaint; and on making a determination under that subsection the court may in its discretion make such order as it thinks just and reasonable as to the payment by any of the persons mentioned in that subsection of the whole or any part of the costs of the determination, and costs ordered to be paid under this subsection shall—

- (i) in the case of costs to be paid by the defendant to the person in whose favour the attachment of earnings order in question is made, be deemed to be a sum due under the related maintenance order; and
- (ii) in any other case, be enforceable as a civil debt.

For s. 122 of the Magistrates' Courts Act, 1952, see 32 Halsbury's Statutes (2nd Edn.) 516.

(6) In subsection (3) of section fifty-two of the Magistrates' Courts Act, 1952 (which provides for the clerk through whom payments under a magistrates' court order are required to be made to proceed in his own name for the recovery of arrears under the order) for the words "Where an order under subsection (1) of his section requires the payments to be made weekly" there shall be substituted the words "Where periodical payments under an order of any court are required to be paid to or through the clerk of a magistrates' court"; and in subsection (4) of that section (which provides that nothing in that section shall affect any right of a person to proceed in his own name for the recovery of sums payable on his behalf under any order under subsection (1) of that section) for the words "any order under subsection (1) of this section" there shall be substituted the words "an order of any court."

For s. 52 of the Magistrates' Courts Act, 1952, see p. 1410, *ante*.

(7) A complaint for an attachment of earnings order may be heard notwithstanding that the complaint was not made within the six months allowed by section one hundred and four of the Magistrates' Courts Act, 1952.

For s. 104 of the Magistrates' Courts Act, 1952, see p. 1418, *ante*.

(8) For the avoidance of doubt it is hereby declared that a complaint may be made to enforce payment of a sum due and unpaid under a maintenance order notwithstanding that a previous complaint has been made in respect of that sum or a part thereof and whether or not an order was made in pursuance of the previous complaint.

21.—(1) In this Act, unless the context otherwise requires, the following expressions have the following meanings—

"affiliation order", "magistrates' court" and "petty sessions area" have the meanings assigned to them by the Magistrates' Courts Act, 1952, and for the purposes of the definition of a magistrates' court the reference to that Act in subsection (2) of section one hundred and twenty-four thereof shall be construed as including a reference to this Act;

For s. 124(2) of the Magistrates' Courts Act, 1952, see p. 1419, *ante*.

"Attachment of earnings order" has the meaning assigned to it by subsection (1) of section six of this Act;

"defendant", in relation to a maintenance order or a related attachment of earnings order, means the person liable to make payments under the maintenance order;

"earnings", in relation to a defendant, means any sums (other than excepted sums) payable to him—

- (a) by way of wages or salary (including any fees, bonus, commission, overtime pay or other emoluments payable in addition to wages or salary by the person paying the wages or salary or payable under a contract of service);
- (b) by way of pension (including an annuity in respect of past services, whether or not the services were rendered to the person paying the annuity, and including periodical payments by way of compensation for the loss, abolition of relinquishment, or any diminution in the emoluments, of any office or employment);

"employer" means a person by whom, as a principal and not as servant or agent, earnings fall to be paid to a defendant, and references to payment of earnings shall be construed accordingly;

"England" includes Wales;

"excepted sums" means—

- (a) sums payable by any public department of the government of any territory outside the United Kingdom or of Northern Ireland;
- (b) pay or allowances payable to the defendant as a member of Her Majesty's forces;
- (c) pension, allowances or benefit payable by the Minister of Pensions and National Insurance, other than such part of any pension as is so payable to the defendant in respect of his service in Her Majesty's forces or in respect of any employment of his;
- (d) pension or allowances payable to the defendant in respect of his disablement or disability; and
- (e) wages payable to the defendant as a seaman or apprentice, other than wages payable to him as a seaman or apprentice of a fishing boat;

and in paragraph (e) of this definition expressions used in the Merchant Shipping Act, 1894, have the same meanings as that Act;

"maintenance order" means—

- (a) an order for alimony, maintenance or other payments made or deemed to be made by a court in England under any of the following enactments, that is to say—
 - (i) sections nineteen to twenty-seven of the Matrimonial Causes Act, 1950;

For ss. 19-27 of the Matrimonial Causes Act, 1950, see p. 1388, *ante*.

- (ii) the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949;

For the Summary Jurisdiction (Separation and Maintenance) Acts, 1895-1949, see pp. 1329, 1245, 1277, 1307, 1408, *ante*.

- (iii) subsection (2) of section three, subsection (4) of section five or section six of the Guardianship of Infants Act, 1925;

For sub-s. (2) of s. 3, sub-s. (4) of s. 5 or s. 6 of the Guardianship of Infants Act, 1925, see p. 1250, *ante*.

- (iv) section four of the Affiliation Proceedings Act, 1957, section forty-four of the National Assistance Act, 1948, or section twenty-six of the Children Act, 1948;

For s. 4 of the Affiliation Proceedings Act, 1957, see 37 Halsbury's Statutes (2nd Edn.) 40; for s. 44 of the National Assistance Act, 1948, see 16 Halsbury's Statutes (2nd Edn.) 970; for s. 26 of the Children Act, 1948, see 12 Halsbury's Statutes (2nd Edn.) 1122.

- (v) section eighty-seven of the Children and Young Persons Act, 1933, or section forty-three of the National Assistance Act, 1948; or

For s. 87 of the Children and Young Persons Act, 1933, see 12 Halsbury's Statutes (2nd Edn.) 1036; for s. 43 of the National Assistance Act, 1948, see 16 Halsbury's Statutes (2nd Edn.) 969.

- (b) an order registered in a court in England under Part II of the Maintenance Order Act, 1950, or the Maintenance Orders (Facilities for Enforcement) Act, 1920, or an order confirmed by such a court under the last-mentioned Act,

For Part II of the Maintenance Orders Act, 1950, see p. 1397, *ante*; for the Maintenance Orders (Facilities for Enforcement) Act, 1920, see p. 1241, *ante*.

and includes any such order which has been discharged if any arrears are recoverable thereunder;

"prescribed" means prescribed by rules of court;

"proper officer", in relation to a magistrates' court, means the clerk of the court;

"Rules of court", in relation to a magistrates' court, means rules under section fifteen of the Justices of the Peace Act, 1949.

For s. 15 of the Justices of the Peace Act, 1949, see 28 Halsbury's Statutes (2nd Edn.) 856.

(2) Any reference in this Act to a person entitled to receive payments under a maintenance order is a reference to a person entitled to receive such payments either directly or through another person or for transmission to another person.

(3) Any reference in this Act to proceedings relating to an order includes a reference to proceedings in which the order may be made.

(4) Any reference in this Act to costs incurred in proceedings relating to a maintenance order shall be construed, in the case of maintenance order made by the High Court, as a reference to such costs as are included in an order for costs relating solely to that maintenance order.

(5) Any earnings which, in pursuance of a scheme under the Dock Workers (Regulation of Employment) Act, 1946, fall to be paid to a defendant by a body responsible for the local administration of the scheme acting as agent for the defendant's employer or as delegate of the body responsible for the general administration of the scheme shall be treated for the purposes of this Act as falling to be paid to the defendant by the last-mentioned body acting as a principal.

For the Dock Workers (Regulation of Employment) Act, 1946, see 9 Halsbury's Statutes (2nd Edn.) 186.

(6) Any reference in this Act to any enactment is a reference to that enactment as amended by or under any subsequent enactment.

22. No limitation on the powers of the Parliament of Northern Ireland imposed by the Government of Ireland Act, 1920, shall preclude that Parliament from making laws for purposes similar to the purposes of this Act.

For the Government of Ireland Act, 1920, see 17 Halsbury's Statutes (2nd Edn.) 56.

23.—(1) This Act may be cited as the Maintenance Orders Act, 1958.

(2) This Act, except paragraph (a) of subsection (3) of section twenty, shall not extend to Scotland or, except section nineteen, the said paragraph (a) and the last foregoing section, to Northern Ireland.

(3) This Act shall come into operation on such date as the Secretary of State may by order, made by statutory instrument, appoint; and different dates may be so appointed for the purposes of different provisions of this Act.

This Act was brought into operation by the Maintenance Orders Act, 1958 (Commencement) Order, 1958 (1958 No. 2111 (C. 17)), on the 16th February, 1959.

(4) Subsection (2) of section eight of the Guardianship of Infants Act, 1925, and section ten of the Affiliation Proceedings Act, 1957, are hereby repealed; but nothing in this subsection shall affect any order in force or deemed to be in force under either of those provisions at the commencement of this subsection, and any such order may be discharged or varied as if this subsection had not been passed.

For s. 8 (2) of the Guardianship of Infants Act, 1925, see p. 1252, *ante*. For section 10 of the Affiliation Proceedings Act, 1957, see 37 Halsbury's Statutes (2nd Edn.) 47.

SCHEDULE

PAYMENTS UNDER ATTACHMENT OF EARNINGS ORDERS

1. The provisions of this Schedule shall have effect in respect of each occasion (in this Schedule referred to as a "pay-day") on which any earnings to which an attachment of earnings order relates fall to be paid.

2. In this Schedule, the following expressions have the following meanings respectively—

"normal deduction" and "protected earnings", in relation to any pay day, mean the amount which would represent a payment at the normal deduction rate specified by the order or, as the case may be, at the protected earnings rate so specified in respect of the period between the pay-day in question and either the last preceding pay-day or, where there is no last preceding pay-day, the date last before the pay-day in question on which the employer became the defendant's employer;

"relevant earnings", in relation to any pay-day, means the amount of the earnings aforesaid falling to be paid on the pay-day in question after the deduction from those earnings of any amount falling to be deducted therefrom by the employer by way of income tax or of contributions under the National Insurance (Industrial Injuries) Acts, 1946 to 1957, the National Insurance Acts, 1946 to 1957, or the National Health Service Contributions Act, 1957, or of lawful deductions under any enactment, or in pursuance of a request in writing by the defendant, requiring or authorising deductions to be made for the purposes of a superannuation scheme within the meaning of the Wages Councils Act, 1945.

For the National Health Service Contributions Act, 1957, see 37 Halsbury's Statutes (2nd Edn.) 805; for the Wages Councils Act, 1945, see 9 Halsbury's Statutes (2nd Edn.) 158.

3. If the relevant earnings exceed the sum of—

- (a) the protected earnings; and
- (b) so much of any amount by which the relevant earnings falling to be paid on any previous pay-day fell short of the protected earnings for the purposes of that pay-day as has not been made good by virtue of this sub-paragraph on any other previous pay-day,

the employer shall, so far as that excess permits, pay to the officer designated for the purpose in the order—

- (i) the normal deduction; and
- (ii) so much of the normal deduction for any previous pay-day as was not paid on that pay-day and has not been paid by virtue of this sub-paragraph on any other previous pay-day.

MATRIMONIAL PROCEEDINGS (CHILDREN) ACT, 1958

(6 & 7 Eliz. 2, c. 40)

An Act to extend the powers of courts to make orders in respect of children in connection with proceedings between husband and wife and to require arrangements with respect to children to be made to the satisfaction of the court before the making of a decree in such proceedings. [7th July, 1958]

Part I

This Part of this Act was brought into operation on the 1st January, 1959, by the Matrimonial Proceedings (Children) Act (Commencement) Order, 1958 (1958 No. 2081 (c. 16)).

JURISDICTION IN ENGLAND AND WALES

1.—(1) Subject to the provisions of this section, section twenty-six of the Matrimonial Causes Act, 1950 (which enables the High Court to provide for the custody, maintenance and education of the children of the parties to matrimonial proceedings), shall apply in relation to a child of one party to the marriage (including an illegitimate or adopted child) who has been accepted as one of the family by the other party as it applies in relation to a child of both parties.

(2) In considering whether any and what provision should be made by virtue of the foregoing subsection for requiring any party to make any payment towards the maintenance or education of a child who is not his own, the court shall have regard to the extent, if any, to which that party had, on or after the acceptance of the child as one of the family, assumed responsibility for the child's maintenance and to the liability of any person other than a party to the marriage to maintain the child.

(3) It is hereby declared that the reference in subsection (2) of the said section twenty-six to the children of the petitioner and respondent includes a reference to any illegitimate child of the petitioner and respondent.

(4) In subsection (1) of section twenty-three of the said Act (under which a husband guilty of wilful neglect to maintain his wife or the infant children of the marriage may be ordered to make periodical payments to his wife) the

reference to the infant children of the marriage shall be construed as including a reference to an illegitimate child of both parties to the marriage.

(5) In this section "adopted child" means a child adopted in pursuance of an adoption order made under the Adoption Act, 1950, or any enactment repealed by that Act, or under any corresponding enactment of the Parliament of Northern Ireland.

(6) This section shall not apply in relation to proceedings instituted before the commencement of this Part of this Act.

For ss. 23, 26 of the Matrimonial Causes Act, 1950, see p. 1390, *ante*. The Adoption Act, 1950 was replaced as from the 1st April, 1959, by the Adoption Act, 1958 (38 Halsbury's Statutes (2nd Edn.) 538).

2.—(1) Subject to the provisions of this section, in any proceedings for divorce, nullity of marriage or judicial separation where the High Court has, by virtue of subsection (1) of section twenty-six of the Matrimonial Causes Act, 1950, jurisdiction in relation to any child, the court shall not make absolute any decree for divorce or nullity of marriage or pronounce a decree of judicial separation unless and until the court is satisfied as respects every such child who has not attained the age of sixteen years—

- (a) that arrangements have been made for the care and upbringing of the child and that those arrangements are satisfactory or are the best which can be devised in the circumstances, or
- (b) that it is impracticable for the party or parties appearing before the court to make any such arrangements.

For the commencement of this sub-s., see sub-s. (4), *infra*.

(2) The court may if it thinks fit proceed without observing the requirements of the foregoing subsection if it appears that there are circumstances making it desirable that the decree nisi should be made absolute, or, as the case may be, that the decree for judicial separation should be pronounced, without delay and if the court has obtained a satisfactory undertaking from either or both of the parties to bring the question of the arrangements for the children before the court within a specified time.

(3) In subsection (2) of section two of the said Act (which requires the judge in determining an application for leave to present a petition for divorce before the expiration of three years from the date of the marriage to have regard to the interests of any children of the marriage) the reference to any children of the marriage shall be construed as including a reference to any other child in relation to whom the court would have jurisdiction by virtue of subsection (1) of the said section twenty-six in proceedings instituted by the petition.

For s. 2 (2) of the Act of 1950, see p. 1382, *ante*, and for *ibid.*, s. 26 (1), see p. 1390, *ante*.

(4) Subsection (1) of this section shall not apply in relation to proceedings instituted before the commencement of this Part of this Act.

3.—(1) Where proceedings instituted after the commencement of this Part of this Act in the High Court for divorce, nullity of marriage or judicial separation are dismissed at any stage after the beginning of the trial, the court may, either forthwith or within a reasonable period after the proceedings have been dismissed, make such provision with respect to the custody, maintenance and education of any child as could be made in the case of that child under subsection (1) of section twenty-six of the Matrimonial Causes Act, 1950, if the proceedings were still before the court.

For s. 26 (1) of the Matrimonial Causes Act, 1950 see p. 1390, *ante*.

(2) Where an order has been made under the foregoing subsection as respects a child, the court may from time to time make further provision with respect to his custody, maintenance and education.

4.—(1) Where the court makes an order after the commencement of this Part of this Act under subsection (1) of section twenty-three of the Matrimonial Causes Act, 1950, the court shall also have jurisdiction from time to time to make such provision as appears just with respect to the custody of any such child as is referred to in that subsection (and, as in a case under the last foregoing section, with respect to access to the child), but the jurisdiction conferred by this subsection, and any order made in exercise of that jurisdiction, shall have effect only as respects any period when an order is in force under subsection (1) of the said section twenty-three.

For s. 23 of the Matrimonial Causes Act, 1950, see p. 1389, *ante*.

The "last foregoing" section would appear to mean s. 26 of the Matrimonial Causes Act, 1950 (p. 1390, *ante*).

(2) In any case where the court would have power, on an application made under subsection (1) of the said section twenty-three, to order the husband to make to the wife periodical payments for the maintenance of any such child as is referred to in that subsection, the court may, if it thinks fit, order those payments to be made to the child, or to any other person for the benefit of the child, instead of to the wife) and the reference to the wife in subsection (2) of that section (which relates to security for maintenance) shall be construed accordingly.

For s. 23 of the Matrimonial Causes Act, 1950, see p. 1390, *ante*.

5.—(1) Where the court has jurisdiction to make provision as to the custody of a child, either by virtue of section twenty-six of the Matrimonial Causes Act, 1950, or of this Part of this Act and it appears to the court that there are exceptional circumstances making it impracticable or undesirable for the child to be entrusted to either of the parties to the marriage or to any other individual, the court may if it thinks fit make an order committing the care of the child to the council of a county or county borough (hereinafter referred to as the local authority) and thereupon Part II of the Children Act, 1948 (which relates to the treatment of children in the care of a local authority), shall, subject to the provisions of this section, apply as if the child had been received by the local authority into their care under section one of that Act.

For s. 26 (1) of the Matrimonial Causes Act, 1950, see p. 1390, *ante*. For the Children Act, 1948, see 12 Halsbury's Statutes (2nd Edn.) 1103.

(2) The authority specified in an order under this section shall be the council of the county or county borough in which the child was, in the opinion of the court, resident before the order was made to commit the child to the care of a local authority, and the court shall before making an order under this section hear any representations from the local authority, including any representations as to the making of an order for payments for the maintenance and education of the child.

(3) While an order made by virtue of this section is in force with respect to any child, the child shall continue in the care of the local authority notwithstanding any claim by a parent or other person.

(4) An order made by virtue of this section shall cease to have effect as respects any child when that child attains the age of eighteen years and the court shall not make an order committing a child to the care of a local authority under this section after he has attained the age of seventeen years.

(5) In the application of the said Part II of the Children Act, 1948, under this section—

- (a) the exercise by the local authority of their powers under sections twelve to sixteen of that Act shall be subject to any directions given by the court, and
- (b) section seventeen of that Act (which relates to arrangements for the emigration of a child under the care of a local authority) shall not apply.

For Part II of the Children Act, 1948, see 12 Halsbury's Statutes (2nd Edn.) 1113.

(6) *If a child who is committed to the care of a local authority under this section comes under the control of any person or authority under the provisions of the Mental Deficiency Acts, 1913 to 1938, or the Lunacy and Mental Treatment Acts, 1890 to 1930, he shall thereupon cease to be committed to the care of the local authority under this section.*

This sub-section is repealed, as are the statutes referred to therein, by the Mental Health Act, 1959, 8th Schedule (p. 1480, *post*).

(7) It shall be the duty of any parent or guardian of a child committed to the care of a local authority under this section to secure that the local authority are informed of his address for the time being and a person who knowingly fails to comply with this subsection shall be liable on summary conviction to a fine not exceeding five pounds.

(8) The court shall have power from time to time by an order under this section to vary or discharge any provision made in pursuance of this section.

6.—(1) Where the court has jurisdiction to provide for the custody of a child under section twenty-six of the Matrimonial Causes Act, 1950, or this Part of this Act and it appears to the court that there are exceptional circumstances making it desirable that the child should be under the supervision of an independent person, the court may, as respects any period during which the child is, in exercise of that jurisdiction, committed to the custody of any person, order that the child be under the supervision of an officer appointed under this section as a welfare officer or under the supervision of a local authority.

For s. 26 of the Matrimonial Causes Act, 1950, see p 1390, *ante*.

(2) Where the court makes an order under this section for supervision by a welfare officer, the officer responsible for carrying out the order shall be such probation officer as may be selected under arrangements made by the Secretary of State and where an order is for supervision by a local authority, that authority shall be the council of a county or county borough selected by the court and specified in the order.

(3) This section shall be included among the enactments specified in subsection (1) of section thirty-nine of the Children Act, 1948 (which lists the functions which are matters for the children's committee of a local authority and in respect of which grants are payable under section forty-seven of that Act), and a local authority shall discharge the duties conferred on them by an order under this section through an officer employed in connection with those functions.

For sub-s. (1) of s. 39 of the Children Act, 1948, see 12 Halsbury's Statutes (2nd Edn.) 1132.

(4) The court shall not have power to make an order under this section as respects a child who in pursuance of an order under the last foregoing section is in the care of a local authority.

(5) Where a child is under the supervision of any person in pursuance of this section the jurisdiction possessed by a court to vary any order made with respect to the child's custody, maintenance or education under section twenty-six of the Matrimonial Causes Act, 1950, or this Part of this Act shall, subject to any rules of court, be exercisable at the instance of the court itself.

For s. 26 of the Matrimonial Causes Act, 1950, see p. 1390, *ante*.

(6) The court shall have power from time to time by an order under this section to vary or discharge any provision made in pursuance of this section.

PART II

JURISDICTION IN SCOTLAND

* * * *

PART III

GENERAL

16. There shall be paid out of moneys provided by Parliament any increase attributable to this Act in the sums payable out of moneys so provided—

- (a) under section forty-seven of the Children Act, 1948, or
- (b) under Part I of the Local Government Act, 1948, or the Local Government (Financial Provisions) (Scotland) Act, 1954, as amended by the Valuation and Rating (Scotland) Act, 1956.

For s. 47 of the Children Act, 1948, see 12 Halsbury's Statutes (2nd Edn.) 1138; for Part I of the Local Government Act, 1948, see 14 Halsbury's Statutes (2nd Edn.) 455.

17. Any order for maintenance or other payments made by virtue of this Act or any corresponding enactment of the Parliament of Northern Ireland shall be included among the orders to which section sixteen of the Maintenance Orders Act, 1950, applies (which section specifies the maintenance orders which are enforceable under Part II of that Act) and, in the case of an order made by virtue of Part I of this Act, shall be a maintenance order within the meaning of the Maintenance Orders Act, 1958.

For s. 16 of the Maintenance Orders Act, 1950, see p. 1397, *ante*, and for the Maintenance Orders Act, 1958, see p. 1444, *ante*.

18.—(1) This Act may be cited as the Matrimonial Proceedings (Children) Act, 1958.

(2) Any reference in this Act to any enactment shall be construed as a reference to that enactment as amended or extended by any other Act, including this Act.

(3) This Act (except so far as it affects Part II of the Maintenance Orders Act, 1950) shall not extend to Northern Ireland.

(4) Part I of this Act shall come into force on such a day as may be appointed by the Lord Chancellor by an order contained in a statutory instrument and Part II of this Act shall come into force on such day as may be appointed by the Secretary of State by such an order.

Part I was brought into operation on the 1st January, 1959, by the Matrimonial Proceedings (Children) Act (Commencement) Order, 1958 (1958 No. 2081 (C. 16)).

DIVORCE (INSANITY AND DESERTION) ACT, 1958

(6 & 7 Eliz. 2, c. 54)

An Act to amend the law as to the circumstances in which, for the purposes of proceedings for divorce in England or Scotland, a person is to be treated as having been continuously under care and treatment and as to the effect of insanity on desertion; and to enable a petition for divorce to be presented on the ground of desertion notwithstanding any separation agreement entered into before desertion became a ground for divorce in English law. [23rd July, 1958]

1.—(1) Notwithstanding anything in subsection (2) of section one of the Matrimonial Causes Act, 1950, or subsection (3) of section six of the Divorce (Scotland) Act, 1938, a person shall be deemed to be under care and treatment for the purposes of the said section one, and under care and treatment as an insane person for the purposes of the said section six, at any time when he is receiving treatment for mental illness—

- (a) as a resident in a hospital or other institution provided, approved, licensed, registered or exempted from registration by any Minister or other authority in the United Kingdom, the Isle of Man or the Channel Islands; or
- (b) as a resident in a hospital or other institution in any other country, being a hospital or institution in which his treatment is comparable with the treatment provided in any such hospital or institution as is mentioned in paragraph (a) of this subsection.

For s. 1 (2) of the Matrimonial Causes Act, 1950, see p. 1381, *ante*.

(2) For the purposes of the foregoing subsection a certificate by the Admiralty or a Secretary of State that a person was receiving treatment for mental illness during any period as a resident in any naval, military or air-force hospital under the direction of the Admiralty, the Army Council or the Air Council shall be conclusive evidence of the facts certified.

(3) In determining for the purposes of the said section one or the said section six whether any period of care and treatment has been continuous, any interruption of such a period for twenty-eight days or less shall be disregarded.

For the discussion of "interruption" in relation to a "continuous" period, see Ch. III, para. 185, p. 215, *ante*.

2. For the purposes of any petition or action for divorce or judicial separation the court may treat a period of desertion as having continued at a time when the deserting party was incapable of continuing the necessary intention, if the evidence before the court is such that, had he not been so incapable, the court would have inferred that that intention continued at that time.

3. For the purposes of paragraph (b) of subsection (1) of section one of the Matrimonial Causes Act, 1950 (which provides that a petition for divorce may be presented to the High Court on the ground that the respondent has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition), any agreement between the petitioner and the respondent to live separate and apart, whether or not made in writing, shall be disregarded if the agreement was entered into before the first day of January, nineteen hundred and thirty-eight, and either—

- (a) at the time when the agreement was made the respondent had deserted the petitioner without cause; or
- (b) the court is satisfied that the circumstances in which the agreement

was made and the parties proceeded to live separate and apart were such as, but for the agreement, to amount to desertion of the petitioner by the respondent without cause.

For s. 1 (1) (b) of the Matrimonial Causes Act, 1950, see p. 1381, *ante*.

4.—(1) This Act may be cited as the Divorce (Insanity and Desertion) Act, 1958.

(2) This Act does not extend to Northern Ireland.

(3) In paragraph (d) of subsection (2) of section one of the Matrimonial Causes Act, 1950, the words from “being treatment” to “this subsection”, and in subsection (3) of section six of the Divorce (Scotland) Act, 1938, the words “other than treatment as a voluntary patient” are hereby repealed.

MATRIMONIAL CAUSES ACT, 1963

(1963 c. 45)

An Act to amend the law relating to matrimonial causes; to facilitate reconciliation in such causes; and for purposes connected with the matters aforesaid. [31st July 1963.]

1. Any presumption of condonation which arises from the continuance or resumption of marital intercourse may be rebutted on the part of a husband, as well as on the part of a wife, by evidence sufficient to negative the necessary intent.

2.—(1) For the purposes of the Matrimonial Causes Act, 1950, and of the Matrimonial Proceedings (Magistrates' Courts) Act, 1960, adultery or cruelty shall not be deemed to have been condoned by reason only of a continuation or resumption of cohabitation between the parties for one period not exceeding three months, or of anything done during such cohabitation, if it is proved that cohabitation was continued or resumed, as the case may be, with a view to effecting a reconciliation.

(2) In calculating for the purposes of section 1(1)(b) of the Matrimonial Causes Act, 1950, the period for which the respondent has deserted the petitioner without cause, and in considering whether such desertion has been continuous, no account shall be taken of any one period (not exceeding three months) during which the parties resumed cohabitation with a view to a reconciliation.

3. Adultery which has been condoned shall not be capable of being revived.

4.—(1) Section 4 of the Matrimonial Causes Act, 1950 (duty of court on presentation of petition), shall be amended as follows:—

(a) paragraph (c) of subsection (2) (proof of absence of collusion), together with the word “and” immediately preceding that paragraph, shall be omitted;

(b) in the proviso to that subsection, after the words “if it finds” there shall be inserted the words “that the petition is presented or prosecuted in collusion with the respondent or either of the respondents or”.

(2) Nothing in this section affects the duty of the court under the said section 4 to inquire whether any collusion exists between the parties, or any duty of the parties to disclose to the court any agreement or arrangement made between them in contemplation of or in connection with the proceedings, or any power or duty of Her Majesty's Proctor under the said Act.

(3) Provision may be made by rules of court for enabling the court, upon application made either before or after the presentation of a petition for

divorce, to take into consideration for the purposes of the said section 4 as amended by this section any agreement or arrangement made or proposed to be made between the parties, and to give such directions in the matter as the court thinks fit.

5.—(1) In any case in which the court has power to make an order (other than an interim order) under section 19 or section 20 of the Matrimonial Causes Act, 1950 (maintenance and alimony), the court may, in lieu of, or in addition to, making such an order, make an order for the payment of a lump sum.

(2) Notwithstanding anything in the said Act of 1950 or in the Matrimonial Causes (Property and Maintenance) Act, 1958, rules of court may provide, in such cases as may be prescribed by the rules—

- (a) that applications for ancillary relief shall be made in the petition or answer; or
- (b) that applications for ancillary relief which are not made as aforesaid shall be made only with the leave of the court.

(3) Any rules of court made before the commencement of this Act shall be deemed to have been validly made if such rules could be made after that date under the last foregoing subsection; but nothing in this subsection affects any order for ancillary relief made on or after 20th December, 1962, and before the commencement of this Act.

(4) In subsections (2) and (3) of this section “ancillary relief” means relief under section 19, section 20, section 22 and section 26 of the said Act of 1950.

6.—(1) Where proceedings are brought for financial relief and the court is satisfied, on an application under this section by the person bringing those proceedings—

- (a) that the person against whom the proceedings are brought is about to make any disposition with the intention of defeating the claim for financial relief made in the proceedings, or
- (b) that that person is about to transfer any property out of the jurisdiction of the court, or otherwise to deal with any property, with that intention,

the court may make such order restraining that person from making the disposition or transferring or otherwise dealing with the property, as the case may be, or otherwise for protecting the claim, as the court thinks fit.

(2) In this section “financial relief” means relief (otherwise than by way of an interim order) under section 19, section 20, section 22, section 23, section 24 or section 26 of the Matrimonial Causes Act, 1950, or under subsection (1) of section 5 of this Act, and “disposition” and “property” have the same meanings as in the Matrimonial Causes (Property and Maintenance) Act, 1958.

(3) Subsections (4) and (7) of section 2 of the said Act of 1958 (except so much of subsection (4) as refers to a disposition falling within subsection (3) of that section) shall apply to this section, and to any transaction or claim to which this section applies, as they apply to that section and to any disposition or claim to which that section applies.

(4) For the purposes of sections 2 and 5 of the said Act of 1958, “financial relief” shall include relief under subsections (1) and (3) of section 26 of the said Act of 1950 and subsection (1) of section 5 of this Act.

7.—(1) This Act may be cited as the Matrimonial Causes Act, 1963.

(2) This Act shall be construed as one with the Matrimonial Causes Act, 1950.

(3) This Act does not apply to Scotland or Northern Ireland.



First Session—Twenty-seventh Parliament
1966

PROCEEDINGS OF
THE SPECIAL JOINT COMMITTEE OF THE SENATE
AND HOUSE OF COMMONS ON
DIVORCE

No. 2

TUESDAY, JULY 5, 1966

Joint Chairmen

The Honourable A. W. Roebuck
and

Mr. A. J. P. Cameron, M.P.

WITNESS:

Dr. P. M. Ollivier, Law Clerk and Parliamentary Counsel,
House of Commons

ROGER DUHAMEL, F.R.S.C.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1966

MEMBERS OF THE
SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS
ON DIVORCE

FOR THE SENATE

Hon. A. W. Roebuck, Joint Chairman

The Honourable Senators

Aseltine	Denis
Baird	Fergusson
Belisle	Flynn
Burchill	Gershaw
Connolly (<i>Halifax North</i>)	Haig
Croll	Roebuck—(12).

FOR THE HOUSE OF COMMONS

Mr. A. J. P. Cameron (*High Park*), Joint Chairman

Members of the House of Commons

Aiken	Langlois (<i>Mégantic</i>)
Baldwin	MacEwan
Brewin	Mandziuk
Cameron (<i>High Park</i>)	McCleave
Cantin	McQuaid
Choquette	Otto
Chrétien	Peters
Fairweather	Ryan
Forest	Stanbury
Goyer	Trudeau
Honey	Wahn
Laflamme	Woolliams—(24).

(Quorum 10)

ORDERS OF REFERENCE

Extracts from the Votes and Proceedings of the House of Commons:

MARCH 15, 1966:

"On motion of Mr. McIlraith, seconded by Mr. Hellyer, it was resolved—thaat a Special Joint Committee of the Senate and the House of Commons be appointed to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either House;

That 24 Members of the House of Commons, to be designated by the House at a later date, be members of the Special Joint Committee, and that Standing Order 67(1) of the House of Commons be suspended in relation thereto;

That the Committee have power to engage the services of such technical, clerical and other personnel as may be necessary for the purpose of the inquiry;

That the Committee have the power to send for persons, papers and records, to examine witnesses, to report from time to time, and to print such papers and evidence from day to day as may be ordered by the Committee, and that Standing Order 66 be suspended in relation thereto; and

That a Message be sent to the Senate requesting Their Honours to unite with this House for the above purpose, and to select, if the Senate deems it so advisable, some of its Members to act on the proposed Special Joint Committee."

"By unanimous consent, on motion of Mr. McIlraith, seconded by Mr. Hellyer, it was ordered—That the order of the House of Monday, February 21, 1966 referring the subject-matter of the following bills to the Standing Committee on Justice and Legal Affairs, namely:—

Bill C-16, An Act to provide in Canada for the Dissolution of Marriage (Additional Grounds for Divorce).

Bill C-19, An Act to provide in Canada for the Dissolution and the Annulment of Marriage.

Bill C-41, An Act to amend the British North America Acts, 1867 to 1965, (Provincial Marriage and Divorce Laws).

Bill C-44, An Act to provide in Canada for the Dissolution of Marriage.

Bill C-55, An Act to provide in Canada for the Dissolution of Marriage.

Bill C-58, An Act respecting Marriage and Divorce.

Bill C-79, An Act to amend the Dissolution and Annulment of Marriages Act (Additional Grounds for Divorce).

be discharged, and that the subject-matter of the same bill be referred to the Joint Committee of the Senate and the House of Commons on Divorce."

March 16, 1966:

"By unanimous consent, on motion of Mr. Stewart, seconded by Mr. Byrne, it was ordered—That the subject-matter of Bill C-133, An Act to extend the grounds upon which courts now have jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief, be referred to the Special Joint Committee on Divorce."

"By unanimous consent, on motion of Mr. Stewart, seconded by Mr. Byrne, it was ordered—That the subject-matter of Notice of Motion No. 11 be referred to the Special Joint Committee on Divorce."

March 22, 1966:

"On motion of Mr. Pilon, seconded by Mr. McNulty, it was ordered—That a Message be sent to the Senate to acquaint Their Honours that this House will unite with them in the formation of a Joint Committee of both Houses to inquire into and report upon divorce in Canada, and that the Members to serve on the said Committee, on the part of this House, will be as follows: Messrs. Aiken, Baldwin, Brewin, Cameron (*High Park*), Cantin, Choquette, Chrétien, Fairweather, Forest, Goyer, Honey, Laflamme, Langlois (*Mégantic*), MacEwan, Mandziuk, McCleave, McQuaid, Otto, Peters, Ryan, Stanbury, Trudeau, Wahn and Woolliams."

LÉON-J. RAYMOND,
Clerk of the House of Commons.

Extracts from the Minutes of the Proceedings of the Senate:

March 23, 1966:

"Pursuant to the Order of the Day, the Senate proceeded to the consideration of the Message from the House of Commons requesting the appointment of a Special Joint Committee of the Senate and House of Commons on Divorce.

The Honourable Senator Connolly, P.C., moved, seconded by the Honourable Senator Roebuck:

That the Senate do unite with the House of Commons in the appointment of a Special Joint Committee of both Houses of Parliament to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either House;

That twelve Members of the Senate, to be designated at a later date, act on behalf of the Senate as members of the said Special Joint Committee;

That the Committee have power to engage the services of such technical, clerical and other personnel as may be necessary for the purpose of the inquiry;

That the Committee have the power to send for persons, papers and records, to examine witnesses, to report from time to time, and to print such papers and evidence from day to day as may be ordered by the Committee, and to sit during sittings and adjournments of the Senate; and

That a Message be sent to the House of Commons to inform that House accordingly.

After debate, and—

The question being put on the motion, it was—
Resolved in the affirmative."

March 29, 1966:

"With leave of the Senate,

The Honourable Senator Beaubien (*Provencher*) moved, seconded by the Honourable Senator Inman:

That the following Senators be appointed to act on behalf of the Senate on the Special Joint Committee of the Senate and House of Commons to inquire into and report upon divorce in Canada and the social and legal problems

relating thereto, namely, the Honourable Senators Aseltine, Baird, Belisle, Bourget, Bruchill, Connolly (*Halifax North*), Croll, Fergusson, Flynn, Gershaw, Haig, and Roebuck; and

That a Message be sent to the House of Commons to inform that House accordingly.

The question being put on the motion, it was—
Resolved in the affirmative.”

May 10, 1966:

“Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Roebuck, seconded by the Honourable Senator Croll, for the second reading of the Bill S-19, intituled: “An Act to extend the grounds upon which courts now having jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief”.

The question being put on the motion—

In amendment, the Honourable Senator Connolly, C.P., moved, seconded by the Honourable Senator Hugessen, that the Bill be not now read the second time, but that the subject-matter be referred to the Special Joint Committee on Divorce.

After debate, and—

The question being put on the motion, it was—
Resolved in the affirmative.”

June 28, 1966:

“With leave of the Senate,

The Honourable Senator Beaubien (*Provencher*), moved, seconded by the Honourable Senator MacDonald (*Cape Breton*), that the name of the Honourable Senator Denis be substituted for that of Honourable Senator Bourget on the list of Senators serving on the Special Joint Committee on Divorce; and

That a Message be sent to the House of Commons to acquaint that House accordingly.

The question being put on the motion, it was—
Resolved in the affirmative.”

J. F. MACNEILL,
Clerk of the Senate.

MINUTES OF PROCEEDINGS

TUESDAY, July 5, 1966.

Pursuant to adjournment and notice of the Special Joint Committee of the Senate and the House of Commons on Divorce met this day at 3.30 p.m.

Present: For the Senate: The Hon. Senators Aseltine, Croll, Denis, Ferguson, Flynn, and Roebuck (*Joint Chairman*).

For the House of Commons: Messrs. Aiken, Cameron (*High Park*) (*Joint Chairman*), Cantin, Fairweather, Forest, Goyer, Honey, MacEwan, Mandziuk, McCleave, Peters, and Trudeau.

Dr. P. M. Ollivier, Law Clerk and Parliamentary Counsel, House of Commons, was heard.

At 5.15 p.m. the Committee adjourned to the call of the Joint Chairmen.

Attest.

John A. Hinds,
Assistant Chief Clerk of Committees.

THE SENATE

THE SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS ON DIVORCE

EVIDENCE

TUESDAY, July 5, 1966.

The Special Committee of the Senate and the House of Commons on divorce met this day at 3.30 p.m.

Honourable Senator Arthur W. Roebuck, Q.C. and Mr. A. J. P. Cameron, Q.C., M.P. (*High Park*), Co-Chairmen.

The Co-CHAIRMAN (*Senator Roebuck*): Honourable members, I see a quorum. I have two very interesting matters to bring before you.

May I introduce Dr. Peter J. King, who will be our special assistant. The sittings of this committee will extend into the fall, this being the last sitting before the summer holidays. In that interval, I hope, with Dr. King's assistance, to organize a full program for our fall sittings.

Dr. King is a professor at Carleton University in the Department of History, specializing in the modern history of the nineteenth century. He is very interested in our work and will be of tremendous assistance to us in organizing it and in bringing it to a happy conclusion.

I may add that it was the dean of Carleton who assisted me in finding Dr. King and who recommended him for this task.

The next point of interest is the presence of Dr. P. M. Ollivier, who has informed me that someone accused him of being an expert in divorce. He has had no personal experience—for that matter, neither have I nor has any other member of the committee. Nevertheless, Dr. Ollivier has an extensive knowledge of the law of divorce and will be able to give us much information which we need on the situation in Quebec as it affects the general situation in Canada. He knows the kind of information we need and, with your consent, I shall call upon him now.

Dr. P. M. Ollivier, Law Clerk and Parliamentary Counsel, House of Commons: Mr. Chairman and honourable members, when I was invited to appear before your committee, my first thought was that I should start with an historical review of divorce in Canada, consider the law as it stood in all provinces and the efforts that were made in the last fifty years to change that law, and then end up with some conclusions of my own.

However, having read the splendid speech made by the honourable Senator Roebuck in the Senate on March 3, and having had the privilege of reading what was said in this committee by the Parliamentary Counsel of the Senate, I came to the conclusion that what I had in mind to deal with had already been covered much better than I could have covered it myself.

I would, on the other hand, if I may be allowed to do so, mention some highlights in Senator Roebuck's speech, as I would like to refer to them later on in dealing more specially with the situation in the province of Quebec.

Senator Roebuck said there are two types of decrees of courts, one from bed and board, and the other from the bonds themselves. This is a complete divorce, in other words, *a vinculo matrimonii*.

This, of course, is the great distinction. However, it might be of some use to this committee if I borrow at this time the definition of divorce from Bouvier's Law Dictionary, a definition which is more complete and more detailed and which is as follows:

"Divorce. The dissolution or partial suspension, by law, of the marriage relations.

The dissolution is termed divorce from the bond of matrimony, or, in the Latin form of the expression, *a vinculo matrimonii*; the suspension, divorce from bed and board, *a mensa et thoro*. The former divorce puts and end to the marriage; the latter leaves it in full force. The term divorce is sometimes also applied to a sentence of nullity, which establishes that a supposed or pretended marriage either never existed at all, or at least was voidable at the election of one or both of the parties.

The more correct modern usage, however, confines the significance of divorce to the dissolution of a valid marriage. What has been known as a divorce *a mensa et thoro* may more properly be termed a legal separation. So also a sentence or decree which renders a marriage void *ab initio*, and bastardizes the issue, should be distinguished from one which is entirely prospective in its operation; and for that purpose the former may be termed a sentence of nullity. The present article will accordingly be confined to divorce in the strict acceptation of the term.

"For the other branches of the subject, see *separation a mensa et thoro*; *nullity of marriage*.

Marriage, being a legal relation, and not—as sometimes supposed—a mere contract, can only be dissolved by legal authority."

There is much more under this heading, in this Encyclopaedia of the Law by Bouvier, which, however, deals mostly with the situation in the United States, for he also defines some of the more important grounds for divorce such as desertion, abandonment, cruelty, habitual drunkenness, conviction of crime, incurable insanity, failure to support, impotence—I think some of these have already been dealt with in the committee incapacity to enter into the contract, fraud, duress, etc. Then he refers to the consequences of divorce, as alimony, maintenance, the custody of the children, etc. As these subjects are dealt with mainly from the point of view of the United States, it is not necessary to do more than mention them in this memorandum.

Now, summarizing the situation in all provinces, the honourable Senator stated that: "There are now provinces that rely on pre-confederation statutes, British Columbia, New Brunswick, Nova Scotia and Prince Edward Island; three that rely on provisions in the act of their own incorporation—Manitoba, Alberta and Saskatchewan; one a special act—that of the province of Ontario; then there are two where there is no jurisdiction."

Of course, those two provinces are Quebec and Newfoundland, but before coming to that, that is the situation in Quebec in relation to parliamentary divorce, I would like to refer to a matter of interest which shows the evolution that has taken place in the very first years of Confederation in relation to parliamentary divorce.

Before 1878, the instructions given to the Governor General were to the effect that he should reserve his assent to certain bills, that is, to seven categories of bills, the sixth of those categories being bills relating to divorce. The right of reserving bills, granted by section 55 of the Constitution, did not permit the Governor General to refuse his sanction to a bill, but allowed him to reserve it for the signification of the King's pleasure. Pursuant to instructions received before 1878, the Governors had up to that time reserved twenty-one bills I would say one-third of them were divorce bills. After Mr. Blake had visited England, the practice of enumerating the acts to be reserved was

discontinued and, in 1879, the first bill of divorce received Royal Assent (42 Victoria, ch. 79). That is to say it received Royal Assent in Canada. The act is entitled, An Act for the Relief of Eliza Maria Campbell, and from many points of view it is very interesting. In a long preamble of nearly three pages it starts by reciting the alleged adultery of Eliza Maria Campbell, then refers to an action for criminal conviction brought against one George Gordon by the husband and a verdict for \$1,500 in favour of the husband. Then of a suit for alimony by the defendant which suit was dismissed; following this, reference is made to the fact that the said Robert Campbell prayed that the said marriage might be dissolved, annulled and put an end to. Then it is stated that Mr. Campbell petitioned to the effect that Campbell had treated her with cruelty, and ill used and insulted her and asked that she be divorced *a mensa et thoro*.

What now becomes more interesting in the recital within the preamble is that Mrs. Campbell asks for "judicial separation" and adequate provision for her support and the support of her children; asks also for the care and custody of at least the two youngest of her children. It is also noted, in the preamble, that her adultery has not been proven but that the cruelty of the husband has been so proven.

Now, I find these words in Senator Roebuck's speech where he is dealing with the custody of the children: "We have not done so up to this time," said the senator, and he added: "I am perfectly satisfied that the care of the children, the division of property between the parties and alimony, are ancillary to divorce."

It is time that we have a look at the act itself, and the first remark I would make is that this Act for the relief of Mrs. Campbell is not a complete Divorce Act but rather an act respecting a separation from bed and board, and also that the relief was granted to her not for the reason of adultery but on account of the cruelty of her husband.

There are nine sections in the statute, and section 1 reads as follows:

"1. From and after the commencement of this act, the said Eliza Maria Campbell shall be and shall remain separated from the bed and board of her husband, the said Robert Campbell."

The rest of the act—which is a federal statute—deals with those questions which the Senate has since then been loath to deal with, although Senator Roebuck and others, among them Senator Pouliot, have said they were within the exclusive jurisdiction of Parliament as being ancillary to marriage and divorce. For instance, section 2 provides that the separation shall have the same force and the same consequences as judicial separation in England pronounced by the proper court. The following section, that is section 3, provides for alimony and how it shall be paid, then provision is made for custody of one child and the allowance for support of same. There is provision for the registration of the act in the Court of Chancery and, finally, for the effect of the act if there should be reconciliation and cohabitation.

Bora Laskin in his book on Constitutional Law has referred to these ancillary powers—he writes, at page 641:

Is it competent for the Dominion to deal with alimony or custody of children as coming within its authority in relation to marriage and divorce? Would it make any difference if such dealing were unrelated to divorce proceedings?

Are judicial separation and decrees for the restitution of conjugal rights within exclusive federal authority or within exclusive provincial authority or are they susceptible of treatment by either provinces or Dominion, subject to the doctrine of Dominion paramountcy?

In answer, he quotes two decisions to the following effect:

“ . . . the right to maintain an action for damages caused by an adulterer is, in my opinion, a civil right within the jurisdiction of the provincial legislature and is not a matter of marriage and divorce within the jurisdiction of the Dominion: *Mitchell v. Mitchell* and *Croome*, 44 Man. R.23(1936) 1 W.W.R.553. . . .’ per Laidlaw, J.A., in *Mowder v. Roy*, (1946) O.R.154 at p. 166.”

This last statement, of course, might leave some doubt as to the question of jurisdiction. It remains that it would have been interesting to have such an act as the Act for the Relief of Eliza Maria Campbell tested before the Supreme Court of Canada.

Perhaps it would be proper at this time to consider divorces that were granted in the ten previous years; that is, up to 1879. There were eight cases altogether. The first one I would refer to is that of Joseph Frederick Whiteaves. That was in 1868, and it became chapter 95. This chapter appears in the Statutes of Canada for 1869. The act reserved for the signification of Her Majesty’s pleasure thereon on the 22nd May, 1868; Royal Assent given by Her Majesty in Council on the 7th July, 1868; Proclamation thereon made by His Excellency the Governor General on the 26th November, 1868. In this case the marriage was declared null and void to all intents and purposes whatsoever, as well as the marriage contract before the notary. It is a curious fact that not only they voided the marriage but they voided the marriage contract, and the children of the marriage were declared to be legitimate. I think this happened in practically all cases before 1878.

The following year, that is 1869 in the Stevenson case,—that was the case of the marriage of a minor without his father’s consent—the bill was reserved, assented to, and proclaimed a few months after having been reserved. The marriage was made void and the issue of the marriage declared legitimate. The third case is that of Henry William Peterson. Again the bill was reserved and later assented to.

Then, in 1877, the case of Mary Jane Bates: the marriage was dissolved and the children were declared to be legitimate and the bill was reserved in April and assented to in August. The same remarks apply to cases 5 and 6, those of Walter Scott and Martha Holiwell. In those three cases the bills were reserved on the same date, 28th April, assented to on the 13th August and proclaimed on the 5th September of that year, 1877.

There were two cases in 1878, that of Victoria Elizabeth Lyon and that of George F. Johnston. Both these bills were reserved on the 10th May, 1879, both received Royal Assent on the 29th June and were proclaimed on the 18th August, 1878. These eight cases cover the divorces that were granted from Confederation to the Campbell case of 1879, to which we have already referred at length.

As we have stated, divorce bills were not reserved for Her Majesty’s assent after 1878, since the instructions had by then been amended to permit the Royal Assent in Canada.

The next act we come upon is also of some interest. It is in 1884 and is entitled, An Act for the relief of John Graham, chapter 107 of 47 Victoria. This is really a divorce bill, for here the marriage is dissolved and is declared to be null and void to all intents and purposes whatsoever. Graham is given the right to marry again, his children are declared legitimate and their rights to inherit declared to be and remain the same as they would have been if the marriage had not taken place.

This, to my mind, is not a very happy wording. It seems to me it would have been preferable to say that they would have had the right to inherit as if

the divorce had not taken place. However, it is not important. What is important is that reference is made to the children; the act attempts to provide for them and to protect them.

The Co-CHAIRMAN (*Senator Roebuck*): The marriage not having taken place, they would have been illegitimate, so I fancy the courts would have read a real meaning into the wording of the act.

Dr. OLLIVIER: Yes.

I would like here to open a parenthesis. In evidence before this committee, if I am not mistaken, it would appear that the enlargement of grounds for divorce is being discussed only as to the application in those provinces where the courts have jurisdiction to grant divorce *a vinculo matrimonii*.

The Co-CHAIRMAN (*Senator Roebuck*): No, our reference is quite unlimited, and I think our intention is also unlimited. We are certainly going to take into consideration the situation in Quebec.

Dr. OLLIVIER: I was going to make a plea for that, and perhaps I could still make it.

The Co-CHAIRMAN (*Senator Roebuck*): By all means, make it.

Dr. OLLIVIER: On the other hand, the Act of Parliament, 1963, ch. 10, authorizing the Senate of Canada to dissolve and annul marriages, does not mention at any time that parliamentary divorce will apply only to cases originating in Quebec and Newfoundland, and it is further to the effect that a marriage could only be dissolved or annulled, as the case may be, under the laws of England as they existed on the 15th day of July 1870, or under the Marriage and Divorce Act, ch. 176 of the Revised Statutes of Canada, 1952. Is that not restricting the powers you had before?

The Co-CHAIRMAN (*Senator Roebuck*): Yes, but understand, it leaves our powers complete so far as the bill is concerned, so nothing was taken away from the Senate's powers. The bill merely adds the right of the Senate to grant a dissolution under certain circumstances.

Dr. OLLIVIER: That was the amendment Mr. Mandziuk added, which was later on amended by Mr. McCleave and yourself.

The Co-CHAIRMAN (*Senator Roebuck*): Yes. Mr. Mandziuk has the honour of having introduced the bill which was amended and finally passed.

Dr. OLLIVIER: In spite of what you said, if this committee should recommend the extension of grounds for divorce and if its conclusions should be given effect by legislation, should not this legislation be uniform throughout Canada? In other words, should not the extension of those grounds apply to parliamentary divorce as well as to divorce granted by the courts?

The Co-CHAIRMAN (*Senator Roebuck*): I might say right now that that is one of the things we will very seriously consider and be very glad to have your views in connection with.

Dr. OLLIVIER: Before the adoption of the Dissolution and Annulment of Marriage Act in 1963, Parliament was not so restricted, the granting of divorce was altogether discretionary with Parliament. If you bring in a private act, you are not restricted. If you want to, you still have the power.

The Co-CHAIRMAN (*Senator Roebuck*): Our jurisdiction remains as it was prior to the bringing in of that act, except to the extent our powers were increased by that act.

Dr. OLLIVIER: Answering the question: Within what limit should Parliament act? John Alexander Gemmill wrote in 1889, at pages 60-61 of his book on Parliamentary Divorce:

It being clear then that the Parliament of Canada has jurisdiction to grant statutory divorces, and that it is not limited in its power, and can

grant such divorces for any cause and without any cause, the only question which can exist therefore, is within what limit ought Parliament to act?

As a matter of policy and good morals, it is universally admitted that that power should not be exercised arbitrarily and without cause.

By some it has been submitted that it is obligatory on us in Canada to follow the principles and precedents recognized in the House of Lords, but in view of the unlimited powers of our own Parliament, this argument is fallacious.

The Co-CHAIRMAN (*Senator Roebuck*): "Obligatory", yes, but if instead of the word "obligatory" you had said that we should, that I think would be a matter of opinion.

Dr. OLLIVIER: I agree the argument is fallacious.

I now come to this proposition. Parliamentary divorce is a legislative act originating and now being completed in the Senate. It is a legislative act because of the Statute of 1963, which has delegated to the Senate the powers previously exercised by Parliament itself. The act of 1963 has not created a court nor has it changed the general law. Each divorce resolution is like each divorce act passed previously, a law of exception. As far as the Province of Quebec is concerned, the general law as found in the Civil Code as it was in 1867 remains unchanged since it has not been repealed by a general act of Parliament. In other words, just as each divorce act was a private bill, each particular resolution is of a private nature and stands by itself as an exception to the general law.

As an example of what I mean and by way of illustration, in each province there are general laws providing for the admission to the practice of law, or medicine, and that is the general law. The legislature may well adopt private bills admitting certain individuals to the practice of law, or medicine, under special circumstances but that does not change the statutes which have regulated the exercise of those professions within the province.

In the same manner divorce bills were not passed, nor resolutions adopted, by virtue of a general law on divorce. They have been, and are in each case, special private acts or resolutions applicable to individual cases. The act of 1963 deals simply with the procedure to be followed and conditions to be applied.

Parliamentary divorce has been discontinued for the Province of Ontario by chapter 14 of the Statutes of 1930 and jurisdiction given to the Supreme Court of Ontario for the purpose of that act, but what is the law in the Province of Quebec?

There is a chapter in the Civil Code intituled "Of the Dissolution of Marriage". This chapter has only one article, Article 185 which reads:

185. Marriage can only be dissolved by the natural death of one of the parties, while both live it is indissoluble.

Mr. PETERS: May I ask a question for purposes of clarification?

Dr. OLLIVIER: Yes.

Mr. PETERS: Do you mean that the Legislature of Quebec cannot repeal this article, but the federal Parliament can?

Dr. OLLIVIER: Yes, Parliament can, but the Legislature of Quebec, although it is an article of the Civil Code, cannot repeal that article. When the federal Parliament passed an act to the effect that a man could marry the sister of his deceased wife, or that a woman could marry the brother of her deceased husband, and so on, the provisions of the Civil Code were not affected. There are different provisions there and they are still in the code. However, they are superseded by those amendments to the Marriage and Divorce Act. Generally, editors of the Civil Code in Quebec do not include those provisions, but some

do. They put them in as a footnote so that we know what is going on. But, the legislature itself should not repeal its own section, since it has been repealed by the federal law.

Mr. MANDZIUK: I do not want to take the doctor away from his subject, Mr. Chairman, but is not the question of consanguinity a matter which each province decides for itself? I think in Manitoba we have our own provincial statutes with respect to it.

Dr. OLLIVIER: If it relates to the celebration of marriage, if it is one of the conditions of the celebration of marriage, then the province still has jurisdiction. If you want to prevent a marriage from taking place then I suppose you could use those provisions to do it, but if the marriage does take place in spite of that then it is validated by the fact that we have appropriate legislation.

Mr. PETERS: Is this an indication of the fact that even if it wanted to the province could not withdraw this section?

Dr. OLLIVIER: Article 185, which says that marriage is indissoluble, was in the Code in 1867, but jurisdiction as to marriage and divorce is here, and the province itself cannot repeal that section. It would have to be changed here at Ottawa. That is my contention.

Mr. PETERS: Is the whole Napoleonic Code not amendable?

Dr. OLLIVIER: The province could not repeal those sections dealing with marriage and divorce. This matter was debated by Senator Pouliot. I would not go so far as he went, but he said in the Senate that many of the amendments made to the marriage clauses in Quebec would not be valid because Quebec did not have the jurisdiction to deal with marriage and divorce. I would make a distinction between a divorce of a *vinculo matrimonii* and a divorce *a mensa et thoro*. I would not say that the province does not have the right to deal with a divorce *a mensa et thoro*, but it has not the right to deal with divorce *a vinculo matrimonii*. If the conditions respecting marriage relate to the celebration of marriage, such as religious impediment, then I would say the province has the right, but now they are strictly confined to marriage itself.

Mr. PETERS: Is the whole Code involved?

Dr. OLLIVIER: The whole Code covers more than marriage and divorce.

Mr. PETERS: But it cannot be amended—any of it?

Dr. OLLIVIER: Some of those parts dealing with marriage could not be amended.

Mr. PETERS: But can any of the Code be amended by Quebec today?

Dr. OLLIVIER: Oh, yes. They can amend the whole Code, except those parts dealing with marriage and divorce.

Mr. PETERS: Why the distinction?

Dr. OLLIVIER: The distinction is that the British North America Act gives to the central authority the right to legislate with respect to marriage and divorce.

Senator ASELTINE: Exclusively?

Dr. OLLIVIER: Yes, exclusively.

Mr. FOREST: There exists jurisprudence in this matter?

Mr. OLLIVIER: Indeed, there have been cases related to this matter, but not cases which have determined the issue; whatever jurisprudence exists is restricted to these clauses.

Mr. FOREST: Not a single clause, except clause 185?

All clauses concerning marriage and divorce?

Dr. OLLIVIER: There may have never been any issue raised, in view of the difficulties involved; it was less trouble not to do so.

Mr. FAIRWEATHER: The practical aspect, Mr. Chairman, surely, is that the British North America Act supersedes these sections of the Napoleonic Code.

Dr. OLLIVIER: Yes, but I shall be coming back to this point a little later on when I deal with the Constitution, and which provides that all the acts that were in force before Confederation remain in force after Confederation up to the time that they are amended by the proper authorities.

My claim is that that question of indissolubility is still the law, and since jurisdiction has been given to Parliament by Head 26 of section 91 of the British North America Act, 1867, the legislature itself could neither repeal nor amend this article of its Civil Code. That is my answer to Mr. Peter's question.

Mr. PETERS: Before you leave that, there may be other sections of the Napoleonic Code that come into conflict with the common law—

Dr. OLLIVIER: Yes.

Mr. PETERS: It must do that in a large number of fields. I cannot think of any offhand, but I assume the Napoleonic Code covered labour conditions, for instance, in France at the time the code was developed, elementary as it may have been.

Dr. OLLIVIER: In the first instance, the Civil Code of Quebec is not all the Napoleonic Code. It contains ordinances that existed in France previously, but it is quite different from the Napoleonic Code. At that time I think there were about 70 different codes. There was a code for forests, a code for rivers, and so on. There were many codes. The Napoleonic Code dealt with persons and, later on, with commercial ventures, and its provisions may well come into conflict with present-day legislation governing trade and commerce. As you know, there are nearly a thousand cases on questions concerning constitutional differences between the Code and federal legislation.

Mr. PETERS: Was it not worded in such a way in our passing of the divorce act of 1930 that the Province of Ontario was able to take advantage of it and use enabling legislation? Would this legislation not have been available to the Province of Quebec if it had so wished?

Dr. OLLIVIER: Oh, yes.

Mr. PETERS: This clause then would not be barred?

Dr. OLLIVIER: In 1930 the Supreme Court of Ontario was given the right to deal with divorces, and then having that right there was no trouble afterward as to what they would do with the ancillary powers, because they had those ancillary powers by virtue of the federal power given to the courts or by virtue of the power they have under the provincial right of common law which corresponds to our Civil Code. But there is no conflict here between the common law material and the civil law of Quebec.

The Co-CHAIRMAN (*Senator Roebuck*): May I ask this question, doctor? The Napoleonic Code, when it was drawn up at first, of course, applied to France. Did it apply to New France prior to the Revolution?

Dr. OLLIVIER: No, it did not apply to New France because the Napoleonic Code came into force in 1804.

Mr. McCLEAVE: Would it not be better to call it the Civil Code of Quebec?

Dr. OLLIVIER: It is the Civil Code of Quebec. It is not the Napoleonic Code, which was simply used as a model. Our code was based more on the ordinances that had been registered and had force of law in French Canada.

Mr. MANDZIUK: Does that not apply to the laws which existed before the B.N.A. Act?

Dr. OLLIVIER: If I understand your question well, we had laws before 1867, of course.

Mr. MANDZIUK: Yes.

Dr. OLLIVIER: And we have those powers. The powers of the Province of Quebec in matter of property and civil rights had been recognized in the Quebec Act of 1774, and we were exercising those civil rights without any difficulty then because there was no central power.

Mr. MANDZIUK: Where is it recognized in the B.N.A. Act in 1867?

Dr. OLLIVIER: In section 129, I believe.

Mr. McCLEAVE: Section 129.

Dr. OLLIVIER: Section 129 says that whatever laws were in force at the time of Confederation continue in force until they are repealed or amended, but then they can only be repealed or amended by the proper authority.

Mr. MANDZIUK: Thank you, doctor.

Dr. OLLIVIER: To continue: By virtue of section 129 of the Constitution, the laws existing at the time of Confederation were continued in force after the 1st of July, 1867, subject "to be repealed, abolished or altered by the Parliament of Canada, or by the Legislature of the respective Province according to the Authority of the Parliament or of that Legislature under this Act."

This article 185 existed, as it is now at the time of Confederation. It is a fundamental principle enunciated by the Civil Code giving expression to the doctrine of ancient French law as well as of canon law. It has not been repealed or amended by enactment of Parliament. Each divorce bill has been an exception to the general rule, which is that in Quebec "marriage can only be dissolved by the natural death of one of the parties; while both live, it is indissoluble."

So much so that even absence—it does not matter how lengthy it is—does not alter the situation. Article 108 reads:

108. The presumptions of death arising from absence, whatever be its duration, do not apply in the case of marriage; the husband or wife of the absentee cannot marry again without producing positive proof of the death of such absentee.

It might be pertinent at this point to look at section 240 of the Criminal Code, dealing with the offences against conjugal rights:

(2) No person commits bigamy by going through a form of marriage if

(a) that person in good faith and on reasonable grounds believes that his spouse is dead,

(b) the spouse of that person has been continuously absent from him for seven years immediately preceding the time when he goes through the form of marriage, unless he knew that his spouse was alive at any time during those seven years,

I do not need to read any further. There is a distinction in this case between the Criminal Code and the Civil Code. In Quebec, according to the code you cannot presume that a person is dead even if that person has been away for 20 years.

Mr. PETERS: Does the Criminal Code override that?

Dr. OLLIVIER: In the case of bigamy a person cannot be convicted if he or she in good faith has reasonable ground to believe the other spouse is dead.

Mr. FAIRWEATHER: In the common law provinces you can petition for a declaration.

Mr. McCLEAVE: These, of course, are legislative presumptions.

Dr. OLLIVIER: To continue: This also is still the law in the Province of Quebec, and I still say that the act of 1963 entitled "An Act authorizing the Senate of Canada to dissolve or Annul Marriage" has not created a divorce court.

Senator Choquette stated in the Senate on March 4, "It is my opinion that the Senate Committee on Divorce has been constituted and recognized as a court for some 12 or 13 years." Here I respectfully beg to disagree, for neither the amendment to the Criminal Code defining "judicial proceeding," nor the act of 1963 for Dissolution and Annulment of Marriages has created a court. It is the Senate of Canada which declares that a marriage is dissolved or annulled after the officer appointed by the Senate has so recommended. The fact that the officer is a judge of the Exchequer Court does not make the committee part of that or any other court.

I am inclined to agree with Senator Aseltine who said, as reported on March 8, "So I have come to the conclusion that the Senate Divorce Committee is not a court. The proceedings of that committee are and have been judicial proceedings, made so by this section on Interpretation which I have read from the Criminal Code.

As I have said before, if there is to be an extension of the grounds of divorce in the courts of the land, this extension should, for the sake of uniformity apply as well to parliamentary divorce and the reasons for such extension are just as valid in the case of divorces granted by the Senate."

Of course, even if you could not make it apply you still, to put it in another way, could apply it to the Senate. The Senate could do so by virtue of its authority.

As previously noted, the act passed by our Parliament in 1963 limits the Senate to the causes expressed in the English act of 1870.

Adultery, of course, is not the worst of offences; cruelty in many instances would appear to be a much better reason for granting a divorce. Adultery is not a crime. Some people say it is only a pastime.

As once stated by Lord Birkenhead in the Lords in 1920, "I am concerned to make this point, by which I will stand or fall, that the moral and spiritual sides of marriage are incomparably more important than the physical side. . ." Or as A. P. Herbert once said: "Is ten minutes of adultery worse than three years of desertion or a lifetime of cruelty?"

In the Province of Quebec, before 1954, articles 187 and 188 under the heading "Causes of separation from bed and board" were as follows:

"187. A husband may demand the separation on the ground of his wife's adultery".

But listen now to 188:

"A wife may demand the separation on the ground of her husband's adultery, if he keep his concubine in their common habitation."

This was adding insult to injury and was considered a form of cruelty. This last article was replaced, on the 16th of December, 1954, by the following:

"188. A wife may demand the separation on the ground of her husband's adultery."

Therefore, both parties are equal now. This to me appears to be the fact of a province dealing with divorce, for separation as to bed and board is divorce *a mensa et thoro* and as only Parliament can deal with marriage and divorce, one may very well question the validity of such an amendment. I will leave the answer to Senator Pouliot.

One of the worse consequences of having only adultery as the only reason for divorce is that when divorce should really be granted for extreme cruelty or

for some other valid reason, then adultery sometimes has to be invented or simulated, which leads to perjury, fabrication of evidence, collusion, connivance or conspiracy.

We have had quite a few cases of divorce in the Senate and the House in years gone by where such crimes have been committed. Unfortunately, it has been impossible either to trace them all, or to do anything about them, except perhaps refuse the grant of a divorce. In the Senate Debates of March 4, Senator Choquette has referred to one of them which brought a subsequent amendment to the Criminal Code, but how many others took place which were never questioned or even suspected? Mr. McCleave will remember the number of cases that were reopened in the House of Commons.

The bills introduced in the Senate and in the House this year enlarging the grounds for divorce have already been enumerated and discussed; and reference has also been made to similar bills introduced in years gone by. There is no need here to duplicate the work already done. My only suggestion, if I may respectfully make one, would be that a list be made of all the grounds advocated in those bills, that a not too large selection of those be made by voting on each one separately and then that the selection made be included in the report of the committee as a guide line to the government if it should be decided to introduce a bill following such report.

I have already referred to what should be a rather restricted list. In the United States there are more than forty grounds which have received the approbation of the legislators. I am convinced that we should not in Canada, or in this committee, open such a Pandora's box.

Before closing my remarks, I would like to take a few more moments of your time to refer to a very interesting article in the *Canadian Bar Journal* of April 1966. The article is by Mr. Douglas F. Fitch of Calgary and the title is "As Grounds for Divorce let's abolish Matrimonial Offences". It constitutes a new approach and is well worth reading. The title explains the purpose of the plea that is made and I have no intention even of giving a summary of the contents thereof. The article concludes with a draft section, the object of which is to eliminate the present abuses that arise in Canada from divorce being granted upon proof of a single act of adultery and to substitute therefor a divorce granted on account of the permanent breakdown of the marriage. I would like, if I am allowed to do so, for the convenience of the committee, to place on record the conclusions of the article:

DRAFT SECTION FOR MATRIMONIAL CAUSES ACT

1. (1) "Extreme cruelty" means a course of conduct towards the petitioner, or the petitioner and one or more children of the petitioner or of the defendant, of such a character as to endanger life, limb or health, bodily or mental, or to create a reasonable apprehension thereof.

(2) A court having jurisdiction to grant a divorce shall, upon a petition by one of the parties to the marriage, decree dissolution whenever the marriage has permanently broken down.

(3) Permanent breakdown of the marriage shall be proven by evidence that either:

(a) the petitioner and defendant have separated and thereafter have lived separately and apart for a continuous period (except for a period of cohabitation of not more than two months that has reconciliation as a prime purpose) of not less than three years immediately preceding the date of the granting of the decree, and there are no reasonable grounds for believing that there will be a reconciliation, or

(b) (i) the petitioner and the defendant have separated and thereafter have lived separately and apart for a continuous period of not less

than one year immediately preceding the date of the granting of the decree, and there are no reasonable grounds for believing that there will be a reconciliation, and (ii) the defendant has committed adultery or has, during a period of not less than one year, habitually been guilty of extreme cruelty."

I may perhaps now state my own conclusions which in a general manner are as follows.

1. Grounds for divorce should be extended and rationalized.
2. There should be a strict limitation to that extension.
3. The grounds for divorce should be uniform throughout Canada, that is, the same for parliamentary or non-parliamentary divorce.
4. The time has not arrived yet for establishing a divorce court in the Province of Quebec. I have no opinions about Newfoundland.

Here I am in disagreement with Mr. Justice Walsh. I think that in Quebec marriage is still indissoluble and that that province is not yet ready, for a divorce court. So we should proceed by degrees and later on establish divorce proceedings there. But that is a matter of opinion.

I would like to end this memorandum with a last quotation, also from the article by Mr. Fitch, a quotation that echoes the sentiments often expressed in the Senate by Senator Roebuck, sentiments which are also mine and are those, I imagine, of this committee.

I wish to dispel any assumption that I intend to make a plea for "easy divorce". I am opposed to "easy divorce". I believe that the institution of marriage is one of the most important to our society, and I oppose any change that will awaken it. My plea is that we rationalize, not liberalize, our divorce law. And if my proposal would reduce the number of divorces I would not for that reason be unhappy. If the number of people who get divorced and should not were balanced against the number of persons who don't get divorced but should, it might well mean the overall divorce rate would be reduced, and the purpose of my proposal is to bring the rate closer to what it should be.

The Co-CHAIRMAN (*Senator Roebuck*): Dr. Ollivier is now ready to answer questions, I presume.

Mr. AIKEN: At the last meeting the question of the breakdown of marriages as a new approach to divorce, which Dr. Ollivier has raised again now, was raised by Mr. Wahn, and I indicated some support for that view as well. I take it from your paper, Dr. Ollivier, that you at least considered this approach worthy of consideration by the committee.

Dr. OLLIVIER: Yes, otherwise I would not have brought it in. I have read the article he referred to. I have not read Mr. Wahn's testimony. He probably got his information from the same source as I did. I think it is a new idea that is worth-while suggesting to the committee; it might be considered that in spite of divorce being granted for absence or cruelty, the reason might be that the parties could not be brought together again for one reason or another. The main consideration is that this marriage is finished; it is no use trying to go on; you cannot bring the parties together. That would be the main reason for a divorce. Of course it is still tied to the other reasons.

Mr. AIKEN: I read that whole article and I must admit I was impressed with the possibility. It is a new approach which I think we should welcome.

Mr. McCLEAVE: At a meeting of the Nova Scotia Barristers Society we made the point that it should be the failure of the marriage, and we listed the grounds for the failure. I think society is adopting a more practical approach in this matter. Marriage may not fail simply because of adultery.

Senator CROLL: Dr. Ollivier, I don't understand the purpose of this. As I recall it, time and again during the course of our hearings in the Senate committee we were not sure whether the proof was absolute or not, but we came to the conclusion that there was no marriage left. On those grounds we often granted a divorce. We rationalized in that fashion.

Dr. OLLIVIER: But you were still seeking proof of adultery.

Senator CROLL: We were seeking proof of adultery, but what do you suggest we should have proof of now in rationalizing?

Dr. OLLIVIER: In rationalizing—that suggestion is not mine. I am suggesting what I have suggested because it is a new approach. It could be that the parties could not be brought together again; the woman is not ready to forgive the adultery, or she has been treated so cruelly that she would not want to live with the husband again under any circumstances, and so the marriage has broken down. For whatever the reason, the marriage is ended. You might have both reasons at the same time.

Senator CROLL: Suppose you had neither; suppose a woman just came in and said the marriage has broken down and I refuse to live with him.

Dr. OLLIVIER: She would have to have a serious reason. If she said it was broken down simply because her husband reads the newspaper at breakfast instead of looking at her—it would have to be something more than that.

Senator FERGUSON: It would have to be something more than incompatibility.

Dr. OLLIVIER: I would not want it to be suggested that somebody could come before the court and say, without any other reason, that the marriage had broken down and therefore wanted a divorce.

Senator CROLL: What I gather you are saying in effect is that there could be an accumulation of offences.

Dr. OLLIVIER: There could be. Mind you, I am only quoting.

Senator CROLL: It must be an accumulation of offences. That is what I gather from what you say, and if that be so, in what respect do we liberalize? As it is we have an offence, and it is quite true that at times it is evaded, but in what respect do we liberalize if we depart from this?

Dr. OLLIVIER: When I say "liberalize," if you brought only two or three reasons for divorce—for example, cruelty, absence for so many years, or because one of the parties is in an asylum—if you limit it to things like that, then you are rationalizing. If you follow the examples in the United States where there are 40 different causes, then I say you are not rationalizing but you are liberalizing.

Senator CROLL: Nobody thought in those terms. By the way, in Nova Scotia is it extreme cruelty?

Mr. McCLEAVE: The definition quoted here is often used down there.

Senator CROLL: I noticed in the press reports that the term was cruelty.

Mr. McCLEAVE: It is either extreme cruelty or gross cruelty.

Mr. MACEWAN: I asked Mr. Hopkins about this at the last committee meeting and he did not know.

Senator CROLL: I looked it up and it said cruelty—without "extreme" or "gross".

Mr. AIKEN: I think Mr. Hopkins undertook to get a number of definitions of cruelty for us.

Mr. PETERS: What are the legal and moral arguments against divorce by consent? We have noticed in the past that the Senate, and I presume the courts, have always paid a great deal more attention to a divorce that was apparently contested than to an uncontested divorce.

Dr. OLLIVIER: I suppose the legal contention is that marriage is not purely a contract. If it was only a contract it could be dissolved by consent. But here you are dealing with legislative action when granting a divorce, and you cannot break up this particular type of contract. You can break up an ordinary contract by consent, but marriage is not an ordinary contract.

Mr. PETERS: Is this a carry-over from our ecclesiastical law?

Dr. OLLIVIER: It is possibly so, at least from yours and mine.

Mr. PETERS: Not mine, really. I do not belong to the Jewish faith where you protest that you are divorced on a number of occasions and it is automatically granted. Why is the assumption so strong that the Province of Quebec will not avail itself of the federal legislation which enables them to set up a provincial divorce court?

Dr. OLLIVIER: Because, I believe, of the proportion of the population that is Catholic. The law is still that marriage is indissoluble and therefore as the people cling to the Civil Code, and according to the Code which has not been changed, marriage is still indissoluble. Therefore it is against their religion.

Senator ASELTINE: How do you account for the fact that at least one-third of the divorces heard in the Senate in the past have been by people who have that belief?

Dr. OLLIVIER: I suppose the answer to that question is very easy. Of the 85 or 90 per cent Catholics in the Province of Quebec there are probably quite a number who do not practise.

Mr. PETERS: Is it not true that states such as Italy, France and Spain, and a number of other countries have much more liberal divorce laws than you have?

Senator CROLL: No, they don't have any divorce laws at all.

Mr. PETERS: It is a legal term, but it amounts to the same thing. You can become separated legally there and you can remarry.

Dr. OLLIVIER: There are a number of people in Italy who would like a divorce but cannot get it. Some succeed in getting an annulment, but not everybody. When you talk about annulments it is more rare than divorce.

Senator FLYNN: On the same matter I was inclined some time ago to agree with your conclusion that the time was not ripe for establishing a divorce court in Quebec, but there are many ways of doing this. I understand that where a divorce court exists in other provinces it is because the provincial legislature has granted authority to a court created by the legislature to hear divorce cases. Is not that the situation?

Dr. OLLIVIER: Yes. While the province has provided for the procedure—

Senator FLYNN: And given the jurisdiction.

Dr. OLLIVIER: —I would rather we have a real court in Quebec rather than send it to the Exchequer Court. I think that is just hypocrisy. If you are going to have a court, have the Superior Court hear divorces.

Senator FLYNN: Where would you see any problems with giving jurisdiction all across Canada to the Exchequer Court, even if you were to appoint a justice of the Superior Court in Quebec or the Supreme Court?

Dr. OLLIVIER: Do you mean a justice of the Exchequer Court would sit in Montreal or Quebec? That would not make much difference. If you sent it to the Exchequer Court here you would not have a court in Quebec, but still a court outside Quebec, except that you allowed the justice to go and sit in Montreal.

Senator FLYNN: The justice could travel, on circuit. There is a second point I want to put to Dr. Ollivier, if I may, Mr. Chairman. It is on page 9 of his brief, where he suggests that separation as to bed and board is divorce *a mensa et thoro* and, therefore, any provincial legislation in this matter might be *ultra vires*. I might be inclined to accept this conclusion, but I think everybody

realizes that if we were to accept this conclusion it would make the solution of the problem much more difficult. Would Dr. Ollivier agree that if we were to adopt a law respecting divorce and if we were to define divorce as having the strict meaning of final and complete and irrevocable dissolution of marriage, we would not avoid this difficulty?

Dr. OLLIVIER: If you pass such a law you might include in it a provision like the decision rendered by the Supreme Court in Washington lately, that that legislation would not have a retroactive effect. Otherwise, if you applied it to all the persons separated as to bed and board in the last 50 years it would certainly create a lot of trouble.

Senator FLYNN: It seems to me that if we were to accept this definition of divorce which is suggested, we would be complicating the problem immensely.

Mr. MANDZIUK: Mr. Chairman, I feel the committee should be grateful to the steering committee for having given Mr. Hopkins and Dr. Ollivier an opportunity to give us the groundwork of what the law is. I personally feel that we should not delve too much as a committee or ourselves individually as to how far we are prepared to liberalize the grounds for divorce, because this is one matter where we have to follow public opinion. I respect that Quebec wants to retain the law as is. We are going to hear briefs from various agencies from across the land. I would rather meet these representations that are going to be made with an open mind. That is, I have my opinions and I know every member of the committee has his or her opinions, but are we not trying to jump before we come to the stile? Let us approach it with an open mind. When we hear those representations we will question them only with a view to eliciting more information as to how strongly they feel about this, because I do not think we can legislate or be ahead of public opinion, if public opinion is not ready, as I think one gentleman has mentioned it is not ready in Quebec, to have courts. Let it be so. But I agree with the point in particular that what recommendations we make should be applicable not only to divorce courts in respect of the provinces, but these grounds, if they are liberalized or extended, should apply to the Senate divorce committee as well. I agree it is not a court, doctor. Supposing we just leave it at that for the time being and are prepared, as a jury, to hear what the country has to say about it—and I am sure the country will say plenty.

Dr. OLLIVIER: I have to make a little correction here, as to the Senate and what I say about parliamentary divorce. The Senate committee can deal with it as it wishes. It is rather a guideline to your committee than anything else.

The Co-CHAIRMAN (*Senator Roebuck*): May I say here that, of course, we all agree with you, Mr. Mandziuk, that we should keep an open mind, and when we have heard all the evidence that is to be presented to us it will be time enough to come to conclusions. I might also add that nobody is to be bound by the discussions that take place in the meantime, prior to the time for decisions.

Senator CROLL: Doctor, I am rather on a matter you did not cover. Can you take a minute or so and give us the legal position of children in the Province of Quebec, give us the procedure from the beginning? They can make an application in the court?

Dr. OLLIVIER: Up to now the Senate committee has never dealt with, except in the very much earlier cases, the question of the children. What has happened is that the aggrieved party, the party who wants the maintenance or anything, makes an application to the court and takes an action to the courts, as if it were an entirely provincial matter. Seeing the Senate has not dealt with it, or Parliament previously when they had divorce acts did not deal with it, the woman would ask for alimony for the care of the children before the courts. What happened very often was this, the men who were paying alimony to their

wives would come here to get a divorce so that they would not have to continue to pay alimony. That is what happened very often, because then the courts would say, "Why should this man pay you alimony, since you are completely separated? You are not husband and wife, and are in the same position as if you had never been married." There has been a conflict of decisions there.

Senator CROLL: The wife in some respects enters into it with her eyes open; she can see what is happening. An order is made for maintenance, \$10, \$20, \$15 a week, there is an infant child, a divorce is granted. What are the child's rights? How do we protect the child? The husband says, "I am not interested any more."

Dr. OLLIVIER: I think the child is in a better position than the wife, because although it is as though the marriage has never taken place the child is still the child of the father, and the father is still obliged to feed and clothe him and provide the money for that. It is what we call a putative marriage, that although the marriage is dissolved the courts in Quebec, as far as the children are concerned, will in every case decide the father is responsible for the upbringing, and if sometimes a woman does not succeed in getting alimony she will succeed in getting money for the children.

Senator CROLL: As maintenance?

Dr. OLLIVIER: Yes, as maintenance. That is in the Superior Court.

Senator CROLL: So we have no worry on that ground at all?

Dr. OLLIVIER: Not for the children, but you might have a worry for the wife.

Senator CROLL: Let us deal with the children first.

Mr. PETERS: Mr. Chairman, on a point of order, is it not true in the case of children that this is really nothing to do with the act taken in divorce? This has to be a separate court action that can take place either before or after the dissolution; it is an overt act?

Dr. OLLIVIER: In the divorce cases here, in some of those cases Parliament itself has provided for the maintenance of the wife and children.

The CHAIRMAN: But not in recent times?

Dr. OLLIVIER: But not in recent times.

Senator FERGUSON: I found those cases very interesting, where Parliament did take this upon themselves, Dr. Ollivier. In your searching through the cases, could you tell us when Parliament dropped doing this, because in our divorce committee we have had the idea, and it has been expounded a number of times, that we had no authority to do that.

Dr. OLLIVIER: Yes, but take this case of Mrs. Campbell with which I was dealing. The act provides:

3. The said Robert Campbell shall pay annually to his said wife for her support and maintenance the sum of five hundred dollars during her separation as aforesaid, in two equal instalments, payable half-yearly, on the last days of May and November in each year.

4. The said Eliza Maria Campbell may, after the commencement of this Act, have the custody and care of one of the children of the said marriage, namely, Francis Wililam Campbell, during her separation as aforesaid.

5. The said Robert Campbell shall pay annually to his wife, the said Eliza Maria Campbell, the sum of two hundred dollars for the support and education of the said child, while he remains in her custody during the separation as aforesaid. The said sum of two hundred dollars shall be

payable in equal half-yearly instalments of one hundred dollars, on the last day of May and November in every year during the minority of the said child.

Senator CROLL: Let us talk just about the position of the wife for a moment, Doctor. She is receiving, say, \$30, \$40 or \$50 a month, and then she is divorced. Do you say that these payments will not continue?

Dr. OLLIVIER: What I say is this, that sometimes a man and a woman are separated as to bed and board, and the judge in Quebec has declared that the wife should receive so much money. Then the husband comes here and obtains a divorce. In that case the money paid by the husband for the support of his wife while they were separated as to bed and board does not need to be paid by reason of the fact that he has obtained a divorce.

Senator CROLL: Yes, but the wife knows that at the time she comes here.

Dr. OLLIVIER: Yes.

Mr. HONEY: May I ask you, Dr. Ollivier, in respect of the last question that the senator put to you, this question: If a wife from Quebec comes here for a divorce and is, prior to that time, receiving alimony under a judgment of the Superior Court of Quebec, is she denied alimony or maintenance, if she goes back to the Quebec court, because of the dissolution of the marriage or because there is evidence of her misconduct which supported the dissolution?

Dr. OLLIVIER: No, it is simply on account of the dissolution of the bond. I think that Senator Flynn has had more practice in this line than I have, and—

The Co-CHAIRMAN (*Senator Roebuck*): Gentlemen, it is 5 o'clock—

Mr. MANDZIUK: I have a supplementary question to ask, Mr. Chairman. Does the Civil Code of Quebec recognize a divorce granted by Parliament?

Dr. OLLIVIER: It does not recognize it formally.

Mr. MANDZIUK: If it does—

Dr. OLLIVIER: It does in a way, because once you grant a divorce here the woman is worse off, because she cannot ask for alimony.

Mr. MANDZIUK: If Quebec does not recognize the divorce why should not the protection the wife gets under the Code remain with her and the children?

Dr. Ollivier: For the reason that divorce is not granted here by virtue of the general law. It is granted by virtue of the jurisdiction of Parliament, and each case is an exception. It has to be recognized in Quebec otherwise there would be chaos.

Mr. AIKEN: May I ask a supplementary question, Mr. Chairman?

The Co-CHAIRMAN (*Senator Roebuck*): Yes.

Mr. AIKEN: We seem to have been skating around what I take to be your theory in the first part of your paper, namely, that there may be a dual authority in respect of maintenance, alimony and custody of children. There is, first, a separate right which belongs to the provinces and, secondly, a right ancillary to marriage and divorce. Perhaps we have not, as a federal authority gone into the question of ancillary rights; that we have gingerly walked around them. Perhaps the time has come to reconsider this.

Dr. OLLIVIER: I suppose the answer to that is if there is a wrong somewhere there should be a remedy—*ubi jus ibi remedium*. If a person comes here and gets a divorce and all Parliament says is: "Here, you are divorced", and does nothing, then surely there must be a remedy somewhere for that person in respect of maintenance, alimony, the care of children and all of those things. If we refuse to deal with that in Ottawa then that right, not having been exercised by us, is exercised by the provinces who occupy the field that Parliament has refused to occupy.

The Co-CHAIRMAN (*Senator Roebuck*): Mr. McCleave has a question.

Mr. McCLEAVE: This is in the line of the question of the so-called ancillary rights. I ask the witness if he will agree with me that because this is a field in which many poor people are involved, naturally, it might be a field that is dangerous to step into because the courts might hold that our view on ancillary rights was wrong. For that question to be determined it should really be taken to the Supreme Court of Canada. Does the witness not agree with this?

Dr. OLLIVIER: Yes, I agree.

The Co-CHAIRMAN (*Senator Roebuck*): When the doctor answers the question, that will terminate the meeting.

Mr. McCLEAVE: He has answered. He agrees with me.

Senator CROLL: May I make one observation, Mr. Chairman? In this day and age how can we deal with divorce in a vacuum. It seems to me that we have not dealt with divorce in this country for 99 years, and then suddenly we have an opportunity of dealing with it. This is a new condition—a new aspect. How can we possibly, without knowing where we are going, deal with divorce and say: "This is it"? We may have enlarged the grounds for divorce, or decided to do other things, but the country will have no confidence in that, and we will not have done our job. Surely, somebody must present some new line on this subject as it affects women, and as it affects children, and those aspects are as important as the divorce itself. I think we have to get some evidence before us as to these questions.

Senator ASELTINE: That applies only to Quebec. Other provinces have divorce courts.

Senator CROLL: Yes, I know, but we have to have a law that is applicable all over the country—a law that appeals to Quebec and Newfoundland, and which they will accept.

Dr. OLLIVIER: What strikes me, Senator, is the fact that in the early days when Parliament did deal with those matters such as maintenance there was never any difficulty. It was never contested, and it never went to the Supreme Court.

Senator CROLL: What you are saying is that we just stopped.

Dr. OLLIVIER: Yes, Parliament just stopped, after doing it for about 30 years.

The Co-CHAIRMAN (*Senator Roebuck*): The field is wide open—

Mr. McCLEAVE: Cannot we hear from somebody from the Montreal Bar, a lawyer who has not only handled these cases in Ottawa but has handled them in respect of maintenance, property rights and the rights of children before the Quebec courts? Could not we ask one of those gentlemen to appear before us?

Dr. OLLIVIER: I do not know whether that will be conclusive or not. You could present a bill respecting divorce containing all of those conditions and then, as you have the right to do, by virtue of the Supreme Court Act, refer that bill to the Supreme Court for a decision as to its validity.

Mr. PETERS: Do we not have the right as a committee to make use of that section of the Supreme Court Act? Cannot we refer a hypothetical case to the Supreme Court of Canada for a decision as to the validity of a proposition we wish to make? I know this has been done on a limited basis by governments in the past.

Dr. OLLIVIER: That cannot be done by the committee itself. It can be done by the Senate or the House of Commons.

Senator CROLL: The Senate can do it. The Standing Committee on Divorce of the Senate can give a divorce on any ground with any conditions.

Mr. PETERS: I am asking about what is actually a reference to the Supreme Court of Canada as to the legality of our jurisdiction in respect of passing federal divorce legislation which would provide for maintenance of children and custody of children, and alimony for the woman. As the senator has said, when we get into the Province of Quebec we have done worse things, until the last two or three years. We have taken away from the wife any money she may have had before because of the peculiar fact that a woman in the Province of Quebec was not entitled to hold money in her own right. The *Terry* case was a good example of that. A million dollars was involved, and a parliamentary divorce would have eliminated the wife's having a share in that money. Is it not possible for us to ask the House or the Senate to have this question referred to the Supreme Court of Canada so that we may obtain a judicial decision—

Dr. OLLIVIER: The only way to do it is to propose a bill.

Senator FLYNN: If you do that you will sidetrack the whole matter. You will not solve a thing.

The Co-CHAIRMAN (*Senator Roebuck*): May I have the floor for a minute in order to answer that question? If you read the Judicature Act you will see that the only authority for the reference of questions to the Supreme Court of Canada is in the Government, and not in the House of Commons or the Senate.

Dr. OLLIVIER: But, senator, is there not a clause that says you may refer a bill?

The Co-CHAIRMAN (*Senator Roebuck*): The Government may.

Mr. PETERS: Is it done by way of joint address?

The Co-CHAIRMAN (*Senator Roebuck*): No, it is referred by the Government to the Supreme Court.

Senator CROLL: The Senate referred the margarine bill to the Supreme Court, not to the Government.

Mr. PETERS: Could I suggest that the steering committee pursue this matter of the reference, and if possible to get this kind of reference before the Supreme Court, because it seems to me that our deliberations would be much easier if we were able to come to that fairly simple conclusion.

Senator CROLL: Oh, that would be two years away. The reference would take two years before you got through with it.

Mr. PETERS: What I had in mind was that if it were considered and became the subject of a reference we could go along with the rest of the act in the meantime. I do not want to see anything held up by protracted judicial proceeding.

The Co-CHAIRMAN (*Senator Roebuck*): It is now past five o'clock, and before we adjourn I would like to hear from my co-chairman.

The Co-CHAIRMAN (*Mr. Cameron*): On behalf of the committee, I think I should express our appreciation to Dr. Ollivier for his learned, most interesting, clear and comprehensive statement on the subject matter of divorce. I know that I have learned a great deal from it, and I am sure that we have all benefited very much from it. I think we should thank Dr. Ollivier for the perspiration that went toward the inspiration of what he has put before this committee this afternoon.

The Co-CHAIRMAN (*Senator Roebuck*): That expresses the thanks of us all, Dr. Ollivier. This meeting is adjourned.

The committee adjourned.



First Session—Twenty-seventh Parliament
1966

PROCEEDINGS OF
THE SPECIAL JOINT COMMITTEE OF THE SENATE
AND HOUSE OF COMMONS ON
DIVORCE

No. 3

TUESDAY, OCTOBER 18, 1966

Joint Chairmen

The Honourable A. W. Roebuck

LIBRARY

and

Mr. A. J. P. Cameron, M.P.

★ NOV 16 1966 ★
UNIVERSITY OF TORONTO

WITNESSES:

Department of Justice: E. A. Driedger, Deputy Minister and Deputy Attorney General. *Seventh-Day Adventist Church in Canada:* Rev. Darren L. Michael, Barrister, Secretary for public affairs, National Executive Committee.

ROGER DUHAMEL, F.R.S.C.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1966

MEMBERS OF THE
SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS
ON DIVORCE

FOR THE SENATE

Hon. A. W. Roebuck, Joint Chairman

The Honourable Senators

Aseltine	Denis
Baird	Fergusson
Belisle	Flynn
Burchill	Gershaw
Connolly (<i>Halifax North</i>)	Haig
Croll	Roebuck—(12).

FOR THE HOUSE OF COMMONS

Mr. A. J. P. Cameron (*High Park*), Joint Chairman

Members of the House of Commons

Aiken	Langlois (<i>Mégantic</i>)
Baldwin	MacEwan
Brewin	Mandziuk
Cameron (<i>High Park</i>)	McCleave
Cantin	McQuaid
Choquette	Otto
Chrétien	Peters
Fairweather	Ryan
Forest	Stanbury
Goyer	Trudeau
Honey	Wahn
Laflamme	Woolliams—(24).

(Quorum 10)

ORDERS OF REFERENCE

Extracts from the Votes and Proceedings of the House of Commons:
MARCH 15, 1966:

"On motion of Mr. McIlraith, seconded by Mr. Hellyer, it was resolved—That a Special Joint Committee of the Senate and the House of Commons be appointed to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either House;

That 24 Members of the House of Commons, to be designated by the House at a later date, be members of the Special Joint Committee, and that Standing Order 67(1) of the House of Commons be suspended in relation thereto;

That the Committee have power to engage the services of such technical, clerical and other personnel as may be necessary for the purpose of the inquiry;

That the Committee have the power to send for persons, papers and records, to examine witnesses, to report from time to time, and to print such papers and evidence from day to day as may be ordered by the Committee, and that Standing Order 66 be suspended in relation thereto; and

That a Message be sent to the Senate requesting Their Honours to unite with this House for the above purpose, and to select, if the Senate deems it so advisable some of its Members to act on the proposed Special Joint Committee."

"By unanimous consent, on motion of Mr. McIlraith, seconded by Mr. Hellyer, it was ordered—That the order of the House of Monday, February 21, 1966 referring the subject-matter of the following bills to the Standing Committee on Justice and Legal Affairs, namely:—

Bill C-16, An Act to provide in Canada for the Dissolution of Marriage (Additional Grounds for Divorce).

Bill C-19, An Act to provide in Canada for the Dissolution and the Annulment of Marriage.

Bill C-41, An Act to amend the British North America Acts, 1867 to 1965, (Provincial Marriage and Divorce Laws).

Bill C-44, An Act to provide in Canada for the Dissolution of Marriage.

Bill C-55, An Act to provide in Canada for the Dissolution of Marriage.

Bill C-58, An Act respecting Marriage and Divorce.

Bill C-79, An Act to amend the Dissolution and Annulment of Marriages Act (Additional Grounds for Divorce).

be discharged, and that the subject-matter of the same bill be referred to the Joint Committee of the Senate and the House of Commons on Divorce."
March 16, 1966:

"By unanimous consent, on motion of Mr. Stewart, seconded by Mr. Byrne, it was ordered—That the subject-matter of Bill C-133, An Act to extend the grounds upon which courts now have jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief, be referred to the Special Joint Committee on Divorce."

"By unanimous consent, on motion of Mr. Stewart, seconded by Mr. Byrne, it was ordered—That the subject-matter of Notice of Motion No. 11 be referred to the Special Joint Committee on Divorce."

March 22, 1966:

"On motion of Mr. Pilon, seconded by Mr. McNulty, it was ordered—That a Message be sent to the Senate to acquaint Their Honours that this House will unite with them in the formation of a Joint Committee of both Houses to inquire into and report upon divorce in Canada, and that the Members to serve on the said Committee, on the part of this House, will be as follows: Messrs. Aiken, Baldwin, Brewin, Cameron (*High Park*), Cantin, Choquette, Chrétien, Fairweather, Forest, Goyer, Honey, Laflamme, Langlois (*Mégantic*), MacEwan, Mandziuk, McCleave, McQuaid, Otto, Peters, Ryan, Stanbury, Trudeau, Wahn and Woolliams."

LÉON-J. RAYMOND,
Clerk of the House of Commons.

Extracts from the Minutes of the Proceedings of the Senate:

March 23, 1966:

"Pursuant to the Order of the Day, the Senate proceeded to the consideration of the Message from the House of Commons requesting the appointment of a Special Joint Committee of the Senate and House of Commons on Divorce.

The Honourable Senator Connolly, P.C., moved, seconded by the Honourable Senator Roebuck:

That the Senate do unite with the House of Commons in the appointment of a Special Joint Committee of both Houses of Parliament to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either House;

That twelve Members of the Senate, to be designated at a later date, act on behalf of the Senate as members of the said Special Joint Committee;

That the Committee have power to engage the services of such technical, clerical and other personnel as may be necessary for the purpose of the inquiry;

That the Committee have the power to send for persons, papers and records, to examine witnesses, to report from time to time, and to print such papers and evidence from day to day as may be ordered by the Committee, and to sit during sittings and adjournments of the Senate; and

That a Message be sent to the House of Commons to inform that House accordingly.

After debate, and—

The question being put on the motion, it was—

Resolved in the affirmative."

March 29, 1966:

"With leave of the Senate,

The Honourable Senator Beaubien (*Provencher*) moved, seconded by the Honourable Senator Inman:

That the following Senators be appointed to act on behalf of the Senate on the Special Joint Committee of the Senate and House of Commons to inquire

into and report upon divorce in Canada and the social and legal problems relating thereto, namely, the Honourable Senators Aseltine, Baird, Belisle, Bourget, Burchill, Connolly (*Halifax North*), Croll, Fergusson, Flynn, Gershaw, Haig, and Roebuck; and

That a Message be sent to the House of Commons to inform that House accordingly.

The question being put on the motion, it was—

Resolved in the affirmative.”

May 10, 1966:

“Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Roebuck, seconded by the Honourable Senator Croll, for the second reading of the Bill S-19, intituled: “An Act to extend the grounds upon which courts now having jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief”.

The question being put on the motion—

In amendment, the Honourable Senator Connolly, P.C., moved, seconded by the Honourable Senator Hugessen, that the Bill be not now read the second time, but that the subject-matter be referred to the Special Joint Committee on Divorce.

After debate, and—

The question being put on the motion, it was—

Resolved in the affirmative.”

J. F. MacNEILL,
Clerk of the Senate.

MINUTES OF PROCEEDINGS

TUESDAY, October 18, 1966

Pursuant to adjournment and notice the Special Joint Committee of the Senate and the House of Commons on Divorce met this day at 3.30 p.m.

Present: For the Senate: The Hon. Senators Roebuck (*Joint Chairman*), Baird, Fergusson and Haig.

For the House of Commons: Messrs. Cameron (*High Park*) (*Joint Chairman*), Aiken, Baldwin, Brewin, Cantin, Fairweather, Goyer, Honey, Mandziuk, McCleave, Peters, Ryan and Stanbury.

The following witnesses were heard:

Department of Justice: E. A. Driedger, Deputy Minister;

Seventh-Day Adventist Church in Canada: Rev. Darren L.

Michael, Barrister, Secretary for public affairs, National Executive Committee.

At 5.55 p.m. the Committee adjourned to the call of the Joint Chairmen.

Attest.

Patrick J. Savoie,
Clerk of the Committee.

THE SENATE
SPECIAL JOINT COMMITTEE OF THE SENATE AND
HOUSE OF COMMONS ON DIVORCE
EVIDENCE

OTTAWA, Tuesday, October 18, 1966.

The Special Joint Committee of the Senate and House of Commons on Divorce met this day at 3.30 p.m.

Senator Arthur A. Roebuck and Mr. A. J. P. Cameron (*High Park*), Co-Chairmen.

Co-Chairman Senator ROEBUCK: Ladies and gentlemen, will you come to order. We have a quorum, and we have two very distinguished and well-informed witnesses to present to you, the first of whom is the Deputy Minister of Justice of the Dominion of Canada, Mr. Driedger. I have some notes which I wish to place on the record and also to inform you who are here, so that others who read what will be presented to us will have some better idea of who it is who is speaking. Mr. Driedger was born at Osler, Saskatchewan. He received his primary education there and completed high school at Rosthern, Saskatchewan. He attended the University of Saskatchewan at Saskatoon, from which he received B.A. degree in 1932 and an LL.B. in 1934. He received an honorary LL.D. degree from the University of Ottawa in 1963. He was articled to F. F. MacDermid of the firm of Ferguson, MacDermid and MacDermid in Saskatoon, and continued with that firm after admission to the Bar. He entered into partnership with the late Wilson M. Graham of Yorkton, Saskatchewan, in 1939.

He was appointed Librarian of the Supreme Court of Canada on June 1, 1940, and transferred to the legal branch of the Department of Justice in December, 1941, as Junior Advisory Counsel. He was appointed Senior Advisory Counsel in 1945, Assistant Deputy Minister on July 1, 1954, and Deputy Minister of Justice and Deputy Attorney General of Canada on July 1, 1960. He was created a Dominion K.C. on July 1, 1949.

He has written numerous articles and papers on legislation and related subjects, including an annotated Consolidation of the British North America Acts, and is the author of a text *Composition of Legislation and Legislative Forms and Precedents*, both standard reference works on legislation. He was a member of the Statute Revision Commission which prepared the Revised Statutes of Canada for 1952, and is a member of the Statute Revision Commission of 1966.

He was awarded the Gold Medal of the Professional Institute of the Public Service of Canada in February, 1960. In 1939 he lectured in Company Law at the University of Saskatchewan, and from 1958 to 1960 lectured in Legislation and Administrative Law in the Faculty of Law at the University of Ottawa.

He is the representative of the Department of Justice on the Conference of Commissioners on Uniformity of Legislation in Canada and the National Council on the Administration of Justice. He is a member of the Canadian Bar Association, the Law Society of Saskatchewan, the Law Society of Upper Canada and the Federal Lawyers Club. He is a member and Past President of the Kiwanis Club of Westboro.

He is married to the former Elsie V. Norman of Yorkton, Saskatchewan, and has two sons, Alan and Tom.

His hobbies and recreation—that is what we want to hear about—include photography, philately and music.

I am not going to ask him to sing, but I am going to ask him to speak, and you will realize from what I have told you that we have a very distinguished representative here today, whose words will be full of wisdom and information, and whom we are glad to welcome.

Mr. E. A. Driedger, Q.C., Deputy Minister of Justice and Deputy Attorney General:
Mr. Chairman, ladies and gentlemen.

1. Introduction of English Law:

The divorce laws of Canada consist of English statutes, pre-Confederation provincial statutes and post-Confederation federal statutes, with the result that the source and nature of the divorce laws for Canada vary from province to province. A brief survey of the history of the divorce laws in Canada might therefore be useful as a preliminary step to the consideration of possible changes in the law.

The divorce law of five of the provinces is the Divorce and Matrimonial Causes Act of 1857, which came into force in England on January 1, 1858. Before we see how this became the law of some provinces and not of others, it is necessary to say something about the introduction of English law into English colonies or possessions.

The extent to which English law applies to a colony or possession depends upon the manner in which it was acquired. In the case of a colony acquired by settlement, the common law of England and the statute law as existing at that date apply. (See Halsbury, 3rd ed. Vol. 5, at pages 619-697; Keith—*Responsible Government in the Dominions*, 2nd ed. Vol. 1, at pages 3-5). In the case of colonies acquired by conquest or by cession, which at the time of their acquisition had laws of their own, the Crown had power to alter and change those laws, but unless this was done the laws of the conquered or ceded colony remained in force. (See Halsbury and Keith above: *Uniacke v. Dickson*, James N.S.L.R. (1853-55) 2 *Cooper v. Stuart* (1889) 58 L.J.P.C.93.)

In the eighteenth century the further doctrine was developed that in a colony acquired by settlement, laws could only be made with the assent of the assembly in which the people were present in person or by representatives.

Once an elective assembly was established in a colony it made its own laws, and laws thereafter passed in England were not automatically applicable. They could, however, be made applicable in one of two ways. First, the Imperial Parliament was absolutely supreme and, at least until the Statute of Westminster, 1931, had unfettered jurisdiction to legislate for the whole Empire. Imperial legislation, however, was *prima facie* applicable to the United Kingdom only, and ordinarily it did not apply to the colonies. Certain acts, however, were applicable to the colonies. There were those that were enacted expressly for particular colonies, as, for example, the British North America Act, 1867, and there were those that by express terms or necessary implication extended to the whole Empire, as, for example, the Merchant Shipping Act of 1894. Whether an Imperial statute applied outside the United Kingdom was therefore a matter of construction.

English laws also could be made to apply in a colony by an enactment of the colony itself. A colony could adopt English law in whole or in part, and it then became part of the law of the colony, not because the original law by its terms extended to the colony, but because the colony had in effect re-enacted that law for itself.

Imperial laws that extended to the colonies by their own terms—*in proprio vigore*—could not be changed by the colonial legislature. Imperial laws adopted by a colony, of course, could be changed by the colonial legislature.

THE ATLANTIC PROVINCES:

Nova Scotia, which originally included what is now New Brunswick, was a settled British Colony. In such cases, the Crown could by ordinance, and the Imperial Parliament or its own legislature when it came to possess one could by statute, declare what parts of the common and statute law of England should have effect within its limits. When that was done the law of England became from the outset the law of the colony, in so far as it was reasonably applicable to the circumstances of the colony, and until abrogated or modified either by ordinance or statute.

From 1713 to 1758 the provincial government in Nova Scotia consisted of a Governor or Lieutenant-Governor and a Council, and the latter body presumed to possess both legislative and executive powers. However, on April 29, 1755, the Attorney General and Solicitor General gave the opinion that the Governor in Council did not have power to make laws for the government of Nova Scotia. (See Houston—*Constitutional Documents of Canada*, pp. 17 and 18; for constitutional documents pertaining to the establishment of representative governments in Prince Edward Island, Nova Scotia and New Brunswick, see *Sessional Papers* 1883, No. 70). A Legislative Assembly was then established pursuant to instructions to the Governor. Prince Edward Island was formerly part of Nova Scotia, but it was created a separate province by Letters Patent issued to the Governor in 1769. Authority was conferred to convene an Assembly and the Assembly was organized and met in 1773.

In 1784, New Brunswick was carved out of Nova Scotia and created a province with a Legislative Assembly, also by instructions to the Governor.

Applying the principles just outlined, the English law was brought to the provinces of Nova Scotia, New Brunswick and Prince Edward Island. The first representative legislature there—and indeed on the North American continent—was established in Nova Scotia in 1758 and the first day of the meeting of the first general assembly was October 3, 1758. That, then, is the cut-off date. The English law as of October 3, 1758, was the law of Nova Scotia, and thereafter as changed by the legislature of Nova Scotia, or as changed by Imperial legislation that by express terms or necessary implication extended to Nova Scotia. At that date there was no divorce law in England, so there was then no divorce law in Nova Scotia. The classic decision of the courts on the introduction of English law into Nova Scotia is *Uniacke v. Dickson*—James N.S.L.R. (1853-55) 287.

Prince Edward Island and New Brunswick were originally part of Nova Scotia, and October 3, 1758, is therefore also the cut-off date for these two provinces. Prince Edward Island was created a separate province in 1769 and its first assembly met in 1773. The law of Prince Edward Island was therefore the English law up to 1758, Nova Scotia law until 1773 and Prince Edward Island law thereafter. Prince Edward Island, however, was not added to Nova Scotia until 1763. New Brunswick was created a separate province in 1784 with its own Legislative Assembly, so that the law of New Brunswick was therefore English law until 1758, Nova Scotia law until 1784 and New Brunswick law after 1784. It follows that there was then also no divorce law for Prince Edward Island and New Brunswick, because the Divorce and Matrimonial Causes Act of England was not enacted until 1857.

In Newfoundland, the Assembly was not established until December 31, 1832. Its law was therefore the English law until 1832 and thereafter Newfoundland law. Again, the English Divorce Act did not become the law of Newfoundland, since the colony had its own Assembly before the English act was passed.

ONTARIO:

The Royal Proclamation of 1763 authorized the Governor to establish courts for hearing and determining all causes... as near as may be agreeable to the laws of England.

By the Quebec Act of 1774, however, the law in force previously, relating to property and civil rights, was restored, but the criminal law of England was continued. In 1791, the Constitutional Act divided Quebec into the two provinces of Lower Canada and Upper Canada. On October 15, 1792, the Legislative Assembly of Upper Canada, at its first session, enacted that from and after that date

in all matters of controversy relative to property and civil rights, resort should be had to the laws of England, as the rule for the decision of the same.

This provision has continued to the present day and now appears as the Property and Civil Rights Act of Ontario, R.S.O. 1960, c. 310. Alterations in the law by Imperial statutes, by pre-Confederation legislation of Upper Canada or Canada, or by Ontario, are of course excepted.

The criminal law was in force by virtue of the Quebec Act and section 33 of the Constitutional Act, and no further legislation was necessary except to fix the precise day. This was done by the statutes of Upper Canada, 40 Geo. III, c. 1. The date of introduction fixed was September 17, 1792.

In *Doe d. Anderson v. Todd*, 2 U.C.Q.B. 82 it was held that the enactment of October 15, 1792, did not place Upper Canada in a position materially different from the settled colonies.

Here again, the English divorce Act did not become the law of Upper Canada.

QUEBEC:

The Royal Proclamation of 1763 provided for the government of the newly acquired territory of Quebec by a Governor and an appointed Council with power to make ordinances for the peace, welfare and good government of the province. The Constitutional Act of 1791 divided Quebec into the two provinces of Upper Canada and Lower Canada with a Governor and an appointed Council for each province, and also provided for an Assembly for each province.

The Union Act of 1840 re-united the two provinces with a Legislative Council and an Assembly, which continued until Confederation in 1867.

Whether the Royal Proclamation of 1763 introduced English civil law is a matter of doubt. In any case, it is clear that the Quebec Act of 1774 established French law as the civil law of Quebec, and this was continued in the province of Lower Canada by the Act of 1791. See *Citizens Insurance v. Parsons* 7 A.C. 96:

...the law which governs property and civil rights in Quebec is in the p. 111 main the French law as it existed at the time of the cession of Canada...

Obviously, the English divorce law was not introduced into Quebec.

MANITOBA:

Manitoba was carved out of the Northwest Territories. The Hudson's Bay Company surrendered Rupert's Land and the Northwestern Territory by Deed of Surrender dated November 19, 1869. In anticipation of the surrender and the admission of these territories into the Canadian Confederation, the Parliament of Canada (32-33 Victoria, c. 3) enacted a statute providing for the temporary government of these territories. Section 5 of this Act provided that all laws in force therein at the time of their admission into the Union should remain in

force until altered. Also, in anticipation of the admission, the Parliament of Canada enacted the Manitoba Act (33 Victoria c. 3) establishing the Province of Manitoba. This Act contained no continuation of law provision, except the general one (section 2) applying the provisions of the British North America Act, which presumably included section 129, which provided for the continuation of laws.

The Rupert's Land Act of the Imperial Parliament (31-32 Victoria, c. 105) provided for the acceptance of the surrender from the Hudson's Bay Company. These territories were admitted to the Union by Imperial Order in Council of June 23, 1870, effective July 15, 1870.

In *Sinclair v. Mulligan*, a Manitoba case, it was held that the common law of England was introduced on May 2, 1670 the date of the Hudson's Bay Company Charter.

In 1874 the Legislature of Manitoba passed a statute incorporating English law existing on July 15, 1870—

Co-Chairman Senator ROEBUCK: Have you the reference for that case that you quoted?

Mr. DRIEDGER: Yes. 1888, 5 Man. L.R. 17. I may say that this case I believe created great consternation in Manitoba, and it was as a result of that that Manitoba, in 1874, passed this statute incorporating English law, but only in respect of matters over which the legislature had jurisdiction. See 1874 c. 12, which provided that the Court of Queen's Bench should

decide and determine all matters of controversy relative to property and civil rights according to the laws existing, or established and being in England, as such were, existed and stood on the 15th day of July, 1870, so far as the same can be made applicable to matters relating to property and civil rights in this province.

The Parliament of Canada enacted a corresponding statute in relation to matters over which Parliament had jurisdiction. See 51 Victoria, c. 53. So that by a combination of the two statutes, the English law as of July 15, 1870, was incorporated into the laws of Manitoba.

NORTHWEST TERRITORIES AND YUKON TERRITORY:

The Northwest Territories Act enacted by the Parliament of Canada in 1886 incorporated the civil and criminal laws of England as they existed on July 15, 1870

in so far as the same are applicable to the Territories, and in so far as the same have not been, or may not hereafter be, repealed, altered, varied, modified or affected by any Act of the Parliament of the United Kingdom applicable to the Territories or of the Parliament of Canada, or by any ordinance of the Lieutenant-Governor in Council.

This law has continued to the present day and now appears as section 17 of the Northwest Territories Act, R.S.C. 1952, c. 331.

The Yukon Territory was carved out of the Northwest Territories in 1898 by the Yukon Territory Act, 61 Victoria, c. 6. Section 9 of that Act continued in force the then existing laws of the Northwest Territories. The result is that the Yukon is in the same position as regards English law.

SASKATCHEWAN AND ALBERTA:

These provinces were carved out of the Northwest Territories in 1905 by the Alberta Act, 1905, c. 3, and the Saskatchewan Act, 1905, c. 42. Each Act continued the laws of the Northwest Territories then in force, so that again the

law of England of July 15, 1870, subject to any changes made before 1905 by the Parliament of Canada or by Northwest Territories Ordinance, was adopted.

Thus, in the provinces of Manitoba, Saskatchewan and Alberta, and in the Northwest Territories and the Yukon, the law of England of July 15, 1870, was incorporated in positive terms.

BRITISH COLUMBIA:

By Ordinance No. 70 of March 6, 1867, the civil and criminal laws of England as of November 19, 1858, were introduced

so far as the same are not from local circumstances inapplicable.

This now appears as the English Law Act, contained in the *Revised Statutes of British Columbia*. The Ordinance of 1867 was carried forward after the admission of British Columbia by section 129 of the British North America Act.

SUMMARY:

The result is:

- (1) that at the cut-off date for the introduction of English law the Divorce and Matrimonial Causes Act, 1857, was not introduced into the provinces of Newfoundland, Prince Edward Island, Nova Scotia, New Brunswick, Ontario or Quebec;
- (2) the Divorce and Matrimonial Causes Act became the law of the other provinces of Saskatchewan, Manitoba Alberta and British Columbia. It has been so held by the following decisions:
 (B.C.) *Watts v. Watts*—(1908) A.C. 573
 (Man.) *Walker v. Walker*—(1919) A.C. 947
 (Alta.) *Board v. Board*—(1919) A.C. 956
 (Sask.) *Fletcher v. Fletcher*—(1920) 1 W.W.R. 5

Pre-Confederation Provincial Legislation:

I. Continuation of Laws:

Before dealing with special pre-Confederation provincial legislation it might be of assistance to say something at this point about the continuation of laws by our constitutional documents. Many pre-Confederation laws are still valid today, notwithstanding the creation of new political entities and the abolition of old, because laws and courts have been continued from one entity to another.

The Royal Proclamation of 1763 gave authority to the Governor of Quebec to establish courts for hearing and determining civil and criminal causes

according to the law and equity, and as near as may be agreeable to the laws of England.

A change was made by the Quebec Act of 1774. Section 8 of that Act provided that in all matters of controversy relative to property and civil rights resort should be had to the laws of Canada. Section 11, however, continued the criminal law of England in force in the province of Quebec.

The Constitutional Act of 1791 divided Canada into the two provinces of Upper Canada and Lower Canada. Section 33 provided that all laws in force on the coming into force of that Act should remain and continue in effect in each province, subject to repeal or amendment by the legislatures of the new provinces.

The Act of Union of 1840 re-united the two provinces, and section 46 of that act provided that all laws in force in the provinces of Upper Canada and Lower Canada at the time of union should continue in force until altered or repealed under the authority of that act by the legislature of the province of Canada.

The provinces of Canada, New Brunswick and Nova Scotia, were united by the British North America Act of 1867, and section 129 of that act provided that all laws in force in Canada, Nova Scotia or New Brunswick at the time of union and all courts should continue in Ontario, Quebec, Nova Scotia and New Brunswick respectively, subject to alteration by the Parliament of Canada or the legislature of the province according to their authority under that act. It may be noted in passing that there was excepted from this authority to repeal, abolish or alter laws in force any laws of the Parliament of Great Britain or of the United Kingdom; this limitation was removed by the Statute of Westminster, 1931.

The Rupert's Land Act of 1869, enacted by the United Kingdom Parliament to provide for the acquisition of Rupert's Land and the Northwest Territory from the Hudson's Bay Company provided in section 5 that all laws in force in Rupert's Land and the Northwest Territory at the time of their admission into the Canadian Union as of July 15, 1870, should remain in force until altered by the Parliament of Canada or by the Lieutenant-Governor of the Northwest Territories pursuant to the Rupert's Land Act. The Lieutenant-Governor was authorized to make ordinances for the peace, order and good government of the Territories.

The Northwest Territories Act of Canada of 1886 provided in section 3 that the laws previously in force should continue.

The Alberta Act of 1905, as well as the Saskatchewan Act of 1905, also provided that all laws in force at the time of the creation of those provinces should continue in force, subject to alteration by the Parliament of Canada or the legislatures of the provinces. The law in force of the provinces of Alberta and Saskatchewan therefore goes back to the law of England as of July 15, 1870.

The situation in Manitoba has already been explained. There was some doubt as to the date of incorporation of English law in the Province of Manitoba. This doubt was removed by concurrent legislation passed by Manitoba and by Canada, which also brought the law of England as of July 15, 1870, into force in the Province of Manitoba.

The British North America Act of 1949 added the Province of Newfoundland to the Canadian Confederation and Term 18 continued in force existing laws, subject to alteration by Parliament or the Legislature of Newfoundland.

British Columbia and Prince Edward Island were brought into the Union by Orders in Council passed under section 146 of the British North America Act. There was no express continuation of laws provision, but there was in each case a provision making applicable to the new provinces the provisions of the British North America Act of 1867. This would make applicable to these two provinces section 129 of the act of 1867, and the laws in force in each of those provinces at the time they entered Confederation continued in force thereafter, subject to alteration by Parliament or by the legislatures, according to their jurisdiction under the Act of 1867.

II. Pre-Confederation Divorce Laws:

NOVA SCOTIA:

The Nova Scotia Assembly passed a Divorce Act in 1758, Chapter 17, 17 Geo. II. This act gave the Governor authority to hear and determine matters relating to prohibited marriages and divorce and provided for the grant of divorce for adultery and for desertion. The grounds were changed in 1761 by chapter 7 of the Statutes of 1 Geo. III. In 1841, by chapter 13 of 4-5 Vict., the constitution of the courts was somewhat altered. The act was included as chapter 126 of the Revised Statutes of Nova Scotia, Third Series, 1864, and there was one further amendment before Confederation by chapter 13 of the

Statutes of 1866. These laws therefore continued in force after Confederation and still constitute the basic law of divorce for the province of Nova Scotia.

NEW BRUNSWICK:

New Brunswick first passed a Divorce Act in 1787, which was repealed and revised in 1791 by chapter 5 of the Statutes of 31 Geo. III. This was the law in force at the time of Confederation, and it continued in force after Confederation by virtue of section 129 of the British North America Act.

PRINCE EDWARD ISLAND:

An act was passed in 1833, 3 William IV, providing for the establishment of a court of divorce. This was repealed and revised in 1835 by 5 William IV, chapter 10, and was amended in 1866. These statutes were continued in force after Confederation, as indicated above. The act of 1835, however, was not used until 1945, when Rules of Practice and Procedure especially applicable to the divorce court were promulgated. In 1949 the jurisdiction was transferred to the Prince Edward Island Supreme Court of Judicature.

QUEBEC:

In the Province of Quebec there is no provision for the grant of a divorce. However, the Civil Code contains provisions for obtaining separation from bed and board. The Quebec Civil Code which contained these provisions was enacted by an act of the Province of Canada before Confederation, which came into force on August 1, 1866. They were therefore in force prior to Confederation and continued in force after Confederation by virtue of section 129 of the British North America Act of 1867.

III. Post-Confederation Legislation:

I was going to say something about post-Confederation legislation by the Parliament of Canada. There have been three or four short acts, but I notice from the earlier proceedings that Senator Roebuck had covered this, so I do not think it is necessary for me to discuss the 1925 Marriage and Divorce Act, the 1930 Divorce Act (Ontario) and the 1937 British Columbia Divorce Appeals Act, and the act that was passed within the last year or two.

IV. The Nature of Judicial Relief:

Dissolution—Divorce *a vinculo matrimonii*:

A divorce *a vinculo matrimonii* puts an end to the marriage union after the date the decree becomes final. Until then the marriage is considered to be a valid one, but thereafter it no longer exists, and the parties to the dissolved marriage are free to marry again.

The grounds for which a divorce *a vinculo matrimonii* will be granted in Canada are as follows:

- (a) to either party in all provinces except Quebec and Newfoundland as a result of the adultery of the other;
- (b) in Nova Scotia, also for cruelty, impotence and consanguinity within the prohibited degrees;
- (c) in New Brunswick and Prince Edward Island, also for frigidity or impotence and marriage within the prohibited degrees;
- (d) in jurisdictions where the 1957 Divorce and Matrimonial Causes Act (Imp.) c. 85 applies (British Columbia, Alberta, Saskatchewan, Manitoba, Yukon, Northwest Territories and Ontario), rape, sodomy and bestiality but only where the wife is the petitioning party.

ANNULMENT:

A defective marriage may be either void or voidable. A void marriage is invalid *ab initio* without a judicial decree; a decree of nullity in such cases is merely declaratory of the status of the parties. A voidable marriage, however, is regarded as a valid marriage until it is declared invalid by judicial decree, but then the marriage is deemed to be void *ab initio*.

In England, jurisdiction with respect to nullity was originally exercised by the ecclesiastical courts, but was transferred to a new divorce court by the Divorce and Matrimonial Causes Act of 1857, but without any change in substantive law. Since that act was incorporated into the laws of the western provinces, it follows that the ecclesiastical law of England as confirmed by the act of 1857 became the law of British Columbia, Alberta, Manitoba and Saskatchewan, and of course the Territories.

In Ontario, prior to the Divorce Act (Ontario) of Canada of 1930 the courts had but limited jurisdiction in annulment actions. The act of 1930, however, incorporated the English Act of 1857 so that the position in Ontario is now the same as in the western provinces.

In Quebec, Title V of Book I of the Civil Code provides for nullity proceedings.

In the maritime provinces of Prince Edward Island, New Brunswick and Nova Scotia, the pre-Confederation acts already referred to included suits for nullity, and in Newfoundland the courts have been held to have the same powers as were exercised by the ecclesiastical courts in England before 1832, which was the final date for the introduction of English law.

Substantially, the law respecting nullity is the same in all provinces. There may be some differences, but it is not material to dwell on them at present.

A marriage will be regarded as void *ab initio* where

- (1) there is non-compliance with the ceremonial or evidentiary requirements of the place where the marriage is celebrated; or
- (2) either party lacks the legal capacity to contract a marriage by reason of
 - (a) incompetence owing to age or mentality,
 - (b) a prior subsisting marriage,
 - (c) a marriage within the prohibited degrees, or
 - (d) lack of real consent owing to mistake as to the person or the nature of the ceremony, to duress or to fraud.

A marriage will be regarded as voidable where there is impotence. Also, a marriage of minors entered into without parental consent where the local law requires such consent is usually only voidable because it is usual to impose conditions, such as non-consummation and a time limit within which the action must be brought.

Judicial Separation—Divorce *a mensa et thoro*:

A judicial separation is in effect a divorce but without the right to remarry.

The English act of 1857 also transferred to the courts the jurisdiction formerly exercised by the ecclesiastical courts with respect to judicial separation, and the English law of 1857 therefore also became the law of the western provinces. However, Alberta passed an act in 1927 purporting to govern judicial separation. The validity of this legislation may be open to question.

As for Ontario, the Act of Parliament of 1930 introduced into Ontario only the laws of England relating to the dissolution and annulment of marriage, and the courts in Ontario have held that they have no power to decree judicial separations.

In Nova Scotia, New Brunswick and Prince Edward Island the courts have jurisdiction to decree judicial separations by virtue of the pre-Confederation statutes referred to, and in Newfoundland the courts acquired the jurisdiction of the ecclesiastical courts of England prior to 1832.

Co-Chairman Senator ROEBUCK: Have you the reference there to the case in Ontario where it was declared?

Mr. DRIEDGER: I have one reference that I could give you, yes. I did not go into the details of these decisions. This is judicial separation: *Vamvakidis v. Kiskoff* (1964) Ont. L.R. 585.

I think there are a number of decisions in Ontario, although some text writers I think conclude that the reasoning is perhaps not correct and that Ontario should have jurisdiction, but the courts apparently have said otherwise. That is my recollection.

In Quebec, Title VI of Book I of the Civil Code, which was enacted before Confederation, provides for separation from bed and board. It was enacted before Confederation, and I have stressed that because, since it was enacted before Confederation, it was valid law and was continued in force after Confederation, so that question of validity does not arise.

The grounds for judicial separation in all provinces except Quebec therefore go back to the ecclesiastical rules in England. They are, briefly, adultery, cruelty and desertion without cause for more than two years. Alberta and Saskatchewan have expanded these grounds to include desertion where there is failure to comply with a judgment for restitution of conjugal rights, sodomy, bestiality or attempt to commit sodomy or bestiality. As has been indicated, the validity of such provincial legislation may be open to question.

The grounds on which separation from bed and board may be obtained in Quebec are set out in articles 187 to 191 of the Civil Code as follows:

187. A husband may demand the separation on the ground of his wife's adultery.

189. Husband and wife may respectively demand this separation on the ground of outrage, ill-usage or grievous insult committed by one toward the other.

190. The grievous nature and sufficiency of such outrage, ill-usage and insult, are left to the discretion of the court, which, in appreciating them, must take into consideration the rank, condition and other circumstances of the parties.

191. The refusal of a husband to receive his wife and to furnish her with the necessaries of life, according to his rank, means and condition, is another cause for which she may demand the separation.

OTHER RELIEF:

There are other forms of judicial relief in matrimonial matters, but I assume it is not expected that I should deal with them here. They are restitution of conjugal rights, alimony, criminal conversation and enticement, and jactitation of marriage.

I have taken up quite a bit of time, but I should like to make a general comment on legislative jurisdiction.

Co-Chairman Senator ROEBUCK: Do not drop anything. We are thoroughly interested in what you are giving us.

Mr. DRIEDGER: Thank you.

V. Legislative Jurisdiction:

The British North America Act assigns to Parliament exclusive jurisdiction over "Marriage and Divorce" and to the provincial legislatures exclusive jurisdiction over "Solemnization of Marriage in the Province."

There can be little doubt that Parliament's jurisdiction extends to divorce *a vinculo matrimonii*, especially since only ten years before the British North America Act the British Parliament enacted the Divorce and Matrimonial Causes Act in which the expression "divorce" was used in that sense.

As for judicial separation, this form of relief was designated in ecclesiastical law as divorce *a mensa et thoro*, but the Divorce and Matrimonial Causes Act provided that no decree for a divorce *a mensa et thoro* should thereafter be granted, but in all cases in which such a decree might be pronounced the court may pronounce a decree for judicial separation which shall have the same effect. It is therefore, perhaps, arguable that "divorce" in the British North America Act does not include judicial separation, but, having regard to the nature of the decree, since it was exactly the same as the previous decree, it is reasonable to conclude that Parliament's jurisdiction extends to both divorce *a vinculo matrimonii* and judicial separation.

The jurisdiction of Parliament in relation to "marriage" would by itself no doubt confer jurisdiction to deal with the validity of marriages and the grounds on which a marriage may be declared void. However, this authority must be read in the light of head 12 of section 92, which confers on the legislatures exclusive jurisdiction over the "Solemnization of Marriage in the Province". The courts have held that this provincial power operates as an exception to Parliament's power and extends only to enact conditions as to solemnization that might affect the validity of the contract.

Parliament's jurisdiction over "Marriage and Divorce" would seemingly include jurisdiction to prescribe judicial procedures, although, in the absence of any federal laws, the provinces could prescribe, and have prescribed, the necessary procedural rules under authority derived from head 14 of section 92, which authorizes the legislatures to make laws in relation to the

administration of justice in the province, including the constitution, maintenance and organization of provincial courts, both of civil and criminal jurisdiction, and including procedure in civil matters in those courts.

The courts for the administration of divorce laws are at present the provincial courts established under head 14 of section 92, which I have just read. Parliament, however, could establish a divorce court under section 101 of the British North America Act, which authorizes Parliament to provide for the establishment of courts for the better administration of the laws of Canada.

It would seem, also, that Parliament has exclusive jurisdiction to confer divorce jurisdiction on provincial courts. However, where Parliament enacts a law without establishing a court for its administration, it must be presumed that Parliament intended such law to be administered by the provincial courts and must therefore be taken to have conferred such jurisdiction.

Co-Chairman Senator ROEBUCK: Any questions?

Mr. BREWIN: Mr. Chairman, I wonder if I could ask Mr. Driedger a question that has come up sometimes in the discussions. Does he think the legislative jurisdiction to grant divorce includes, as necessarily ancillary to that, the right in granting divorce to make provision for maintenance of the divorced spouse, or support, and maintenance for the children of the marriage.

In that connection, I might remind Mr. Driedger—probably he does not need reminding—that the 1857 act in Great Britain—which, as he pointed out, was passed ten years before the British North America Act, which conferred jurisdiction on divorce—did contain provision that when divorce was granted by the courts in Great Britain it could include these remedies. I assume that these matters could be regulated by the provinces, in regard to property and civil rights, in the absence of federal legislation. My question is: Is the federal Parliament competent to legislate in regard to these matters?

Mr. DRIEDGER: I do not know how I should answer your question, Mr. Brewin. The provinces have legislated; I believe that there is provincial legislation in this field on the question of alimony. I believe that the provinces have dealt with alimony.

Mr. BREWIN: Yes.

Mr. DRIEDGER: On the other hand, alimony could perhaps be regarded as something that follows, that is necessarily incidental or so closely related to the subject-matter of divorce that the authority that has jurisdiction to legislate with respect to divorce can also deal with the consequences that flow from it. How far Parliament could go in legislating over these matters I do not know. It is a very debatable point.

Co-Chairman Senator ROEBUCK: What you say would cover custody of children too.

Mr. DRIEDGER: It would cover custody of children and alimony, maintenance and all these related matters.

Co-Chairman Senator ROEBUCK: And the distribution of the property.

Mr. DRIEDGER: Yes.

Mr. BREWIN: I wonder, Mr. Driedger, if you agree that the fact that these incidental remedies were part of the jurisdiction of the courts when they granted a divorce at the time of Confederation is something of a basis for arguing that the British North America Act conferring legislative competence over divorce was, I would assume, incidental to it?

Mr. DRIEDGER: Yes, indeed I think it would be. I referred to that kind of argument when speaking on judicial separation. I referred to the Divorce and Matrimonial Causes Act passed in 1857, and if we now construe the British North America Act passed only ten years later one can at least argue—it is not conclusive perhaps but one can at least argue it—that the word “divorce” means the same thing in the two statutes. As for alimony, or some of the relief that flows, that may follow divorce; the British act did I think provide for some of these. I think it is arguable.

Alimony is one thing, but when you get on to support and maintenance of children, the further you go into the area of property and civil rights the further you perhaps get away from federal jurisdiction and the closer to provincial jurisdiction and there may be a twilight area here. I do not know where you draw the line.

Mr. BREWIN: There might be an area in which the matter could be dealt with by one jurisdiction on the aspect of property and civil rights, but that would not prevent the federal jurisdiction exercising an overriding jurisdiction.

Mr. DRIEDGER: That may be.

Mr. RYAN: Supplementary to that, Mr. Chairman, I take it there would be no problem at all as long as we have the divorce and all the incidental laws administered by provincial courts and territorial courts. There would be a real problem, I think, if we tried to get too far afield with the federal court.

Mr. DRIEDGER: I think perhaps it goes a little deeper than that. It goes to the substantive law pertaining to alimony and maintenance. Once the law is there there would not be much difficulty in finding the court to administer it. But who has authority to enact or change these laws?

I must confess, I have not gone into this in any great detail myself, but I see a possible difference between provision for alimony for the wife, or for the former wife, and perhaps provision for maintenance and support of the children during their minority.

Mr. BREWIN: It has always seemed to me, if I may put it this way, totally irresponsible for any human institution, be it a court or anything else, to decree

the termination of a marriage without providing for the victims of the termination. The children are just as much victims of the termination as the spouses. Personally, I do not like to see any jurisdiction in this field exercised without consideration for these incidentals. That is why I wanted to get the constitutional basis in your thinking towards these considerations.

Mr. DRIEDGER: I have not the references here, Mr. Brewin, but I think perhaps the Court of Appeal decisions in the provinces have favoured provincial competence in this field.

Mr. BREWIN: Well, there has been no challenge to it.

Mr. DRIEDGER: No.

Mr. BREWIN: Because there has been no federal legislation dealing with it, as far as I know.

Mr. RYAN: Provincial law fills the vacuum, apparently, satisfactorily in most places today. What about a federal court? The federal court can take cognizance of provincial law, can it not?

Mr. DRIEDGER: At the present time there is no federal court that has jurisdiction in these matters. There are certain federal courts. There is the Supreme Court, of course, which has appellate jurisdiction, and the Exchequer Court which deals with a different class of action. There are miscellaneous courts, like the Transport Commissioners and bankruptcy courts.

Mr. RYAN: Could we have a little précis of just what the Exchequer Court as a divorce federal court is dealing with now?

Mr. DRIEDGER: Perhaps the Chairman or other senators would be more qualified to speak on that than I. That is the new act which was passed by Parliament a year or two ago dealing with the senate activities in the area of divorce, but, as I understand it, that did not establish a court, or a divorce court.

Co-Chairman Senator ROEBUCK: No.

Mr. DRIEDGER: That merely described a mode of parliamentary procedure in obtaining a legislative divorce.

Mr. McCLEAVE: Mr. Chairman, Mr. Brewin has taken my question away from me, or anticipated it. I think, however, it should be pointed out that alimony is the award that is made up until the final decree, and maintenance is the award that follows the final decree, so that we have our terms precisely. The question I wanted to ask was this. We as a Parliament have the right, as it were, of provincial enactments. This would be quite true, Mr. Driedger, would it not? That is, we could alter pre-existing Confederation statutes if there were a conflict with them.

Mr. DRIEDGER: Only if the subject-matter falls within Parliament's powers under Section 91.

Mr. McCLEAVE: I was thinking of the power on marriage and divorce.

Mr. DRIEDGER: As for divorce, any pre-Confederation law that falls under the heading "Marriage and Divorce" is subject to alteration by Parliament. When these laws were continued by Section 129, the cases are quite clear that they are continued subject to alteration by Parliament or the legislatures according to their jurisdiction under the Act of 1867.

Co-Chairman Senator ROEBUCK: Well expressed.

Mr. McCLEAVE: The other question was this. Is there not a provision in the Quebec Civil Code that marriages are not, in fact, divorceable? We do not run into any problem there. We can pass one general law that covers the whole province.

Mr. DRIEDGER: I do not know of any negative provision in the Quebec Civil Code. There are other provisions dealing with separation from bed and board, but offhand I would not want to say.

Mr. FAIRWEATHER: This follows from what Mr. Brewin and Mr. McCleave have said. I wanted to pin Mr. Driedger down a little bit. Should this committee recommend, and should Parliament adopt, an enlarged statute on divorce, does Mr. Driedger feel that we could not recommend certain provisions for the care of the children?

Mr. DRIEDGER: I am afraid, Mr. Fairweather, that I would not at this point be prepared to express any offhand view on that. I was only indicting that under the heading of divorce, divorce deals with the marriage union, and the separation, the bringing of the marriage union to an end, might include power to deal with related matters. How far you can go, as for example in dealing with the children, I do not know. I am just suggesting that there might be a difference, but I am not prepared to say that there would be.

Mr. FAIRWEATHER: You used the expression "twilight zone", as I think you called it, in saying how awkward it is. It is more than awkward. Mr. Brewin used the word "irresponsible". I always felt that we never knew when these bills came before us what happened to the children. We were asked to sit in judgment and had no information at all as to custody and so on. I am firmly of the view that we must complete our duty here or else be quite sure that the provinces fill the vacuum, not in some twilight zone but immediately.

Co-Chairman Senator ROEBUCK: Would the witness consider giving us a considered opinion on this? It is a very important feature of our work, as to what we may recommend or what subjects we may discuss in our report.

Mr. DRIEDGER: Well, perhaps I could. It is not only a difficult problem, it is rather a delicate one too, bearing in mind that the provinces have legislation in this field. I could perhaps put together what I can find on the state of the law as it now is, and as it has been.

Co-Chairman Senator ROEBUCK: That would certainly be useful, if you would do that.

Mr. DRIEDGER: Then we could see where we go from there.

Mr. PETERS: Is Mr. Driedger saying that the only way for us to really test this is by a Supreme Court reference or something of that nature?

Mr. DRIEDGER: I do not know if that is the only way. It could be tested by any person now challenging the validity of provincial legislation taking it to the Supreme Court.

Co-Chairman Senator ROEBUCK: That is the reverse way of doing it.

Mr. BREWIN: On a point of order. I was not suggesting that the provincial legislation was invalid or should be challenged. What I was suggesting was that it is perfectly valid in the aspect of property and civil rights until replaced by some positive enactment by the federal Parliament relating to divorce.

Mr. DRIEDGER: That still raises the question whether Parliament would have jurisdiction.

Mr. BREWIN: I appreciate that.

Mr. DRIEDGER: Jurisdiction to pass legislation.

Mr. BALDWIN: Would it not be possible, without offending against the objection which has been pronounced by the Privy Council that one legislative body cannot delegate authority to another, for the Parliament of Canada to instruct those courts dealing with this matter, when dealing with the question of custody, maintenance and alimony, to make such orders as the provincial legislatures for the respective provinces have made? In other words, there would be an instruction to the court to take into calculation in this grey

debatable area what legislative acts the respective legislatures have passed to deal with these particular problems. Would that be legal and acceptable?

Mr. DRIEDGER: I am afraid I could not answer that offhand without thinking a little more about it.

Co-Chairman Senator ROEBUCK: Now, we must go on, because we have another important delegation to hear from. If the Deputy Minister would take this into his consideration and give us a memorandum, as far as he can go, I am sure it would be useful to us. Is that the will of the committee?

Mr. PETERS: Mr. Chairman, more than that. I think it is not what he wishes to do. He will have to outline, if he is not able to give this kind of decision, how we are going to arrive at it, because we certainly do not want to be in the position of being *ultra vires* in whatever legislation we propose. I think that if this cannot be obtained this way, then it should be obtainable in another manner.

The history of the three witnesses we have had to date has indicated that originally there was no question about the jurisdiction of the courts in England as to the whole matrimonial problem—or marriage, divorce, maintenance of children, annulment and the other things. We have lost this by not operating in this field for some time, and we are going to have to be assured that whatever we decide will—

Co-Chairman Senator ROEBUCK: I do not think we have lost it. I do not think we can lose it in that way. While the field is open the provinces certainly have the constitutional right to legislate in it. But if later on we entered it and ours was the top jurisdiction, I think our jurisdiction still remains. That is what I would like Mr. Driedger to consider, and give us a memorandum on it.

Mr. BALDWIN: Mr. Chairman, might I ask the witness to consider one other question, if he is coming back on this. This is I think of importance to the people in the Northwest Territories. It does not concern a great number of people, but it is something that might be considered.

The witness will have knowledge of the decision of Mr. Justice Sisson about the right of Eskimos to have marriages performed acceptable to their native custom. This was a case Mr. Justice Sissons decided some time ago. I think the department was not too happy about it. I have often wondered if the parallel applies so that a divorce according to native custom of the Eskimo people might be considered as being legal and proper. I wonder if, when you are reporting back, you would consider that question as well.

Mr. McCLEAVE: What do they do up there, rub noses and say "I am divorced"?

Co-Chairman Mr. CAMERON: May I, Mr. Chairman, through you, on behalf of the committee, express to Mr. Driedger our very sincere appreciation for the presentation he has made to us today. It was exhaustive, it was learned and it was authoritative, and it will be of great benefit to the committee when we are making our report and studying the whole matter. Through you, Mr. Chairman, I express the appreciation of the members of the committee, and our very sincere thanks to you, Mr. Driedger.

Co-Chairman Senator ROEBUCK: Ladies and gentlemen, we have a further submission, from a very distinguished representative of one of the great Churches of Canada, and that is the Seventh-day Adventist Church in Canada. Will Mr. Michael please come forward?

I would like to say for the record that the Seventh-day Adventist Church has something of the order of one and a half million members all around the world. It is located in no fewer than 200 countries. In Canada there are about 17,000 members of this Church, and something of the order of 200 congregations, so it is a very important Christian institution in our country.

Its representative, Rev. Darren L. Michael, of Oshawa, Ontario, is a Minister of the Seventh-day Adventist Church in Canada, and serves his communion as its secretary for public affairs for its National Executive Committee.

Mr. Michael was born of missionary parents in India in 1923. He received his early education in India and completed his high school and undergraduate education in the United States. He graduated in 1946 with a Bachelor of Theology degree from Atlantic Union College. In 1947 he received a Master of arts degree from the Denomination's Theological Seminary affiliated with Andrews University.

Mr. Michael has served parishes in the Niagara Peninsula, Kingston and Windsor before coming to his present post in 1952.

As well, Mr. Michael is a graduate of Osgoode Hall Law School, where he received his LL.B degree in 1964, and is now a member of the Bar of Ontario.

I have known Mr. Michael for a long time, and I had the honour to introduce the bill in the Senate that re-organized the Church in great degree. From that time and some time forward I have had a great admiration for him, for his outlook and his industry, and I may say his courage, after holding an important position for a number of years, to go back, as I did, Mr. Michael, to Osgoode Hall, take the medicine that is involved in a law course and finally graduate as a barrister of Ontario.

Rev. Darren L. Michael, Barrister, Seventh-day Adventist Church: Thank you, Mr. Chairman, for your very kind remarks. We hope that after we have completed our submission you will feel as charitably inclined towards us.

Summary: The following grounds for the dissolution of marriage should be recognized by the Courts and by Parliament in the case of Parliamentary divorces:

1. Adultery
2. Cruelty
3. Desertion
4. Life imprisonment
5. Incurable insanity
6. Narcotic and alcoholic addiction
7. Wilful refusal to consummate the marriage

In addition, consideration should be given to the following:

- (a) For purposes of jurisdiction the creation of a Canadian domicile.
- (b) The absolute bars to divorce being made discretionary.

The Seventh-day Adventist Church in Canada believes that a thorough and comprehensive review of marriage and divorce legislation should be undertaken by Parliament, if the whole problem of family instability is to be dealt with by the law, covering the following areas of topics.

1. Marriage breakdown thesis
2. Laws governing nullity for void and voidable marriages
3. Prevention of marriage failure by pre-marital preparation
4. Custody and support of the children of a marriage ending in divorce.

INTRODUCTION:

The National Executive Committee of the Seventh-day Adventist Church in Canada wishes to express its appreciation to the Chairman and members of the Special Joint Committee of the Senate and House of Commons on Divorce for the opportunity of expressing its views on the subject of divorce law reform.

At this point I wish to violate one of the rules of public speaking, and that is to apologize for not having had time to prepare a French version of this submission. It was because of the question of time and not because of a lack of recognition of the importance of it.

It is recognized that a difficult task confronts this committee in dealing with a subject fraught with so much controversy and intensity of feeling. Parliament is to be commended, and the members of this committee congratulated, for taking this long overdue step. It is the fervent hope of the members of this communion that the points of view expressed herein will serve to assist the committee in its formidable undertaking.

It is felt that the committee could have found its task somewhat easier, to say nothing of being able to do a more thorough job, if its terms of reference could have been wide enough to include the entire field of marriage and divorce law in so far as it falls within the competence of the Parliament of Canada. It is the view of this Church that divorce as a social and moral problem cannot be dealt with effectively in a vacuum. Many of the fundamental and basic causes of marriage breakdown are to be found in the circumstances leading up to marriage and not just in the conditions immediately preceding the decision to seek a divorce.

We do not expect that all will agree with all that is presented herein, nor do we take the position that ours is the only point of view worthy of consideration. What we do hope to accomplish is to provide the members of this committee with some positive and constructive suggestions that will assist them in drafting a report that will form the basis of action by Parliament which will bring Canada well into the twentieth century in terms of the law governing divorce.

I do not know, Mr. Chairman, how much of the historical background of this communion I should give.

Co-Chairman Senator ROEBUCK: Mr. Driedger took one hour, so that you I think have one hour. You do not need to limit your remarks at all. It is only five minutes after five, and we will hear you through.

Mr. MICHAEL: Thank you, sir.

Co-Chairman Senator ROEBUCK: Am I right? There is no objection taken by the Committee. Now give us what you have prepared.

Mr. MICHAEL: It was felt that it might assist the committee to know something of the historical background of the Seventh-day Adventist Church and the reasons for its desire to submit its views on this subject to the members of this committee.

Seventh-day Adventists are a conservative Christian communion with theological antecedents that unite them in some respects with their co-religionists in the Catholic, Anglican, Lutheran, Presbyterian, Baptist, Methodist (United Church) and Congregational faiths.

Growing out of the great religious renaissance of the 14th-16th centuries, and more particularly the re-awakening of the mid-19th century with its emphasis on the eschatological teachings of Scripture—

Mr. RYAN: What is that word?

Mr. MICHAEL: Last day—Seventh-day Adventists emerged as a distinct church organization. Believing in the Holy Bible as the only sufficient guide or rule of faith, the name fairly sums up the outstanding and distinguishing features of their faith.

A conviction that the seventh day of the week, Saturday is the only day of religious worship mentioned in the Bible and observed by Christ and his apostles leads Seventh-day Adventists to observe the Sabbath from sundown Friday night to sundown Saturday night. The Biblical teaching of the literal, visible and physical return of Christ to this earth and the need for men

and women to prepare for this cataclysmic triumph of the Christian faith is the other salient doctrine summed up in the name.

Numbering over a million and a half members around the world—practising baptism by immersion only adults are counted—and almost 17,000 in Canada, Seventh-day Adventists conduct a world-wide programme of Christian missions, education, welfare, evangelism and medical service to the community. It is their firm conviction that devout Christianity and a strong sense of social responsibility are not incompatible.

They believe that governments are ordained of God, and teach obedience to properly constituted civic authority within its legitimate sphere as a religious obligation. Adventists are known for their loyalty to Queen and country, and for their devotion to the great traditions of responsible government, parliamentary institutions and liberty. They view the preservation of our tradition of personal liberty as the inescapable responsibility of every loyal citizen. For, in their view, freedom of conscience is the heart and core of all other basic liberties.

Seventh-day Adventists believe firmly in the sanctity of the home and in the ideal of the permanence of marriage as a divine institution going back to the creation of man. Within this communion, divorce with the right of re-marriage is only allowed to the party who is innocent of adultery, with adultery being considered as the only permissible ground for the dissolution of a marriage. This position is predicated upon the teachings of Christ as found in the Gospel of Saint Matthew, Chapter 5, verse 32; and Chapter 19, verse 9, as well as upon the seventh precept of the Ten Commandments.

Having said this, Seventh-day Adventists, who also believe passionately in the freedom of conscience for each man, do not subscribe to the view that the moral standards which ought to be maintained by its members should, through the civil laws of the land, be imposed upon citizens who do not share such convictions. Great suffering has been inflicted upon mankind when the Church, sometimes with the best of intentions, has sought to force its conception of morality upon member and non-member alike through the alien arm of the State. The considerations which should govern the adoption of religious standards and civil standards, while often parallel, are not identical.

GENERAL OBSERVATIONS:

There are some general observations which we would like to make prior to dealing with the submissions.

The integrity of the family as a fundamental pre-requisite to the welfare of society has been stressed wherever Judeo-Christian principles of morality have been accepted. Any study of the history of Western civilization will reveal the importance attached to this principle throughout the development of the social and political structures of our civilization.

The desire for material prosperity, with all that it involves in the development of a complex and stress-ridden society, has not completely obliterated the concern for the welfare of the family. What is often overlooked is that the insatiable quest for affluence creates pressures and conditions that are highly disruptive and destructive of family life.

The safeguards that society considered sufficient to protect the family a century or more ago founded on primitive values may not be adequate today when an almost infinite range of values deserving of recognition and protection clamour for attention. The emerging role of women in society, the new insights into the numerous factors that affect the welfare of the child in forming the patterns of adulthood with the growing awareness of the far-reaching significance of inter-personal relationships all make demands that push to the breaking point the older, simpler and more primitive safeguards of the integrity of the family.

There is much that commends the approach, suggested in some quarters, that the courts dealing with matrimonial and domestic disputes should veer away from the commercial, contractual and criminal concept of marital offences with consequent penalties and relief for the parties involved. There is something very much more realistic and honest in the "marriage breakdown" point of view of the role of the state in matrimonial and domestic problems than that which prevails in the current "matrimonial offence" concept that permeates the law in this area of human conduct and relationship.

The "marriage breakdown" approach would permit an objective, judicial appraisal of the state of the marriage, the welfare of the children, if any, the rights and interests of the parties and whether the marriage was capable of revival, renewal and rehabilitation. With the provision of court-directed counselling services, practical steps could be taken to provide assistance in determining whether the marriage could be saved. If the evidence pointed unmistakably to the irreparable rupture of the marriage, then the court's decree would be essentially a finding of fact—the fact of the death of the marriage, with ancillary provisions to minimize upon the parties, the children and society the impact of the undoubted death of a particular marriage.

An even better approach would be to provide comprehensive pre-marital preparation for every contemplated marriage. Certainly, if modern society is concerned with the preservation of the family, and marriage in particular, and if society is concerned with the prevalence of sick and dying marriages, then the clinically sound approach of prevention should not be overlooked. Such a programme of compulsory pre-marriage training and counselling could be provided by both the private and public sector, and would undoubtedly prove to be the major contributing factor in reducing the incidence of sickly and moribund marriages requiring appraisal or intervention.

THE NEED FOR REFORM:

The question might well be asked, "How is it that a Church that opposes divorce, and only permits its members to seek such relief on the ground of adultery, can advocate the reform of the law dealing with the dissolution of marriage?" The answer lies in the recognition of the fact that we live in a pluralistic society with a democratic form of government. This means that the views of no single group or element in the body politic must be imposed upon all others without their freely given consent. Indeed, the democratic form of government relies on a free electorate arriving at a consensus as to what laws are desirable and should be enforced.

Not all marriages are made in heaven. In fact, many are made a long way from that felicitous clime! Some may even commence life in that benificent atmosphere only to find other levels of existence. With the provision in many jurisdictions for civil marriages, not all marriages are entered into with the blessing of the Church. Not all partners to a marriage accept the teachings of the Church that ideally marriage must be the union of one man and one woman for life to the exclusion of all others.

While in matters of morality we do not subscribe to the idea of finding the lowest common denominator, nevertheless, if the law is to be obeyed and respected it must find endorsement and support by a significant majority. The present state of the law with respect to divorce does not enjoy a broad base of public approval or respect. Where at one time adultery sufficed as a ground for divorce because it alone constituted the one generally accepted matrimonial offence of infidelity, today a great many people consider adultery as only one of many evidences of marital infidelity giving rise to a dissolution of the marriage.

The present state of the law is conducive to the growing number of so-called common-law unions in which many of the victims of sick and dying

marriages take refuge. However much we may try to deny it, the fact is that the law as it now stands tends to encourage the commission of adultery, or a plausible facsimile of adultery, in order to achieve the dissolution of a marriage on the only terms prescribed by the law. This singular stress on physiological infidelity overlooks the fact that for many married persons a marriage can fall apart and cease to exist without the slightest hint of physical disloyalty.

While the Church believes and teaches that no person is beyond the reach of a loving and understanding God, and that no marriage, however anaemic or lifeless it may appear to be, is beyond the saving grace of God, not everyone accepts the eternal verities proclaimed by the Church. Therefore, while the Church has every right to hold out to its members, and indeed to all who wish to listen, a way of life and a philosophy of life that it feels provides mankind with meaningful answers to very real problems, it must not force its viewpoints upon member and non-member, believer and non-believer alike, through the arm of the laws of the state. An individual who declines to accept the Church's teaching in the exercise of the freedom of choice with which he has been provided by his Creator must not find that freedom denied and withheld at the behest of the Church by the laws of the state.

It is for these reasons that the Seventh-day Adventist Church in Canada does not desire to impose its views upon all the citizens of the country through the civil laws of the land. What the Church cannot achieve by intelligent persuasion, education and demonstration, it must not impose by resort to the police power and civil law of the state. Therefore, if an individual wishes to decline to avail himself of the facilities of the Church or its teachings, he must not find himself forced to accept them by the law of the land. In this context, Seventh-day Adventists find no difficulty in supporting those measures for the reform of our country's divorce laws that will once again inspire respect for the law, that will enable people who have made mistakes in their marriages to forgive, forget and try again, that will hold out for the children of sick and dying marriages hope for a reasonably happy home life before it is too late.

SUBMISSION:

As long as the rationale of the law governing divorce is that of relief for the innocent victim of a matrimonial offence and a penalty for the offender, the following grounds for divorce should be recognized by the courts and by Parliament in terms of parliamentary divorces:

1. Adultery: as it is now defined by the courts with specific provision to include acts of lesbianism and homosexuality.

2. Cruelty: without any specific legislative definition, but with the provision for the exercise of judicial discretion as to the definition of cruelty so as to include both physical and mental cruelty.

3. Desertion: if without cause and for more than three years. If there has been an absence of seven years by one partner to a marriage without any contact, the presumption of death that now applies for certain purposes should be extended to a presumption of death of the absent partner sufficient to allow the deserted partner to re-marry.

4. Life imprisonment: if the sentence does not permit of parole or if the confinement is to be "at the pleasure of" the government so that there is not reasonable hope of release, the partner on the outside should be entitled to ask for a dissolution of the marriage.

5. Incurable insanity: where one partner to a marriage is certified as being incurably insane, the other spouse should be free to apply for a divorce which will be granted, if the court is satisfied that there is no reasonable expectation of a cure.

6. Narcotic addiction: where one spouse has been certified as chronically addicted to narcotics, including alcoholism, and the court is satisfied upon proper evidence that there is no reasonable hope of the addict being cured, the other spouse may be granted a divorce.

7. Wilful refusal to consummate: this should be considered not only as a ground for a decree of nullity where there has been no consummation at the outset, but where there is any doubt as a ground for divorce as well, if there is persistent and wilful refusal by one spouse to engage in sexual union with the other spouse.

In addition, it is submitted that consideration should be given to the following questions:

- (a) For purposes of jurisdiction, whether the creation of a Canadian domicile would be desirable in view of the rapidity and ease of transportation from one part of Canada to the other and the highly mobile characteristics of Canada's population and manpower requirements.
- (b) Whether the present absolute bars to divorce (connivance, condonation and collusion) should be merely discretionary bars which the court would be free to apply or not apply in its discretion upon all the facts presented to it.

Again, we would wish to point out that a comprehensive review of marriage and divorce legislation would be most desirable, and indeed is urgently required, if the total problem of family instability is to be properly dealt with by the law. It is hoped that such a study might seriously consider the advantages and disadvantages of the marriage breakdown thesis, the problems relating to the present law governing nullity in respect of void and voidable marriages, the larger issue of the prevention of marriage failure through a comprehensive program of marriage counselling and pre-marital education and preparation by private and public agencies, as well as the most important problem relating to the welfare and custody of the offspring of a marriage terminating in divorce.

In the appendix will be found copies of two resolutions adopted by the highest governing body of the Church in Canada, which serve as the basis for this submission and is submitted for the information of the members of the committee.

In conclusion, the Seventh-day Adventist Church in Canada wishes to re-affirm its belief in the Christian ideal of marriage presented in the teachings of the Bible as being the union of one man and one woman for life. However, it must be recognized that we live in an imperfect society, in a world that the theologian would describe as a sinful world, where the relationships of human being are far from perfect. The role of the Church, indeed of all religious faiths, is to point mankind to a better and higher plane of endeavour, to a more excellent way of life. The role of the state is to protect the individual as far as possible from the harsh impact of man's inhumanity to man, to preserve a modicum of law and order with a maximum of individual freedom consistent with the general welfare of others with equal rights, and to provide the means for resolving as peacefully as possible the conflicting claims of individuals, groups and of society itself.

It is within this context that this submission has been presented to the chairmen and members of the Special Joint Committee of the Senate and House of Commons on Divorce by the Seventh-day Adventist Church in Canada. It is the hope of the members of this communion that this brief will be of assistance to you in completing your difficult task, and that it has not made your undertaking more obscure, nor the success of your mission less certain.

We wish to assure you of our prayers for Divine guidance to attend and sustain you in all your deliberations. We are confident that your report will be one which will commend itself to the Government and to Parliament, as well as to the higher tribunal of the people, for its thoroughness, reasonableness, humanity and justice.

While we continue to regard the preservation of the family as essential to our way of life, we recognize that changing needs arising out of the changing nature of the assaults on the integrity of the Divine institution of marriage and the family call for fresh approaches by both Church and state to provide for the security and strength of these fundamental institutions.

I wish to express our appreciation, Messrs Chairmen and honourable members, for your willingness to hear us out and to permit us to make these views known to you.

Co-Chairman Senator ROEBUCK: Mr. Michael, you referred to two documents which are an appendix to your brief. Would you mind telling us what they are?

Co-Chairman Mr. CAMERON: I would suggest he reads them.

Co-Chairman Senator ROEBUCK: Yes, why not read them.

Mr. MICHAEL: Exhibit "A" is a resolution adopted by the Fifth Quadrennial Session of the Seventh-day Adventist Church in Canada, held in Ottawa, and it reads as follows:

On Marriage and Divorce:

WHEREAS the sanctity of the home as the basic and fundamental institution in a free society is being seriously threatened by the pressures and strains of modern-day living, and

WHEREAS the growing instance of divorce and marital disintegration reflects a grave spiritual inadequacy, and

WHEREAS existing provisions governing marriage and divorce can create grave disabilities for certain citizens,

RESOLVED that:

1. Seventh-day Adventists state their belief in the Christian ideal of a happy, harmonious and lasting marriage and affirm the duty of the church to inculcate among its members the sacredness and permanence of the home and the marriage relationship.

2. Divorce is not an ideal solution to many problems of marital maladjustment but can be resorted to by Christians only on the grounds laid down in Holy Scripture, and that

3. Remarriage of divorced persons is permissible in the teachings of Christ for the innocent party to a divorce that has been obtained in accordance with the Scriptural injunctions, and that

4. We recognize the right of the state to enact certain statutory provisions governing the formation and dissolution of the marriage contract.

Then four years later, at the Sixth Quadrennial Session, held in Edmonton, the following resolution was adopted by the delegates:

On Marriage and Divorce:

WHEREAS the sanctity of the family, as the basic and fundamental institution in a free society, is being gravely threatened by the stress and pressures of many complex social factors in modern life, and

WHEREAS there is an increasingly indifferent attitude on the part of many toward the essential permanency of marriage, and

WHEREAS there is a growing tendency among some religious bodies to seek in the legislative authority of the state support for the moral and spiritual ideals in marriage which they proclaim but with which many individuals are in disagreement, thus causing extensive disregard of the law and the formation of extra-legal marital alliances which result in confusion and sorrow,

RESOLVED, that

1. Seventh-day Adventists reaffirm their belief in the Christian ideal of a happy and lasting marriage and recognize anew their responsibility to provide, through the facilities of the Church, every encouragement in terms of practical assistance and counsel to its members so that the sacredness and permanence of the home and marriage relationship may be fully realized and preserved, and that

2. Since divorce rarely provides the ideal solution to the problems of marital maladjustment, and often creates more problems than it solves, it should be undertaken by the Christian only as a last resort, and then only on grounds laid down in Holy Scripture, and that

3. Remarriage of divorced persons, with the approval of the Church, be entered upon only in accordance with the teachings and principles of Scripture, and that

4. It is incumbent upon the Church to uphold the highest ideals in respect to the formation and dissolution of the marriage bond amongst its members, and that

5. The Church exceeds its authority when seeking to impose universal adherence to its peculiar teachings on this subject through the authority of the state.

Mr. McCLEAVE: May I ask the witness two questions? This is an excellent brief, and it is well written. You have mentioned the death of a marriage or failure of a marriage, but the brief is silent on two points, and these are the two points I raise.

First, what about the marriage that has failed or is practically dead because of the criminal habits of one of the spouses? That is, the man who goes continuously to penitentiary, and perhaps his only contribution to the marriage is short visits in between penitentiary stays, in which he usually adds to the woes of society by begetting more children. Do you not think that should be a ground for divorce, where criminal habits have really made a marriage unworkable?

Mr. MICHAEL: I think there would be very strong argument for that if we first accept the idea that life imprisonment gives some ground for believing that the marriage has in fact ended. With a pattern of habitual criminal conduct that binds one spouse almost continuously in prison, I think there would be some strong support for believing that that should give a ground, with this possible exception, that the marriage might, if it was preserved, prove to be one of the factors that could ultimately help this person. That might be the one element that would modify taking a categorical position and saying that habitual criminal conduct should be a ground, because the marriage might hold within it the potential seeds of stability for that person.

Mr. McCLEAVE: A very fair answer. The other question, sir, I would like your opinion on is this. Suppose the marriage has failed and the parties have entered into a legal agreement to separate, and have maintained themselves separate and apart for, say, a period of three years or more, so that it is very likely they will never come together again. Would you consider this as a ground for divorce? This is really divorce by consent, but it is also a case of a marriage having failed.

Mr. MICHAEL: I am not always sure that it is separation or divorce by consent, because many times the entering into a separation agreement comes after the actual physical separation, more to regulate or provide ground rules to protect the rights of the separated parties. In my limited experience in one profession and a little longer in another, I would say that a separation agreement is sometimes a subsequent development of a separation, and is encouraged and urged to bring some semblance of order to and protection of the rights. If the separation basically and initially is without cause, then, whether or not you have an agreement to try to regulate it or police it, I do not think this should prohibit or prevent an application for divorce then.

Mr. McCLEAVE: Perhaps I should have added this one further point, Mr. Chairman. This is where both parties who have entered into the agreement make the application for divorce after three years of separation.

Co-Chairman Senator ROEBUCK: May I just say at this point that the speaker is Mr. McCleave, the Member for Halifax.

Mr. MICHAEL: Thank you, Mr. Chairman. I think, Mr. McCleave, where both parties have agreed to disagree and go their separate ways, possibly this is coming close to the idea of divorce by consent. If after a period of separation, let us say three years, there is no disposition to try it again, then it would appear that the evidence was rather cogent that the marriage is dead.

Mr. McCLEAVE: Thank you very much.

Mr. BREWIN: I too thought this was a very excellent brief, but is there some inconsistency here, or do I misunderstand? The brief suggests that the breakdown theory or breakdown approach is perhaps the right direction to go, and then afterwards, perhaps just as an alternative or secondary approach, suggests expanding individual grounds.

My understanding of the breakdown approach is that you study as a fact, without consideration of offences, except insofar as the offences may lead to the breakdown, whether the marriage has in fact broken down. I mean, this excludes specific grounds. To take an illustration, it may narrow the specific grounds; a single act of adultery might or might not lead to a breakdown of the marriage.

I just wanted to clarify whether in your brief you are urging us to go along the road of making breakdown the basic consideration—which I know has been recommended by others, including a committee that advised the Archbishop of Canterbury—or whether, on the other hand, you suggest the best approach for us is to enlarge or liberalize the existing offences or grounds for divorce.

Mr. MICHAEL: Mr. Chairman and Mr. Brewin, we feel the breakdown theory has certain features that are worthy of closer examination and study, and perhaps some research. We think it ought to be studied more carefully. We welcome the decision of the committee that reported to His Grace, to which you have referred. However, I think there is the explanation or rationale of the two submissions here on page 10, where we say:

As long as the rationale of the law governing divorce is that of relief for the innocent victim.

This is the approach we would favour. If later on—and the reason for this is that there was some suggestion made to us that the breakdown theory was still some distance in the future; first of all it needs to be studied and examined perhaps a little more thoroughly, but in the meantime—

Co-Chairman Senator ROEBUCK: You think it is sufficiently understood by the population of Canada as a whole to make it politically possible?

Mr. MICHAEL: Well, in my inexpert and unlearned opinion in that area, I do not think it is. I think my first introduction to it was an article in the *Canadian*

Bar Journal this year, in April, which I found extremely intriguing and fascinating to read. Then the report of the committee of the Archbishop of Canterbury lent credence to that. It has many initial attractive and appealing facets, but I would like to hear the case against it, and I think it needs to be studied and examined.

I think the feature that appeals to us in it is that it provides for examining the possibilities of saving the marriage, that first of all nothing can be done for a stipulated period, during which time the parties are subjected to examination and counselling, and the matter of divorce is not looked at. While morally it might be considered an offence in the civil context, it is not looked on as an offence, and the marriage is looked on as something live and viable, and if it is dying or dead why try to keep the corpse around? Physically it is unhygienic to do so, and perhaps sociologically it is equally unhygienic to do so.

Mr. BREWIN: You are not suggesting, are you, sir, that anything approved of by a committee of lawyers and judges advising the Archbishop of Canterbury is unduly radical?

Mr. MICHAEL: I did not say that.

Co-Chairman Senator ROEBUCK: Mr. Perry Ryan, the Member for the City of Toronto, has a question.

Mr. RYAN: Thank you, Mr. Chairman. I would like to draw attention to page 4 of your brief, where you say:

Within this communion, divorce with the right of remarriage is only allowed to the party who is innocent of adultery, with adultery being considered as the only permissible ground for the dissolution of a marriage.

Going further on, in Exhibit "A" at the back of the book, under the heading "On Marriage and Divorce" resolution No. 3 says:

Remarriage of divorced persons is permissible in the teachings of Christ for the innocent party to a divorce that has been obtained in accordance with the Scriptural injunctions.

Then in Exhibit "B", resolution No. 3, which was passed at some later point in time, says:

Remarriage of divorced persons, with the approval of the Church, be entered upon only in accordance with the teachings and principles of Scripture.

It seems to me that there is a possible evolution here in the Seventh-day Adventist Church. Maybe I am taking it wrongly, but on the face of it it would seem, from what I have just read, that the original position of the Church was that they would only remarry a person who had been divorced and who was innocent of adultery, and therefore there would have to be a civil divorce on the basis of adultery before you could remarry even the innocent party. But these subsequent resolutions seem to be moving in another direction, as if anticipating that there may be a change in the law, and your Church would possibly be moving in the direction of remarrying other innocent parties to divorce if the grounds were extended. Is this so?

Mr. MICHAEL: Mr. Chairman, Mr. Ryan, I do not believe so. I may have been guilty of perhaps inexact expression. What is stated on page 4 and then in paragraphs 3 of both resolutions in the two exhibits is essentially the same, that in our Church divorce is only recognized if there is adultery by one partner.

We do not stipulate that the civil action for divorce must be grounded on that necessarily, because in some jurisdictions where that is done it has to be a contested divorce. I am talking about some jurisdictions in the United States. There may be adultery and there may be proof of it, but to avoid that kind of

contest the plaintiff will sue on another ground that is permitted in that state. Now, the Church will not say, "Well, you didn't sue in the courts for adultery". We have to be satisfied that there was adultery, and if there was we admit divorce, and then we only recognize the so-called innocent party's right of remarriage and still enjoying the blessing of the Church.

Mr. RYAN: If we were to bring about an alteration of the law of divorce in Canada so as to permit desertion, cruelty and certain other grounds, would your faith then remarry the innocent party who obtained a divorce on one of those additional grounds?

Mr. MICHAEL: Our approach would be the same as it has been in other countries or jurisdictions where the grounds of divorce are wider than adultery. We would not take any attitude of disrespect towards the decree or order of the court, but as far as membership of the Church is concerned the divorce would have to be one that would come within the understanding of the teachings of the Scriptures.

Mr. RYAN: First of all the civil tie would have to be broken, then you would have to be satisfied that it came within your faith?

Mr. MICHAEL: Yes. We would not stipulate that the suit for divorce had to be for adultery, but we would, as long as this is our position, have to be satisfied that there was adultery.

Mr. RYAN: Thank you.

Co-Chairman Senator ROEBUCK: Let us clarify this. You mean that the Church would not approve of the marriage of one of its own members unless it was in accordance with the principles you have described?

Mr. MICHAEL: Yes.

Co-Chairman Senator ROEBUCK: But if someone came before you who was a member of the Church and you did not approve, he was outside your ground of approval, would you refuse to marry him? You have certain legal rights in the matter of marriage. Would you refuse to exercise those rights and marry the people?

Mr. MICHAEL: That is our teaching and practice.

Co-Chairman Senator ROEBUCK: And practice?

Mr. MICHAEL: Yes.

Mr. McCLEAVE: Other Churches follow it, do they not?

Mr. MICHAEL: Yes.

Co-Chairman Mr. CAMERON: They may go somewhere else and get married. Is that it?

Mr. MICHAEL: Well, this has been the way it has been done in the past. What we try to do now is to take a humane approach and counsel the person. We point out what the teachings and beliefs of the Church are, and say, "What you are planning on, or contemplating doing, is something we cannot participate in. If you wish to do it none the less, the alternative is open to you: in some jurisdictions civil marriage, or marriage by a clergyman who does not feel himself hampered by these convictions that we have. But you will still enjoy our concern and our affection; you may have to be subject to the discipline of the Church if you persist in this", but we try not to be heartless about it. On the other hand, as long as the Church adopts this position it has to be consistent, we have to implement it.

Mr. HONEY: Mr. Chairman, I want to say to Rev. Michael that I think this is a very excellent brief, but I did just want to question you along one line, and that is with reference to your breakdown theory, which you have indicated is something that—and I agree with this—this committee should explore and that all of us should be thinking about.

Would you think from your experience that if we were able to develop this theory there would be an area where we might have a judicial or quasi-judicial process requiring as a condition precedent to going to a court for divorce the submission of the marital problems to a court or combined court and social agency, so that, prior to the marriage deteriorating to a dying or dead position, an attempt was made at a point where it may be in a sick condition to give it some encouragement? It would be a condition precedent to asking for relief that a couple having a sick marriage should be required to consult the court, and maybe the court could work with social and religious agencies in this area. Do you think that is possible?

Mr. MICHAEL: This is something that I think would have to be looked into in terms of its practical implementation. Logically it would seem that if we accept the breakdown thesis it would be foolish not to try to provide some measures for salvage or restoration, rather than merely stand by waiting for it to complete the process of breakdown and then have a court or some judicial body pass the verdict that it has now broken down.

I think the breakdown theory has one very important aspect to it, and that is that some effort be made to assess the degree of marriage disintegration or illness, and to see if it can respond to treatment and effort. I think this would be ideal. Tied in with this we would like to see study given to the idea of even preventing the onset of marriage illness, in terms of preparation and education for it, perhaps in our schools, perhaps through welfare agencies, public and private. But I think counselling and the attempt to save the marriage certainly ought to be a very integral part of the breakdown approach.

Mr. HONEY: And this could be one feature of the court; it could be a judicial process, do you think? Probably in co-operation with social and religious agencies.

Mr. MICHAEL: I do not know how effective the judicial machinery is for helping save marriages. I say this with the greatest respect for our judicial institutions. I am not sure if they lend themselves to this operation, whether it would be better to have it done by a social welfare agency, a community agency, public or private. I think the judicial atmosphere is not the most conducive to examining the health of a marriage and making recommendations as to what will help to save it.

Mr. HONEY: Thank you.

Co-Chairman Senator ROEBUCK: Mr. Baldwin of Peace River, you have a question, have you not?

Mr. BALDWIN: Yes, Mr. Chairman. I wanted to ask a question of Mr. Michael in connection with the specific recommendations he has made in the submission on page 10. I wanted to clarify in my own mind some of the points raised.

Point No. 3 is desertion, and you suggest there:

If there has been an absence of seven years by one partner to a marriage without any contact the presumption of death that now applies for certain purposes should be extended.

On several occasions I have been called on in practice to secure a presumption of death so that a person could put an affidavit in the application for a marriage licence, so that because of the presumption of death by the court the applicant can say, "I am not married," and thereby does not commit perjury and can apply for a marriage licence and marry. But that does not ease the situation if the party who has been missing for seven years shows up.

I wanted to ask if what you suggest here would have the effect of stripping all the rights of party who has been absent for seven years, so that should that

person return he or she has no more civil rights, has lost all property rights? Is that what is envisaged by your proposal in paragraph 3?

Mr. MICHAEL: We should probably have broken that in two, so that it should have been desertion and then another paragraph dealing with prolonged absence. Our thinking here was that if a party has been absent for that seven-year period—which seems to be the commonly accepted one—if there is a presumption of death for the purpose of remarriage it ought to be an irrevocable presumption, so that you do not then get subsequent problems which only create a more complex situation.

Mr. BALDWIN: So the eventual result would be that there would be a divorce, and if the person turned up after seven years that person would, to all intents and purposes, be divorced?

Mr. MICHAEL: Except that perhaps the procedure to obtain this sort of declaration might be simpler and less elaborate than a suit for dissolution of marriage.

Mr. BALDWIN: The other point was on paragraph 7, "Wilful refusal to consummate". I do not know about the jurisdiction in Alberta, but my recollection is that it has only been possible to secure a decree of nullity on the ground of incapacity consummate the marriage. I can recall in my experience as a lawyer trying on one or two occasions to stretch physical incapacity to consummate the marriage to a mental aversion which could be construed as being physical incapacity.

It may be that in Ontario your jurisdiction is somewhat different, but if not, it would strike me that wilful refusal to consummate is adding to what I understand is the law in some provincial jurisdictions, that nullity decrees can only be granted where you are able to establish incapacity. If I am right in that, then wilful refusal adds somewhat to those grounds. I am not trying to make it difficult. I just want to get these things fixed in my own mind.

Mr. MICHAEL: Our thought in putting this here was that, while it has been recognized in certain jurisdictions as a ground for nullity, we ought to give consideration to it as a ground for divorce, and if there is any doubt as to whether it is sufficient to ground an action for nullity, it certainly ought not to exclude the possibility of an application for dissolution.

Mr. BALDWIN: So wilful refusal to consummate may, in fact, be coterminous with incapacity to consummate?

Mr. MICHAEL: Yes.

Mr. STANBURY: Mr. Chairman, I wondered, as Mr. Baldwin did, whether Mr. Michael might clarify some of the points on page 10. I was interested in the second item, cruelty. You suggest that there should be no specific legislative definition, but then you go on to suggest what should be included in "cruelty". Are you satisfied with the present definition of "cruelty" by the courts?

Mr. MICHAEL: I think that "cruelty" as our courts have had occasion to define it has been in a context of desertion, where one party has felt compelled to leave.

Mr. STANBURY: I think not in all cases.

Mr. MICHAEL: Not in all.

Mr. STANBURY: They can continue to live together.

Mr. MICHAEL: Yes, but the judicial definition of "cruelty" enters that area. In mentioning it in this way our feeling was that if we try to define it too precisely in a statute we will probably shackle or handcuff the courts, and I think our courts in Canada have not shown any disposition to define "cruelty," as they have in certain other more southern jurisdictions.

Mr. McCLEAVE: It is mixed in with the tourist industry down there.

Mr. STANBURY: I am inclined to agree with you, Mr. Michael. I was just wondering whether you were suggesting that there should be some specific legislative definition of "cruelty", to the extent of including both physical and mental cruelty, or whether you felt the definition by the courts has been sufficient. I would be inclined to think that the development of definition by the courts has been fairly satisfactory in this field, and that there would be some disadvantages to trying to define "cruelty" in legislation.

Mr. MICHAEL: This was our feeling, that to try to define it in a statute would probably not be a desirable approach, that it would be better to leave it for judicial interpretation or definition; but perhaps going just this far, to state that it should not be limited only to physical cruelty. After all, a human being is a total human being, and both the physical and mental aspects of cruelty should be within the range of the courts power' to define.

Mr. STANBURY: This is within the range of the present definitions by all of the courts, I think, in the common law jurisdiction of Canada.

Mr. MICHAEL: Yes, but it has not gone as far as it has in some other jurisdictions.

Mr. STANBURY: You feel that cruelty should extend to both physical and mental aspects, but you are not necessarily suggesting the legislation should say so?

Mr. MICHAEL: I think that if the grounds are extended it ought to be made clear that they are extending it to include physical and mental, but then stop short.

Mr. STANBURY: Of going further?

Mr. MICHAEL: Yes.

Mr. STANBURY: In the case of desertion, I was going to ask, as Mr. Baldwin did, about your intention here. It seems to me that in at least Ontario the deserted partner is allowed to remarry after a declaration of presumption of death. What you are suggesting here is that the first marriage be invalidated, dissolved.

Mr. MICHAEL: Dissolved.

Mr. STANBURY: So I think that perhaps what you said in paragraph 3 is not exactly what you meant.

Mr. MICHAEL: Quite. I would have to plead guilty to that.

Mr. STANBURY: Then in paragraph 7, where you refer to refusal to consummate, is there not some difficulty here in defining the limits of this wilful refusal? Is there not a danger that there might be an aspect of mental instability involved in the wilful refusal, and that you might in fact be creating a ground for divorce which is really temporary insanity, a temporary mental disease? Have you given any thought to the length of term which you consider to be sufficient wilful refusal to constitute a ground for divorce?

Mr. MICHAEL: Yes, this did give us considerable concern, as to its limits and how we would limit it. In mentioning it we felt that it was something that was perhaps worthy of consideration. What kind of limits you have and what kind of evidence would be required to establish it is not, we would agree, a simple question, and certainly not as easy as perhaps some of the others, such as cruelty of incurable insanity. None the less, we feel it ought to be available as a ground, with certain defined limits or characteristics.

Mr. STANBURY: You have not anything to offer in respect of those limits and characteristics at the moment?

Mr. MICHAEL: I think that over a certain period of time would certainly be one sound approach so that you get away from a temporary aberration situation. What we were thinking of was where this has been the case for

extended periods, so that it does not seem by any stretch of the imagination to lend itself to being considered as just a passing, transitory state, or a period of adjustment say.

Mr. STANBURY: When you say "an extended period", do you think in terms of a period of years?

Mr. MICHAEL: I would say three years.

Co-Chairman Senator ROEBUCK: Now, gentlemen, it is time we adjourned.

Co-Chairman Mr. CAMERON: Mr. Chairman, before we adjourn, may I again on behalf of the committee, through you, thank the Rev. Mr. Michael for the brief prepared by the Seventh-day Adventist Church in Canada. A number of members have commented that it is an excellent brief, it has been well presented, it is based on a realistic appraisal of the situation, and, if I may say so, indicates a great deal of Christian charity.

The committee adjourned.



First Session—Twenty-seventh Parliament
1966

PROCEEDINGS OF
THE SPECIAL JOINT COMMITTEE OF THE SENATE
AND HOUSE OF COMMONS ON

DIVORCE

No. 4

TUESDAY, OCTOBER 25, 1966

Joint Chairmen

The Honourable A. W. Roebuck

and

Mr. A. J. P. Cameron, M.P.

WITNESS:

Parents Without Partners of Windsor: John P. Walsh, Chairman, The Single Parents Divorce Reform Committee, Parents Without Partners of Windsor.

APPENDIX

5. Brief from The Marriage and Family Life Division of the Diocesan Council for Social Service of the Diocese of Nova Scotia, Anglican Church of Canada.

ROGER DUHAMEL, F.R.S.C.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1966

MEMBERS OF THE
SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS
ON DIVORCE

FOR THE SENATE

Hon. A. W. Roebuck, Joint Chairman

The Honourable Senators

Aseltine
Baird
Belisle
Burchill
Connolly (*Halifax North*)
Croll

Denis
Fergusson
Flynn
Gershaw
Haig
Roebuck—(12).

FOR THE HOUSE OF COMMONS

Mr. A. J. P. Cameron (*High Park*), Joint Chairman

Members of the House of Commons

Aiken
Baldwin
Brewin
Cameron (*High Park*)
Cantin
Choquette
Chrétien
Fairweather
Forest
Goyer
Honey
Laflamme

Langlois (*Mégantic*)
MacEwan
Mandziuk
McCleave
McQuaid
Otto
Peters
Ryan
Stanbury
Trudeau
Wahn
Woolliams—(24).

(Quorum 10)

ORDERS OF REFERENCE

Extracts from the Votes and Proceedings of the House of Commons:

March 15, 1966:

"On motion of Mr. McIlraith, seconded by Mr. Hellyer, it was resolved—that a Special Joint Committee of the Senate and the House of Commons be appointed to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either House;

That 24 Members of the House of Commons, to be designated by the House at a later date, be members of the Special Joint Committee, and that Standing Order 67(1) of the House of Commons be suspended in relation thereto;

That the Committee have power to engage the services of such technical, clerical and other personnel as may be necessary for the purpose of the inquiry;

That the Committee have the power to send for persons, papers and records, to examine witnesses, to report from time to time, and to print such papers and evidence from day to day as may be ordered by the Committee, and that Standing Order 66 be suspended in relation thereto; and

That a Message be sent to the Senate requesting Their Honours to unite with this House for the above purpose, and to select, if the Senate deems it so advisable, some of its Members to act on the proposed Special Joint Committee."

"By unanimous consent, on motion of Mr. McIlraith, seconded by Mr. Hellyer, it was ordered—That the order of the House of Monday, February 21, 1966 referring the subject-matter of the following bills to the Standing Committee on Justice and Legal Affairs, namely:—

Bill C-16, An Act to provide in Canada for the Dissolution of Marriage (Additional Grounds for Divorce).

Bill C-19, An Act to provide in Canada for the Dissolution and the Annulment of Marriage.

Bill C-41, An Act to amend the British North America Acts, 1867 to 1965, (Provincial Marriage and Divorce Laws).

Bill C-44, An Act to provide in Canada for the Dissolution of Marriage.

Bill C-55, An Act to provide in Canada for the Dissolution of Marriage.

Bill C-58, An Act respecting Marriage and Divorce.

Bill C-79, An Act to amend the Dissolution and Annulment of Marriages Act (Additional Grounds for Divorce).

be discharged, and that the subject-matter of the same bill be referred to the Joint Committee of the Senate and the House of Commons on Divorce."

March 16, 1966:

"By unanimous consent, on motion of Mr. Stewart, seconded by Mr. Byrne, it was ordered—That the subject-matter of Bill C-133, An Act to extend the grounds upon which courts now have jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief, be referred to the Special Joint Committee on Divorce."

"By unanimous consent, on motion of Mr. Stewart, seconded by Mr. Byrne, it was ordered—That the subject-matter of Notice of Motion No. 11 be referred to the Special Joint Committee on Divorce."

March 22, 1966:

"On motion of Mr. Pilon, seconded by Mr. McNulty, it was ordered—That a Message be sent to the Senate to acquaint Their Honours that this House will unite with them in the formation of a Joint Committee of both Houses to inquire into and report upon divorce in Canada, and that the Members to serve on the said Committee, on the part of this House, will be as follows: Messrs. Aiken, Baldwin, Brewin, Cameron (*High Park*), Cantin, Choquette, Chrétien, Fairweather, Forest, Goyer, Honey, Laflamme, Langlois (*Mégantic*), MacEwan, Mandziuk, McCleave, McQuaid, Otto, Peters, Ryan, Stanbury, Trudeau, Wahn and Woolliams."

LÉON-J. RAYMOND,

Clerk of the House of Commons.

Extracts from the Minutes of the Proceedings of the Senate:

March 23, 1966:

"Pursuant to the Order of the Day, the Senate proceeded to the consideration of the Message from the House of Commons requesting the appointment of a Special Joint Committee of the Senate and House of Commons on Divorce.

The Honourable Senator Connolly, P.C., moved, seconded by the Honourable Senator Roebuck:

That the Senate do unite with the House of Commons in the appointment of a Special Joint Committee of both Houses of Parliament to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either House;

That twelve Members of the Senate, to be designated at a later date, act on behalf of the Senate as members of the said Special Joint Committee;

That the Committee have power to engage the services of such technical, clerical and other personnel as may be necessary for the purpose of the inquiry;

That the Committee have the power to send for persons, papers and records, to examine witnesses, to report from time to time, and to print such papers and evidence from day to day as may be ordered by the Committee, and to sit during sittings and adjournments of the Senate; and

That a Message be sent to the House of Commons to inform that House accordingly.

After debate, and—

The question being put on the motion, it was—

Resolved in the affirmative."

March 29, 1966:

"With leave of the Senate,

The Honourable Senator Beaubien (*Provencher*) moved, seconded by the Honourable Senator Inman:

That the following Senators be appointed to act on behalf of the Senate on the Special Joint Committee of the Senate and House of Commons to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, namely, the Honourable Senators Aseltine, Baird, Belisle,

Bourget, Burchill, Connolly (*Halifax North*), Croll, Fergusson, Flynn, Gershaw, Haig, and Roebuck; and

That a Message be sent to the House of Commons to inform that House accordingly.

The question being put on the motion, it was—
Resolved in the affirmative.”

May 10, 1966:

“Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Roebuck, seconded by the Honourable Senator Croll, for the second reading of the Bill S-19, intituled: “An Act to extend the grounds upon which courts now having jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief”.

The question being put on the motion—

In amendment, the Honourable Senator Connolly, C.P., moved, seconded by the Honourable Senator Hugessen, that the Bill be not now read the second time, but that the subject-matter be referred to the Special Joint Committee on Divorce.

After debate, and—

The question being put on the motion, it was—
Resolved in the affirmative.”

J. F. MacNEILL,
Clerk of the Senate.

MINUTES OF PROCEEDINGS

TUESDAY, October 25, 1966.

Pursuant to adjournment and notice the Special Joint Committee of the Senate and the House of Commons on Divorce met this day at 3:30 p.m.

Present: For the Senate: The Honourable Senators Roebuck (*Joint Chairman*), Baird, Belisle and Fergusson.

For the House of Commons Messrs. Cameron (*High Park*) (*Joint Chairman*), Aiken, Baldwin, Brewin, Forest, Honey, Mandziuk, McCleave, McQuaid, Peters and Stanbury.

In attendance: Dr. Peter J. King, Special Assistant.

Mr. John P. Walsh, Chairman, The Single Parent Divorce Reform Committee, Parents Without Partners of Windsor, was heard.

Dr. King, the Special Assistant, read into the record, the following statements and brief:

1. Statement from the Board of Evangelism and Social Action of the Presbyterian Church in Canada.
2. Statement from the Salvation Army.
3. Statement from the Mennonite Committee (Ontario).
4. Statement from the Catholic Charities of the Diocese of London, Ontario.
5. Brief from the Synod Executive Committee of the Diocese of Huron, The Anglican Church of Canada.

A brief from The Marriage and Family Life Division of the Diocesan Council for Social Service of the Diocese of Nova Scotia, Anglican Church of Canada was ordered to be printed as appendix No. 5 to these proceedings.

On motion of Mr. McCleave it was resolved that the Steering Committee be empowered to select authoritative writings both pro and con on the subject of divorce which could be incorporated as appendices to these proceedings.

The Honourable Senator Baird, seconded by Mr. Baldwin, moved that the quorum of the Committee be reduced to seven (7) members.

The question being put on the said motion, the Committee divided as follows: YEAS—5 NAYS—2.

The motion was declared carried in the affirmative.

On motion duly put it was resolved that henceforth, any brief submitted by mail with no request or requirement for personal representation, should form part of the printed proceedings, subject to the discretion of the Special Assistant.

At 5:30 p.m. the Committee adjourned until Tuesday next, November 1, at 3:30 p.m.

Attest.

Patrick J. Savoie,
Clerk of the Committee.

THE SENATE
SPECIAL JOINT COMMITTEE OF THE SENATE AND
HOUSE OF COMMONS ON DIVORCE
EVIDENCE

OTTAWA, Tuesday, October 25, 1966.

The Special Joint Committee of the Senate and House of Commons on Divorce met this day at 3.30 p.m.

Senator Arthur A. Roebuck and Mr. A. J. P. Cameron (*High Park*), Co-Chairmen.

The Co-Chairman Senator ROEBUCK: Shall we start? What do you think? We now have nine members here. We will have it agreed by the general committee when others arrive. Is there any objection? Very well, that is agreed.

We have a distinguished witness before us today. The gentleman who is before us will represent the Parents Without Partners, Inc. It is an organization in both the United States and Canada. It has some 20,000 members in the United States, and no fewer than five branches of the United States organization in Canada. They are located at London, Bradford, Hamilton, Sarnia, Vancouver and Toronto.

Our visitor comes from Windsor, or thereabouts, and he will tell us much more fully about the organization, but I would like to say something about him personally. To begin with, he is the son of the late Mr. Thomas Edward Walsh, of the Walsh Advertising Company in Toronto, with whom I think nearly all of us were at one time familiar. He was educated at Assumption High School and Assumption College, Windsor, Ontario.

During World War II, he enlisted as a ship's writer in the Royal Canadian Naval Volunteer Reserve. Upon discharge from the service, he worked in the advertising business until 1950, when he left to enter the meat business, and has been in this trade ever since. Mr. Walsh is a graduate of the National School of Meat Cutting, Toledo, Ohio, and a member of the Amalgamated Meat Cutters and Butcher Workmen of North America.

He was chairman of the Western Ontario Naval Reunion, the first naval reunion to be held in Windsor since World War II. He was first president of the Essex Kent Naval Veterans Association, and publicity director. He was president of the St. Vincent de Paul Society, St. Clair Beach, Ontario, 1959-64, and he is a member of the Board of Directors of the Immigration Centre.

Mr. Walsh has been with Parents Without Partners of Windsor since January, 1964. He was chairman of the Publicity Committee, and was chairman of the Single Parents Divorce Reform Committee, which prepared the brief he will be presenting today.

He is presently attending night school at the University of Windsor, where he is taking a certificate course in business administration.

So, ladies and gentlemen, we have a distinguished witness, with a very great deal of experience, and some very special knowledge that he wishes to lay before us. I call on Mr. Walsh.

Mr. John P. Walsh, Chairman, the Single Parents Divorce Reform Committee, Parents Without Partners of Windsor: Thank you, Senator Roebuck. I would like to read our submission to you people.

RECOMMENDATIONS FOR DIVORCE REFORM:

1. Parents Without Partners, Inc., is an international, non-profit, non-sectarian, educational organization devoted to the welfare of single parents and their children. It was incorporated in the State of New York in March, 1958, and now has chapters in nearly every state of the Union and in Canada. Its program and activities are entirely the volunteer work of members of P.W.P., Inc. To be eligible for membership a person must be a parent and single by reason of death, divorce or separation, or unmarried.

2. Windsor chapter of Parents Without Partners is a member of the Metropolitan Detroit chapter No. 126, and the work of its Single Parents Divorce Reform Committee has been directed toward P.W.P. Article (p) of the Constitution II:

To develop, sponsor and work towards improved legislation on all matters relating to separation, divorce, annulment, custody and welfare of children.

3. The members of the Single Parents Divorce Committee consist of: Chairman, John P. Walsh, P.O. Box 44, Belle River, Ontario, Mrs. Marian Woolley and Mrs. Dolena Roy of Windsor.

At this point I would like to say that Mrs. Marian Woolley is a school teacher, and she teaches a junior auxiliary class in Windsor. Mrs. Roy is a medical secretary, who lived in Windsor and has recently married and is living in Detroit, Michigan. These two are very active in this group, and they have done an awful lot of work—more than I have—on this brief, so I would like to give them full accord.

The Co-CHAIRMAN (*Senator Roebuck*): Give them credit where credit is due.

Mr. WALSH: That is right.

4. The three members of this committee have for the past three years been members of P.W.P., a group composed exclusively of single parents, 90 per cent. of whom are separated or divorced. Because of this association and because of personal experience we feel we are in a position to offer concrete and workable suggestions for divorce reform.

5. We would recommend that immediate steps be taken to change the divorce laws in Canada so as to be based upon the recognizable symptoms of a marriage collapse, and we submit the following to be just and reasonable:

- (i) Separation, after two years.
- (ii) Desertion, after two years.
- (iii) Insanity, after four years (uncured and institutionalized).
- (iv) Imprisonment, after four years.
- (v) Extreme physical cruelty.

6. We further recommend that the following stipulations be included in Canada's new divorce legislation:

- (a) Recognition of divorces granted outside of Canada to Canadian citizens on grounds listed in paragraph 5.
- (b) Recognition of the domicile of the plaintiff (whether husband or wife) in filing for divorce, not that of the husband exclusively, and that domicile requirements be not less than one year.
- (e) Refusal to allow the petitioning of a divorce until a marriage has lasted three years.

7. We further recommend the setting up of a child support system in which the father be made responsible for the support of his children in cases of separation and desertion. When the father who is absent from the family becomes delinquent in his child support payments, the payments should be deducted from his source of income, in the manner of income tax, and turned over to the proper government agency, who would then pay the mother or guardian of the children directly.

8. We further recommend that a long range plan be instituted to prevent marital disasters, and suggest the following:

- (a) That a complete study be made of the reasons for marriage breakdown.
- (b) That an educational program be set up in our elementary and secondary school systems, aimed at preparing our youth for the responsibilities of marriage and guiding them toward better mate selection.
- (c) That a system of pre-marital counselling be designed under the direction of sociologists and that pre-marital counselling be mandatory to the issuance of a marriage licence.

9. Our immediate consideration today, however, is the urgently required change in our existing divorce regulations. With the adoption of our recommendations in paragraphs 5 and 6 the personal destiny of thousands of Canadians would rightfully be placed in their own hands.

10. It has been our observation that most couples wish above all to preserve and enhance their marital state. We know of no persons who have separated without good and just reason, and then only after honest attempts to live in harmony and many reconciliations. If after living apart for two years a couple have no desire to ever again live together as man and wife, no law can make it so, and no service is rendered mankind to refuse divorce. We therefore recommend the grounds of separation after two years to be just and necessary.

11. In cases of desertion, the deserted spouse should have the right to begin divorce proceedings if the deserting partner has not returned to the family group within two years. However, during this intervening period legal protection should be afforded the deserted spouse, male or female. We urgently request adoption of recommendations in paragraph 7. Dr. Fernando Henrique, sociologist, in his book *Love in Action* says:

Desertion by either party is another very widespread reason for divorce in simple societies. The effect of desertion is to deprive the wife and children of support without giving the freedom to remarry. Economic security may only be restored by remarriage, so legal dissolution is necessary. Here the advanced society is at one with the savage.

We therefore support desertion as a justifiable ground for divorce in Canada.

12. Those who feel the present divorce laws are adequate and serving the purpose of preserving a stable society are, in fact, judging the marriages of others from limited personal experience. Too much of the commentary on marriage is made by those whose practical knowledge or actual "field training" has been limited to fairly level ground, or by those who have never even donned the "combat uniform", while those who face the facts and the statistics must fight an uphill battle for proper appraisal of the truth.

13. One of the clearest summaries on divorce reform necessity was made by E. D. Leach of West Virginia, who said:

It does not make any difference how high you make the grounds for divorce, people are going to meet it if they cannot live together by the

laws of nature. You cannot suspend those laws by any act of legislature, and until we come to understand that the main duty, the chief purpose and end of an organization of this kind is to increase the sum total of human happiness in this country, I think we are searching after false gods. If we can do so by increasing the standard of divorce, well and good. If we cannot, we better lower it.

14. The Single Parents Divorce Reform Committee came into being in October, 1964, when the publicity chairman (John Walsh), the programming chairman (Marian Woolley) and the newsletter editor (Dolena Roy) of Windsor Parents Without Partners, supported by the membership, began a campaign for better understanding of divorce requirements. With the writing of this brief, the committee itself ceases to exist, as the original committee members are now ineligible for membership in P.W.P. It is ironic that all three members of the committee have been forced to seek divorces in a country other than Canada in order to remarry. Must Canada remain a country whose divorce laws force its citizens to seek legal relief in another country?

15. We commend the Prime Minister for bringing the matter of divorce before this body, and we are confident that wisdom and justice will prevail and a new divorce law will be passed, aimed at a realistic understanding of the needs of the Canadian citizen.

The Co-CHAIRMAN (*Senator Roebuck*): Very good. Now, I think some members of the committee will have questions to ask in response to what you have said, Mr. Walsh.

Mr. WALSH: That is fine, senator.

Mr. MANDZIUK: I feel that I should get the ball rolling. I would like to ask the witness this. Which of these suggested grounds for divorce, if not all, have been accepted as or are grounds for divorce in states in the United States, and in how many states?

Mr. WALSH: Well, I cannot give you the number of states, but I believe separation is one; desertion I know is one; extreme physical cruelty is another. That is all I know of.

The Co-CHAIRMAN (*Senator Roebuck*): As grounds for divorce?

Mr. WALSH: Yes.

The Co-CHAIRMAN (*Senator Roebuck*): In what states?

Mr. WALSH: In Michigan.

Mr. MANDZIUK: Any other states?

Mr. WALSH: I could not tell you really. I do have them here for a Mexican divorce. Everybody thinks that Mexican divorce is a very easy thing to get, but these are the grounds there: cruelty, abandonment of the conjugal duties after three months, separation over one year, incompatibility of characters, written consent of divorce. Now, that is another one that is a ground for divorce if the two people are agreeable on it in Michigan. I think it takes sixty days to get one.

The Co-CHAIRMAN (*Senator Roebuck*): Have you advocated that for Canada?

Mr. WALSH: I have advocated these right here, senator. Or I should say our group has.

Mr. MANDZIUK: I have other questions, Mr. Chairman, otherwise I would have to get into an argument with the witness and I do not think that is our duty here. We are trying to get your point of view, Mr. Walsh, and then we will make up our own minds. I will pass on for the time being.

Mr. AIKEN: I was taken by several references in this brief, particularly paragraph 6, and also the closing remarks, concerning recognition of divorces

granted outside Canada in Canada, and also recognition of grounds that exist outside Canada within Canada. As a lawyer, it seems to me that these recommendations you have made are impossible of attainment because of international law.

Mr. WALSH: Do you mean recognition of divorces granted outside of Canada?

Mr. AIKEN: Yes.

Mr. WALSH: Well, that is provided they meet the same requirements as are in Canada. In other words, if they get a divorce for desertion, supposing it is changed to two years, or two years separation; provided it is gotten on those grounds.

Mr. AIKEN: But will that not require a retrial of the issue in Ontario, or wherever in Canada they may be?

Mr. WALSH: If they already have a divorce and it has gone through and the other party does not oppose it, then we believe it should be granted. Why should a person have to go all through this again? In Michigan, if the grounds are the same as in another state, then the divorce is recognized.

Mr. AIKEN: A thing that also troubles me about the last part of paragraph 14 is that some of your members have had to go to the United States to get a divorce. I think it is generally accepted that these are not recognized in Canada.

Mr. WALSH: This is true.

Mr. AIKEN: Do you think there is a system by which they could be without a retrial of the issue? What I am getting at is that some court has to determine, if you want finality to the matter, that the divorce was properly granted. If there were proper grounds for which a divorce could be got in this country, then you are no further ahead.

Mr. WALSH: The thing is, we would like to have it changed to this. What reason would there be to spend this money all over again when you have gone out of the country to get one and matched the grounds that there are in this country?

Mr. AIKEN: Suppose for the moment they are grounds that would be accepted in Canada. Then they would not need to leave.

Mr. WALSH: What I am getting at is the people who have already gone out of the country. There are thousands of them. I know there are an awful lot in Montreal. I know of a lawyer in Mexico who has personally taken up a lot of these people's cases. I mean, up to the time of the changing of these laws.

Mr. AIKEN: Like Mr. Mandziuk, I do not want to enter into a discussion, but one thing that strikes me in your brief is that I just do not see how under international law you are going to have this happen. There is certainly no way in which parliament, as far as I know, could amend the recognition of foreign divorces. I just throw that thought out.

Mr. BALDWIN: As a supplementary point to that, Mr. Chairman, is it not correct that in Canada we do recognize a divorce granted in another country provided there has been a proper establishment of domicile in that other country? In other words, if a matrimonial domicile has been established outside Canada and a divorce is then granted in the courts of that jurisdiction, do we not recognize that divorce? This is what is running through my mind. I do not know whether we have anybody here who is competent to give a legal opinion on that. This is my belief as a member of the bar. Have you any knowledge of that?

Mr. WALSH: Provided the person is living in the country at the time he gets a divorce I believe this is so.

Mr. BALDWIN: By "living" you mean he has established domicile?

Mr. WALSH: Yes.

Mr. BALDWIN: In terms which our courts and our laws recognize as being proper domicile, as distinguished from residence.

Senator BAIRD: We do not recognize Mexican divorce.

Mr. WALSH: You do not recognize American divorce either.

Senator BAIRD: But we recognize an American one for purposes of, shall I say, immigration, do not we?

Mr. WALSH: If a person goes to, for example, Detroit to establish residence there for one, if he gets a divorce there and comes back to Canada after a year I do not think it is recognized.

Mr. AIKEN: It is a question of fact in every case. I believe you have to convince the judge that you went there *bona fide* to live rather than *bona fide* to get a divorce.

The Co-CHAIRMAN (*Senator Roebuck*): The intention being to continue to live there.

Mr. AIKEN: Yes.

The Co-CHAIRMAN (*Senator Roebuck*): And therefore to make his home, what we call his domicile, there, which is distinguished from his mere residence there.

Mr. AIKEN: I wonder if I might ask one supplementary question along the same lines. You suggest that we recognize domicile of the plaintiff wife in filing for a divorce rather than the husband exclusively. Could you tell us why your suggestion was on those lines?

Mr. WALSH: Well, we have a case of a girl with six children. The man deserted her. He took one of the boys to choir practice one night six years ago told the boy he would be back to pick him up in an hour or so, and they have been unable to find him until just recently. Then when they did find him, they tried to catch up with him but he disappeared again. In any case of desertion I think that the party who is left behind should have a chance to file, whether it is male or female.

Senator BELISLE: Are these requests you are making based upon the experience of many cases or just one case?

Mr. WALSH: They are based on several experiences.

The Co-CHAIRMAN (*Senator Roebuck*): Does your brief express the opinion of your whole organization, both in the United States and in Canada? Are these the tenets to which you owe allegiance generally in your organization?

Mr. WALSH: This brief expresses the wishes of our organization in Windsor, because I do not think it would matter in Detroit really, they already have divorce laws that are liveable.

Mr. BALDWIN: Dealing with the point Mr. Aiken mentioned and which the senator discussed, the question of paragraph 6 (b), domicile, my recollection is that under our Divorce Jurisdiction Act, 1930, where a wife has been deserted and the husband has left the jurisdiction, she then has the right to establish domicile for the purpose of divorce, provided that domicile is in the jurisdiction from which the desertion took place. Now you propose to extend that so that without the necessity of the plaintiff wife being free to acquire domicile in one jurisdiction from which the husband deserted her and stayed in desertion for two years, if the wife after the desertion should move from, say, Ontario to Alberta—which would be a very good move, I suggest—the wife would acquire domicile in Alberta, which would permit her to petition the courts in Alberta for a divorce. This is your proposal, is it?

Mr. WALSH: What we want is this, that when a wife is left she does not have to run off to Vancouver to file for divorce. If she is left in Ontario she should be able to file after two years.

Senator FERGUSON: But she can now after two years if she has been deserted in Ontario.

Mr. WALSH: She can?

Senator FERGUSON: She can under the Divorce Jurisdiction Act in Ontario where she was deserted.

Mr. WALSH: If the husband leaves can she?

Senator FERGUSON: Yes, even though he has established a domicile elsewhere.

Mr. BALDWIN: That is right.

The Co-CHAIRMAN (*Senator Roebuck*): There are some people who advocate, as Mr. Baldwin has indicated, that she be allowed to establish her own domicile in any province in which she may live. I know of cases where a woman has been deserted in one province and gone home to live with her parents in another province, and her rights to sue for divorce have been confined to the province where she was deserted.

Senator FERGUSON: Or the province where her husband is domiciled.

The Co-CHAIRMAN (*Senator Roebuck*): Yes, if she still knows where he is.

Senator FERGUSON: I do not mean I am supporting the Divorce Jurisdiction Act, because I think she should have the right to take her domicile on her own.

Mr. BALDWIN: That is one of the few instances where discrimination exists against women. I think that is what the senator would be saying.

Senator FERGUSON: Yes, this is true.

The Co-CHAIRMAN (*Senator Roebuck*): Any more questions?

Mr. MANDZIUK: Yes, Mr. Chairman. Taking your brief as a whole, are you more concerned with the welfare of the children than with the welfare of the deserted or aggrieved spouse, in most cases the wife? Is it the children you are concerned about? I mean, you were talking about the woman with six children, with no chance to remarry. I would like to see a chap who would marry a woman with six children.

Mr. WALSH: Maybe you should see this woman.

Mr. MANDZIUK: I have got lots of experience of this sort of thing. I have not practised law for thirty-five years for nothing.

Mr. BALDWIN: It is a complete package deal.

Mr. MANDZIUK: It is a package deal. Provincial jurisdiction covers that. We have welfare agencies. I know we have provisions in each province. We have them in Manitoba, and I know other provinces follow suit. Is it to be release from the marriage bond that you want to see, with people having a kind of wholesale open door policy?

Mr. WALSH: Definitely not.

Mr. MANDZIUK: Or are you worried about the children?

Mr. WALSH: We are worried about the children and the party that is left behind.

Mr. MANDZIUK: That leads me to another question, Mr. Chairman, and it is this. Do you consider marriage just as a civil contract, without realizing that, I would say, 60 per cent, maybe 75 per cent or more, in Canada consider it as a sacrament? It is not a thing that we can toy with and give notice, "I am going to desert my wife for two years and, by jingo, within three years I can remarry again and just keep on going."

Mr. WALSH: I would like to turn that question round and ask you something.

Mr. MANDZIUK: Go ahead.

Mr. WALSH: When do you consider a marriage not a marriage?

Mr. MANDZIUK: When two people cannot get along, sir, when they are incompatible, or whatever it is. I would say in the eyes of the Maker they are still married. I believe the civil authorities should have a right to separate them, but if you have so many grounds which could be used and abused I do not think the country would go for it.

Mr. WALSH: Well, I do not think so either. We do not want it made easy either, as we have stated here. We have asked for an investigation into marriage failure; this is one thing we have asked for.

Mr. MANDZIUK: I agree with what you have in your brief about educating our students at schools, and I believe something along that line is going on now.

Mr. WALSH: I do not know whether it is or not.

Mr. MANDZIUK: Sex education.

Mr. WALSH: I do not think it is.

Mr. MANDZIUK: Well, I have seen very, very good indications of that on TV lately, that they have done that. If your main concern is with the children, I think that is where it ought to be, because they are the real sufferers. It is not the wife or the husband, whichever one is left behind, that suffers as much as the children.

Mr. WALSH: We realize that.

Mr. MANDZIUK: And that is within provincial jurisdiction. Each province is obliged to look into the matter itself, and we are out of the jurisdiction if we try to legislate something along those lines. I may be wrong, and I know I have some legal lights here on both sides of me.

Senator FERGUSON: Could I ask something about paragraph 7? You say:

We further recommend the setting up of a child support system in which the father be made responsible for the support of his children in cases of separation and desertion.

I think in every province we have Deserted Wives' and Children's Maintenance Acts.

Mr. MANDZIUK: Yes.

Senator FERGUSON: We have reciprocal acts which make it possible to enforce these, even though the father may have gone to another province. What other system could you set up that would be any better? I am in sympathy with it, but I do not see what kind of legislation you could set up that could be any better than we have now, because these acts for deserted wives and children provided that the father should support his children.

The Co-CHAIRMAN (*Senator Roebuck*): We have power to send for a person and put him in gaol, but the weakness of our act is that we have not supplied the authorities with enough money for them to be able to enforce the act. That is our great trouble.

Mr. MANDZIUK: The suggestion in the brief is to have something like income tax deductions, or have an assessment on income tax returns made against the deserting spouse, and that this be turned over to a welfare agency. There seems merit in that, provided the husband is taxable.

Senator FERGUSON: Many of these husbands would not be paying income tax, would they?

Mr. MANDZIUK: They are the kind of people who separate.

The Co-CHAIRMAN (*Mr. Cameron*): My question, Mr. Walsh, is on paragraph 5, where you mention extreme physical cruelty as a ground, but you do not put any time limit on how long it must continue.

Mr. BALDWIN: Until she is half dead!

The Co-CHAIRMAN (*Mr. Cameron*): In paragraph 6 (c) you say:

Refusal to allow the petitioning of a divorce until a marriage has lasted three years.

I can think of many reasons why a petition should be launched before the end of a three-year period. You might have a situation in which a counselling service is used, or the exercise of the judge's discretion as to whether or not it was a proper case, but I personally do not see how you can tie them down to an absolute three-year period regardless of anything, that they must remain married. What is the thinking behind that?

Mr. WALSH: The thinking behind that is that during this time there would be counselling going on, and maybe they could solve the problem.

The Co-CHAIRMAN (*Mr. Cameron*): I do not want to argue or debate the matter with you, but my personal feeling is that, notwithstanding counselling or anything else, there may be a situation where it is obvious, right and proper that the divorce petition should be launched and granted in less than three years, depending on the circumstances of each particular case.

The Co-CHAIRMAN (*Senator Roebuck*): We do that now. Gentlemen, cannot we go on? We have a number of things to dispose of. May I call on my co-chairman, Mr. Cameron of the Commons, to express our gratitude for what we have heard.

The Co-CHAIRMAN (*Mr. Cameron*): I am very glad to do that, Mr. Chairman, and to thank you, Mr. Walsh, most sincerely on behalf of the members of the committee for your attendance here today, for your brief, which contains many valuable suggestions for the use of the committee, and for your ease and facility in answering the questions of the members of the committee.

Mr. WALSH: Thank you.

Mr. PETERS: Mr. Chairman, before the witness goes could I ask a question? I should have asked it before. Mr. Walsh, you mentioned that in Mexican divorce there was a stipulation whereby if there was written consent a divorce could be granted. Are you familiar with that section? This, of course, is by consent.

Mr. WALSH: Of both parties.

Mr. PETERS: Are there stipulations as to conditions that must be met in respect to the separation, for allowances and the children?

Mr. WALSH: A Mexican divorce just dissolves the marriage. It does not do anything with respect to settling affairs.

Mr. PETERS: So really there is nothing in it except that there is written consent. Does having written consent involve the people being there? In other words, can divorce be granted *in abstentio*?

Mr. WALSH: One party should be there. A lot of people think it is easy to get, but I do not know. I have heard it is, but I do not think it is too easy to get.

Mr. MANDZIUK: Did they not try it in the Soviet Union, where the parties just came before some official, declared that they were through with each other and it was granted? That has been discontinued, sir. What would happen to our family life if we went loosely around breaking up these marriage ties on nothing more than under the influence of liquor, or something, or they went and signed a consent?

Mr. PETERS: I apologize for my intervention, Mr. Chairman. It was just that I had never heard of this written consent and I was curious to know whether it was only by agreement or whether the parties had to be there.

Mr. WALSH: We do not want to see the family breakdown taken lightly. I think we have laid it down here in our brief that we do not.

Mr. MANDZIUK: I am not accusing you of that at all, sir, but you are opening the doors to all this by broadening out the grounds.

Mr. WALSH: But the doors right now are closed to people, and there is only one ground on which they can get it.

Mr. MANDZIUK: I think most people in Canada are in favour of broadening the grounds, mind you, but not on flimsy grounds.

Mr. WALSH: Well, I do not think the grounds we have suggested are too flimsy. I am just talking about the one that this gentleman wanted to know about.

Senator FERGUSON: This is not one you suggested. You are just speaking about it.

Mr. WALSH: Yes. He asked a question and I replied to it.

Mr. PETERS: I only asked because I thought perhaps you had some personal or organizational acquaintance with the state of the law in Mexico.

The Co-CHAIRMAN (*Senator Roebuck*): Well, we must go on.

Mr. BREWIN: May I ask a question, Mr. Chairman? Mr. Walsh, have you looked into the suggestion, which apparently was approved by a committee that reported to the Archbishop of Canterbury, which was a radical change, and that is the granting of a divorce, not on the ground of a series of enumerated matrimonial offences, or expanding them, as you suggest, but on a finding by the court that the marriage in fact had broken down, which, of course, might often be due to these causes? Have you looked into that or considered it?

Mr. WALSH: No, I have not.

The Co-CHAIRMAN (*Senator Roebuck*): Thank you, witness, for coming here and spending all this time with us, and enlightening us to the extent that you have.

The next thing that I would like to bring before you is that I would like to have you consider the question of our reducing the quorum from ten to, say, seven. I understand from Senator Croll that they have done that in the Joint Committee of the Senate and House of Commons on Consumer Credit. May I have an expression of opinion on that?

Senator BAIRD: I move that.

The Co-CHAIRMAN (*Senator Roebuck*): Senator Baird moves that we reduce the quorum from ten to seven. Is that seconded?

Mr. BALDWIN: I second that.

Mr. PETERS: Mr. Chairman, personally I am not in favour of reducing the quorum. This is a joint quorum and I think ten is not too many. There is a difficulty that we may face because of the timing. I think there is a great deal of interest in this committee, and maybe the attendance could be better than it is, but we are running into a difficulty in having to meet at 3.30, which is a set time. The members of the House are seldom, if ever, able to leave it at 3.30, and most of our committees are hinged on the basis that the committee will not meet until after the Orders of the Day or 3.30, whichever comes first. Maybe it is the time we should be looking at rather than the quorum. Today they are still not past the Orders of the Day in the House of Commons; it is still going on on adjourned motions.

The Co-CHAIRMAN (*Senator Roebuck*): What would you suggest, Mr. Peters?

Mr. MANDZIUK: There is another thing you must consider, senator, and it is this. The Consumer Credit Committee—and some of us are on this one and that, and I would like to be in both places at the same time—will be sitting for the next week or two every day, and twice a day at times, but they will then be through, so that we shall be freer to give our full attention here. I agree with Mr. Peters, I do not like to see the quorum reduced if we can help it.

Senator FERGUSON: It is the same thing in connection with the Joint Committee on Public Service, which is meeting two and three times a day right now, but that will not last forever.

Mr. MANDZIUK: That is it.

Senator FERGUSON: There are a number of us on that too.

The Co-CHAIRMAN (*Senator Roebuck*): Then is it the consensus of opinion that we had better leave that for the moment?

The Co-CHAIRMAN (*Mr. Cameron*): Could we meet on Wednesday, Mr. Chairman, rather than Tuesday? On Wednesday we have only half-an-hour for questions, which is one item that takes up a lot of time in the Commons.

Mr. PETERS: It is fairly formal when we have finished Orders of the Day on Wednesday. On the other days I think the senators would say it has been ridiculous, the way our Orders of the Day extend. It does make it pretty difficult for the members to get here until the Orders of the Day are over.

The Co-CHAIRMAN (*Senator Roebuck*): I think the great trouble about changing the day is that we have a program arranged at this time and on this day of the week, which will take us until Christmas. It would mean we would have to ask quite a number of people to change their time, and we might run into a lot of trouble that way.

Mr. PETERS: If I could make a suggestion, it would be that we govern it on the vice-chairman's appearance after Orders of the Day rather than 3.30, and if we do not get a quorum I will withdraw my objection to reducing it. I think we are being asked to reduce it because of a situation over which we have no control.

The Co-CHAIRMAN (*Senator Roebuck*): Quite.

Mr. PETERS: Members who would like to be here are finding it impossible to be here, for reasons over which they have no control.

Mr. BREWIN: Mr. Chairman, could I express a different opinion from that which has just been expressed?

The Co-CHAIRMAN (*Senator Roebuck*): Yes.

Mr. BREWIN: It seems to me that we are getting so many committees now—joint committees, and the Senate has many committees too—that reasonably small quorums will be necessary whether we like it or not, and that to hold out for a large quorum is a mistake. Mr. Peters says that we will find out, but there will always be some reason, with the multiplicity of committees and the business that we have.

I know many committees in the United States Congress, for example—although I hate to quote that as an example—sometimes have a small sub-committee to hear evidence of witnesses and that sort of thing. Now, I do not like that; I think all members of the committee should be invited to attend all the hearings; but I do suggest that what you propose seems to make sense, we shall have to come to it, and I personally would be prepared to support it right now.

The Co-CHAIRMAN (*Senator Roebuck*): Well, we have a motion before us moved by Senator Baird and seconded by Mr. Baldwin, that we reduce the quorum from ten to seven, and of course that both Houses be represented. Let us vote on it. Those in favour of it?—five. Those opposed?—two. Some of you are not voting on it.

Mr. MANDZIUK: I abstain.

The Co-CHAIRMAN (*Senator Roebuck*): What do you think about it?

The Co-CHAIRMAN (*Mr. Cameron*): Well, I will have to get it approved in the House. I realize that we shall have to get out of the House sooner, or the committee will have to function on the basis of waiting until you have a

quorum. I will get here as quickly as possible so that you will have one member of the House of Commons, and if you get some others of us here you might be able to start earlier, but on the question of time you have to consider the exigencies of the House.

Mr. BREWIN: Despite the fact that the motion has been put, may I just say this? These committees are largely examining committees, they are not decision-making committees. You have set up a schedule whereby witnesses can appear with briefs and we have an opportunity to examine them. Some time before the committee completes its deliberations it will have to come to its decision and make recommendations.

I agree with Mr. Brewin, that for attempting our present purpose it is logical to anticipate that we may have to limit ourselves to a smaller quorum so that witnesses will not be held up, so that they can appear and present their briefs. Undoubtedly, later in the day, before our meeting has been completed, we usually end up with a quorum, with an opportunity for those who wish to ask questions to do so, but we are getting into the situation where time is of the essence and we should have an opportunity to start earlier. I understand Mr. Peters views, but it was for those reasons that I seconded and voted for the motion.

The CO-CHAIRMAN (*Senator Roebuck*): We could leave this over and think about it until the next meeting. Would that be satisfactory? I do not like to go on with something on a matter of procedure when we are divided on it.

Mr. BREWIN: Why not? I thought we had passed it.

The CO-CHAIRMAN (*Senator Roebuck*): Thank you, Mr. Walsh. We will consider all you have said.

We have something more on our program. It is only five o'clock and we can put in another half-hour very usefully. I am going to call on our Executive Assistant, Dr. King, to lay before us some matters which he was in hand.

Dr. KING: Mr. Chairman, honourable members, there have been presented to the committee by various bodies and organizations, not actual briefs, but statements which those bodies have made at some time or another on the subject of divorce, and they have asked that they be brought to the attention of the committee. What I would like to do this afternoon, with your leave, is to present a few of these, time permitting. They are from groups which feel they have something to say on the matter.

These are just odd statements which we have not had a chance to mimeograph and send round to you, but they will be printed afterwards, so you will have a chance to consider them later.

The first one of these was received from the Board of Evangelism and Social Action of the Presbyterian Church in Canada. As far as I know, the Presbyterian Church in Canada does not intend to present a brief formally, and at the present date this is all we really have from the Presbyterian Church in Canada, so I would like to read the extract they have sent to us. It reads as follows:

While it is not the intention of our Board to present a brief, it was decided to forward to you the decision of the 89th General Assembly (1963) of the Presbyterian Church in Canada re the widening of the grounds for divorce, namely:

Whereas the teaching of the Westminster Confession of Faith re Marriage and Divorce (Chapter XXIV, Section VI) is that "Although the corruption of man be such as is to study arguments, unduly to put asunder those whom God hath joined together in marriage; yet nothing but adultery, or such wilful desertion as can no way be remedied by the Church or the civil magistrate, is cause sufficient of dissolving the bond of marriage: wherein a public and orderly course of proceeding is to be

observed, and the persons concerned in it not left to their own wills and discretion in their own case"; that the General Assembly urge the federal government to appoint a royal commission on divorce to consider such grounds for divorce in addition to adultery as "wilful desertion as can no way be remedied by the Church or civil magistrate".

There is a very brief one from the Salvation Army. Their letter stated:

The Salvation Army has not made an international statement to date on the subject of divorce, but our Women's Executive in Canada made its own statement, which may be of some help in the study of this matter.

The statement is as follows:

Statement made by the Women's Executive of the Salvation Army. Territorial Headquarters, Canada, March, 1966: The widening of grounds for divorce to include insanity, cruelty and desertion, as well as adultery. It was generally agreed that there ought to be some relaxation of this law as the present requirement of adultery encourages lower moral standards, and much deception. Several instances were cited regarding insanity, and the resultant hardship to one of the marriage partners, particularly when a family is involved. It was pointed out that the divorce law in Britain already includes these provisions.

Questions were raised concerning the definition of cruelty, length of desertion, degree of insanity, etc., but it was felt that if the law were passed, Acts of Parliament would define the time, aspects, degrees in each case.

There is a further very brief statement from the Mennonite Church in Canada, from the Mennonite Central Committee:

Whereas marriage is a sacred contract expected to be permanently honoured by both Church and state, and

Whereas the breaking of marriage by any means, legal or illegal, is spiritually, psychologically and economically costly to our society and to the families involved, and

Whereas it has been demonstrated that many marriage difficulties are of a nature that can be corrected by use of professional counselling services,

Therefore it is the conviction of the Mennonites of Ontario that in writing new legislation concerning marriage and divorce in Canada provision should be made to require all married couples before being granted a divorce to give evidence of having first sought the services of competent professional counsellors. Such legislation should spell out the meaning of what constitutes a definition of "competent" and "professional counsellors". These counsellors should attempt to discover bases for preserving the marriage relationship on terms mutually agreeable to the marriage partners and the court.

Mr. PETERS: Maybe even who is going to pay for it.

Dr. KING: There is a very short one from the Catholic Charities of the Diocese of London. This was the statement which I think was originally intended to be presented to the Justice Committee chaired by Mr. Cameron, which has eventually been handed on to us. This is the statement:

Whereas the Parliament of Canada has referred to a special Justice Committee studying divorce the matter of deliberating upon current proposals for amending existing divorce legislation; and

Whereas there is said to be some indication that consideration is being given for an enlargement of the personnel of the said committee so as to include joint Senate-Commons membership; and

Whereas the committee so established to study the proposed bills on the subject of divorce should be appraised of the concern that family and welfare agencies have for safeguarding the effective strengths of the family as a fundamental unit of a healthy society; and

Whereas the impact of divorce as an erosive factor affecting family life and the early social formation within the family unit of society's upcoming citizens; and

Whereas legislation enactment may presently be contemplated which would tend to widen the grounds for seeking divorce because of allegedly untenable or unendurable circumstances in respect of individual cases; and

Whereas due consideration of the common good may indicate need for a more constructive and progressive manner of dealing with individual distress, without prejudicially jeopardizing the public good of society through the erosive effect of family functioning by enlarging the grounds for petitioning a divorce;

Therefore, it was agreed by the Board of Directors of Catholic Charities of the Diocese of London that the following resolution be considered when drafting legislation with respect to divorce in this country:—

That, there be in any amended legislation some built in measures circulated to safeguard the effectiveness and strengths of family life as an important social institution; and

That, to such end any revision of legislation affecting the stability of an existing bond or contract of marriage should provide opportunity, mandatory of law, for prior remedial marriage counselling, the object of which should be the treatment of disruptive factors and the offering of supportive advice calculated to prevent or minimize family breakdown or damage.

On the general subject, which many of these briefs are mentioning, of the provision in legislation of prior remedial counselling before divorce is granted, there is another, slightly longer, statement from the Diocese of Huron, Anglican Church of Canada. These are:

Recommendations to the Government of Canada and the Government of Ontario submitted by the Synod Executive Committee with respect to the enlargement of grounds for divorce in Ontario, and by implication the country at large.

The CO-CHAIRMAN (*Senator Roebuck*): It was brought to our attention by the Bishop of Huron.

Dr. KING: Yes, the Rev. George N. Luxton. This is the statement:

In view of the present consideration being given to the possibility of enlarging the grounds for divorce within the Province of Ontario, the Diocesan Synod gave some consideration to the subject and committed the responsibility for our study to a committee headed by the Chancellor of the Diocese, John D. Harrison, Esq., Q.C. This committee met on June 21 in a lengthy session and formulated a report for the Executive Committee, which met on the day following. In turn, the Executive Committee spent three hours discussing and amending the report; now we offer it to the authorities of government for their consideration.

At the General Synod of the Anglican Church of Canada held last year in Vancouver, a new canon on marriage was passed. When this canon is ratified in the same form at a subsequent General Synod, it will permit Anglican clergy, following approval of an application to the

Church authorities, to remarry certain divorced people whose former partner is living. This is a radical departure from the Anglican Church's traditional position. Many Anglicans in the Diocese of Huron have felt that this recent action suggests the need for a careful study of the present grounds. Our study offers certain positive recommendations and notes two areas of discussion wherein we were unable to find any clear and constructive resolutions.

Resolutions as passed by the Synod Executive:

1. Believing that the sanctity of family life is an essential part of the society in which we live, and believing that early assistance to married couples whose marriages are commencing to flounder is most desirable, we recommend that greater emphasis be put upon, and more adequate facilities be provided for, marriage counselling service at the area of time when many marriages are commencing to break up and the parties first make their appearance in the family court. Coupled with this, we recommend that authority be provided in an appropriate fashion to compel a husband or wife, as the case may be, to attend the marriage counselling service upon the application of his or her spouse, or independently upon the order of a family court judge.
2. We recommend that no divorce should be granted unless the judge hearing the case is satisfied that adequate and responsible arrangements have been made for the welfare of any children of the marriage—

and that they italicize

to as great an extent as reasonably possible; and, in this respect, that the court be vested with independent authority, regardless of any claim made by the parties to the divorce action, to make any necessary or appropriate order to ensure that adequate responsible arrangements are provided for the children of the marriage.

3. We recommend that the provisions of the Matrimonial Causes Act, 1950, of England, providing that except in special circumstances no application for a divorce may be made until after three years have passed since the date of the marriage, including the provisions relating to the special leave which may be granted, be adopted.
4. Subject to the foregoing, we recommend that a petition for divorce may be presented to the court either by the husband or the wife on the ground that the respondent
 - (a) Has, since the celebration of the marriage, committed adultery; or
 - (b) Has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition, provided that, upon the hearing of any petition upon this ground the judge shall have regard to the interests of any children of the marriage and to the question whether there is reasonable probability of a reconciliation between the parties being possible, and shall be vested with the authority to require both the petitioner and the respondent to present themselves for marriage counselling service before proceeding to determine the case;
 - (c) Is incurably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition and, during that period, has been committed to a hospital under the provisions of the Mental Hospitals Act of Ontario or under the provisions of an equivalent act of some other jurisdiction;

- (d) By the wife on the ground that her husband has, since the celebration of the marriage, been guilty of rape, sodomy or bestiality.

Further Recommendations:

1. We specifically recommend that the provision contained in the Matrimonial Causes Act, 1950, of England, providing for divorce on the ground that the respondent has, since the celebration of the marriage, treated the petitioner with cruelty, be not included among the enlarged grounds for divorce in Ontario. Our recommendation is based upon our considered opinion that the term "cruelty" is impossible to define and could result, particularly in the area of alleged mental cruelty, even though modified to the extent that such mental cruelty must be injurious to health, in the extension of grounds for divorce into an ill-defined and wide open area not acceptable to us as a diocese of the Anglican Church of Canada.
2. The Executive Committee discussed extensively the relationship of imprisonment to divorce, and found themselves unable to offer any widely supported resolution in this area. The changing attitudes of government regarding imprisonment, the emphasis on the early parole, and the rehabilitation of almost all offenders, limits the period of confinement and separation between spouse and family, and thereby enables the marriage and family to survive the traumatic experience. The responsibility of each partner to the other in Christian marriage was emphasized as a major factor working towards the rehabilitation of the criminal, and we believe that it ought to be sustained, and indeed increased, during the period of imprisonment and parole. There was considerable support for the view that there might be grounds for divorce allowed to the partner of an habitual criminal, or a chronic "repeater", after conclusive evidence has been established that the offender has adopted crime as a way of life. The executive felt, however, that at the present time no definitive resolution could be formulated for application within this area of constant change.

Respectfully submitted, George N. Luxton,

Bishop of Huron and Chairman of the Synod Executive. June 24, 1966.

I do have several more, if the members of the committee are not getting exhausted.

The Co-CHAIRMAN (*Senator Roebuck*): No, go ahead.

Dr. KING: There is another one also from the Anglican Church. This is:

A brief presented to the Special Committee of the Senate and the House of Commons on Divorce by the Marriage and Family Life Division of the Diocesan Council for Social Service of the Diocese of Nova Scotia, Anglican Church of Canada.

This is rather a long brief and there is a section in it which simply reproduces part of the canon of the Anglican Church mentioned in the previous brief. It is rather long and, with your leave, I would seek to omit it, because there is no doubt that when the Anglican Church themselves arrive they will present it *in extenso*. If you wish, we could take it as read, and it would be reproduced in the record anyway.

The Co-CHAIRMAN (*Senator Roebuck*): Is that agreed?

MEMBERS of the COMMITTEE: Agreed.

Dr. KING: The brief reads:

In an age when moral standards are declining and there is a general tendency among many people to ignore the Divine Law in order to seek their own pleasure rather than the pleasure of Almighty God, the Marriage and Family Life Division of the Diocesan Council—

Mr. PETERS: Mr. Chairman, did not we agree just to table it? If we are having the Anglican Church before us, I would suggest we table the whole presentation.

Mr. McCLEAVE: Print it, not table it.

Mr. PETERS: Print it. This, as I understand, is an advance presentation.

Dr. KING: No. I think it may differ in degree from some of the recommendations made by the previous Anglican Church brief, and that is why I was reading it. What I suggested omitting was the canon which is reproduced here in the text. They go on from there to make recommendations which may or may not be contained in the other formal brief of the Anglican Church. The reason I mention this is because the last one was also from a body of the Anglican Church, and members may detect some slight differences in the recommendations.

Mr. McCLEAVE: Mr. Chairman, I think that briefs which are sent in but not supported by live witnesses should be printed as part of our proceedings without the necessity of Dr. King having to read them.

The Co-CHAIRMAN (*Senator Roebuck*): Then you move that this brief at least be printed.

Dr. KING: This is actually a formal brief. The others were simply statements which were received and not put in as formal briefs at all.

Mr. STANBURY: Mr. McCleave is suggesting something more basic than that, that perhaps we could establish that any brief sent in rather than presented personally would hereafter be made part of the record of the committee, unless there is some brief which is so extensive that the chairman might recommend us to do otherwise. I think that as a general rule any briefs which are submitted by mail could be made part of the record for our information.

The Co-CHAIRMAN (*Senator Roebuck*): Is that agreed?

MEMBERS of the COMMITTEE: Agreed.

(*See Appendix No. "5"*)

The Co-CHAIRMAN (*Senator Roebuck*): Then we will do that in future without a further resolution.

Mr. McCLEAVE: Mr. Chairman, could I raise a point of order that is ancillary to the discussion we have just had? It is a suggestion, and I move it in this form:

That the Steering Committee be empowered to select authoritative writings, both pro and con, on the subject of divorce which could be incorporated in the reports of this honourable committee.

There are some good speeches in both Houses of Parliament, for example, some good articles in the *Canadian Bar Journal* and the like, which if put before us in some convenient form would be useful.

In support of my motion, I would like to make one other point. I am sure a great many members are, like myself, sending copies of our proceedings to students of law, to bar societies, and anybody else interested, and I think we would have a very authoritative document if we added one or two such written items in every committee report we print.

The Co-CHAIRMAN (*Senator Roebuck*): Any comments, gentlemen?

Mr. PETERS: Would that be as an appendix?

Mr. McCLEAVE: As an appendix, not as part of the regular proceedings. It would be as an appendix, unlike what we have previously decided.

The Co-CHAIRMAN (*Senator Roebuck*): There are some very potent articles that we could make use of in whole or in part.

Mr. PETERS: Being a politician I should say I would second that if I agreed with it, but I will second it anyway.

The Co-CHAIRMAN (*Senator Roebuck*): Then it is moved by Mr. McCleave, seconded by Mr. Peters:

That the Steering Committee be empowered to select authoritative writings, both pro and con, on the subject of divorce which could be incorporated in the reports of this honourable committee.

All in favour.

Mr. McCLEAVE: I think I should have added "as an appendix".

The Co-CHAIRMAN (*Senator Roebuck*): Then we will add "as an appendix". Is that agreed?

MEMBERS of the COMMITTEE: Agreed.

The Co-CHAIRMAN (*Senator Roebuck*): Would somebody move that this meeting do now adjourn?

Mr. STANBURY: I so move.

The Committee adjourned.

Appendix "5"

A BRIEF PRESENTED TO THE SPECIAL COMMITTEE OF THE SENATE AND THE HOUSE OF COMMONS ON DIVORCE BY THE MARRIAGE AND FAMILY LIFE DIVISION OF THE DIOCESAN COUNCIL FOR SOCIAL SERVICE OF THE DIOCESE OF NOVA SCOTIA, ANGLICAN CHURCH OF CANADA.

In an age when moral standards are declining and there is a general tendency among many people to ignore the Divine Law in order to seek their own pleasure rather than the pleasure of Almighty God, the Marriage and Family Life Division of the Diocesan Council for Social Service of the Diocese of Nova Scotia feels that it has a solemn duty to defend before this Committee the Christian standard for Marriage or Holy Matrimony since it is the intention of this Committee to review the matter of divorce with the proposed intention of relaxing the present laws by which this subject is governed in Canada.

The following is a reproduction of Part I of Canon 27A of the General Synod of the Anglican Church of Canada. While this Canon must be ratified by General Synod in 1967 before it becomes effective Canon Law, Part I, which is the Introduction to the Canon is considered to be an excellent statement of the Church's position on Holy Matrimony, as it is based on Holy Scripture:

"1. The Anglican Church of Canada affirms, according to our Lord's teaching as found in Holy Scripture and expressed in the Form of Solemnization of Matrimony in the Book of Common Prayer, that marriage is a lifelong union in faithful love, for better or for worse, to the exclusion of all others on either side. This union is established by God's grace when two duly qualified persons enter into a contract of marriage in which they declare their intention of fulfilling its purposes and exchange vows to be faithful to one another until they are separated by death. The purposes of marriage are mutual fellowship, support and comfort, the procreation (if it may be) and nurture of children, and the creation of a relationship in which sexuality may serve personal fulfillment in a community of faithful love. This contract is made in the presence of witnesses and of an authorized minister.

2. The Church affirms in like manner the goodness of the union of man and woman in marriage, this being of God's creation (Gen. 1:27-31). Marriage also is exalted as a sign (Eph. 5:31f) of the redeeming purpose of God to unite all things in Christ (Eph. 1:9f), the purpose made known in the reunion of divided humanity in the Church (Eph. 2:11-16).

3. The Church throughout her history has recognized that not all marriages in human society conform, or are intended to conform, to the standard here described. For this reason, in the exercise of pastoral care as evidence in the earliest documents of the New Testament, the Church has from the beginning made regulations for the support of family life especially among her own members.

4. Aspects of the regulation of marriage in the apostolic Church are recorded in the New Testament. A new standard of reciprocal love between husband and wife was introduced leading towards an understanding of their equality (I Cor. 7:3f, 11:11f, Eph. 5:21-33, cf. Gal. 3:28). In preparation for marriage Christians were directed to seek partners from among their fellow believers (I Cor. 7:39, II Cor. 6:14, cf. I Thess. 4:2-8, R.S.V.). In Christ's Name separated spouses were encouraged to

seek reconciliation (I Cor. 7:10f). In His Name also divorce was forbidden though not without exception (Matt. 5:31ff, Mark 10:2-9, cf. Mal. 2:13-16). In certain circumstances a believer already married to an unbeliever might be declared free from such a marriage bond (I Cor. 7:12-16); in others, and here in the Name of Christ, remarriage during the lifetime of a former spouse was described, with one exception, as an adulterous union (Matt. 19:9, Mark 10:11f, Luke 16:18, cf. Ro. 7:3).

5. From these principles and precedents the Church, living in many cultures and in contact with many different systems of law, has sought in her rites and canons to uphold and maintain the Christian standard of marriage in the societies in which believers dwell. This standard and these rites and canons pertain to the selection of marriage partners, preparation for marriage, the formation of a true marriage bond, the solemnization of marriage, the duties of family life, the reconciliation of alienated spouses, and the dissolution of marriage and its consequences."

From the foregoing text it is obvious that Christian Marriage or Holy Matrimony is a life-long union of one man with one woman to the exclusion of all others, so long as they both shall live. It is also obvious, of course, that we have here been considering the ideal for Holy Matrimony on Scriptural standards. While this ideal is realized in many instances, and we thank God that it is, there are other instances which have been increasing in number since the end of World War II, where the ideal is not realized, and also where it is obvious to the skilled Pastor that no attempt has been made or is being made to achieve this ideal on the part of some couples.

One point which should be clarified by this brief is the attitude of the Anglican Church of Canada towards divorce. The Church does in fact recognize divorce, and it is incorrect to imply that divorce is contrary to Church discipline. We believe that it is essential for the Committee to grasp this point, particularly the way in which divorce is recognized by the Church. There is a legal process, known as divorce, by virtue of the laws of the Dominion of Canada and by the laws of the individual Provinces, whereby the legal contract or aspect of a marriage may be dissolved. Therefore, following the successful completion of a divorce action, a husband and wife no longer bear any legal responsibility to or for one another other than that which may be stipulated by the Court or Judge rendering such a decision. These laws say in effect that a marriage has been validly entered upon and consummated but that now by divorce it no longer exists and the contracting parties are free to negotiate other contracts. While the Church recognized the legality of these processes, and abides by the Court decisions regarding family responsibilities, financial arrangements and property disposition, the Church does not admit the dissolution of the marriage bond itself and still holds that each party is still not free to negotiate a new marriage. In other words, in this last respect, legal divorce is much like legal separation in the eyes of the Church. The Church may make rules governing the discipline of those who are members or who look to the Church for ministrations when they are involved in one or the other. The Church believes a marriage bond to be life-long by nature, apart from the fact that the original vow was specifically stated to be life-long.

This marriage bond is not set aside or dissolved by any process of civil law in the eyes of the Church. Those who seek to do so are unfaithful to the Scriptural standard, and those who seek to contract another marriage during the lifetime of the "previous" partner are guilty of adultery. The Church must take this stand, not only because she is committed to keeping the Divine Law, but also because any newly contracted "marriage" would become an obstacle to Christian forgiveness. Should the guilty or offending partner seek forgiveness and reconciliation with the other partner to an allegedly dissolved marriage

(and here it should be stated in all honesty that it is very difficult in numerous instances to determine just who is the guilty or offending partner and who is the partner against whom the offence has been committed) a subsequent legally contracted marriage would be an insurmountable barrier to the reconciliation of a husband and wife in an atmosphere of Christian love and forgiveness. It cannot be denied however that there are instances where it will be necessary for a husband and wife to continue living apart from one another indefinitely as long as there is no chance of forgiveness or reconciliation.

On the surface such a stand by the Church may at first appear as restrictive and infringing on individual freedom. But the Church makes very few rules, and these are made always in a progressive spirit, in an effort to set a Scriptural standard or to preserve and protect ideals. The Church's rule for marriage is based not only on Holy Scripture, but also on the recognition of the place of the family in society, with a desire to consolidate and solidify the security of the home, and to preserve the sanctity of the home and family as the basic unit of society and as the training place for the young in social obligations and responsibilities.

Moreover, because the laws of our country have grown out of a Christian context, from people who regard the Christian standard with respect, even when not always Christians themselves, we believe that this Committee is obligated to proceed with recommendations for legal revisions, not from the point of view of lowering the standards and weakening the home and family ties to the eventual detriment of our country, but from the point of view of preserving the sociological function of the home and family in society to the degree that is concomitant with personal and individual rights and freedoms. In other words, we believe the Committee should approach its task from the same point of view as the Church.

It is quite obvious that there is a real need for the revision of the laws concerning divorce in Canada, but it is extremely doubtful if any genuine good will come from any widespread relaxation of these laws. On the other hand, laws are concerned mainly with the peace of the community, the protection of individuals, especially minors, the proper handling of money, property etc. In other words, laws can dissolve any or all aspects of the "contract" part of marriage. In this respect it may be that revisions allowing more "causes" for divorce would be good in that they would afford more adequate protection for the deserted spouse and children than they presently have or receive under the maintenance acts etc. of the various Provinces. We would suggest that our Canadian laws might begin with a preamble stating the positive place of the family in the community and the responsibility of all citizens to recognize this. We would suggest that some legal recognition might be given to the Church's vow for life-long marriage. In other words, when a couple are married by the Church, they should be made to understand that there is legal support for the promises they are making, and therefore the law will not permit divorce in their case until the couple have consented to and carried out a programme towards solving the marriage problem conducted by the Church which solemnized their marriage. This would probably force more couples into civil marriage, but it would keep the Clergy and the couple from mouthing the words of a promise there are no sanctions to enforce.

The Church is realistic enough to realize that many people, even many devout members, are not going to realize the Scriptural and sociological ideal for marriage. We realize that there is a great need for an increasing programme by which and through which the Church can minister to these situations more effectively. Easy divorce will not reduce the frequency of these problems but merely add another injurious problem and at the same time by its very nature make a solution irrelevant or impossible. We believe the Committee should explore every possible avenue whereby due processes for solving marriage

problems may be established, such as family courts, counselling services etc. We feel certain that with such encouragement on the part of updated laws, the Church and many voluntary community organizations would rise to the occasion and provide more effective services as well in co-operation with this kind of approach on the part of the State.

The Diocese of Nova Scotia,
Anglican Church of Canada,
The Rev'd., Canon G. F. Arnold,
Clerical Secretary,
5732 College Street,
Halifax, Nova Scotia.

The Rev'd., C. Russell Elliott,
Chairman,
Diocesan Council for Social Service,
St. John's Rectory,
3433 Dutch Village Road,
Halifax, Nova Scotia.

The Rev'd., Richard S. Mowry,
Convenor,
Marriage and Family Life Committee,
Diocese of Nova Scotia,
Christ Church Rectory,
New Ross, Lunenburg County,
Nova Scotia.



First Session—Twenty-seventh Parliament
1966

PROCEEDINGS OF
THE SPECIAL JOINT COMMITTEE OF THE SENATE
AND HOUSE OF COMMONS ON

DIVORCE

No. 5

TUESDAY, NOVEMBER 1, 1966

Joint Chairmen

The Honourable A. W. Roebuck

and

Mr. A. J. P. Cameron, M.P.

WITNESSES:

The Canadian Bar Association: Perrault Casgrain, Q.C., President; A. Gordon Cooper, Q.C., Dominion Vice-President; Ronald C. Merriam, Q.C., Secretary.

APPENDICES:

- 6.—Transcript of the discussion which took place on September 2, 1966 during the 1966 Annual Meeting of the Canadian Bar Association in Winnipeg, Man. on the subject of Divorce.
- 7.—Private brief by Richard B. Holden, Barrister & Solicitor, Montreal, Que.
- 8.—Private brief by Victor La Rochelle, C.A., Quebec, Que.
- 9.—Brief by The Single Parents Associated, Toronto, Ont.
- 0.—Brief by The Magna Carta Club, Vancouver, B.C.

ROGER DUHAMEL, F.R.S.C.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1966

MEMBERS OF THE
SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS
ON DIVORCE
FOR THE SENATE

Hon. A. W. Roebuck, Joint Chairman

The Honourable Senators

Aseltine	Connolly (<i>Halifax North</i>)	Flynn
Baird	Croll	Gershaw
Belisle	Denis	Haig
Burchill	Fergusson	Roebuck—(12).

FOR THE HOUSE OF COMMONS

Mr. A. J. P. Cameron (*High Park*), Joint Chairman

Members of the House of Commons

Aiken	Forest	McQuaid
Baldwin	Goyer	Otto
Brewin	Honey	Peters
Cameron (<i>High Park</i>)	Laflamme	Ryan
Cantin	Langlois (<i>Mégantic</i>)	Stanbury
Choquette	MacEwan	Trudeau
Chrétien	Mandziuk	Wahn
Fairweather	McCleave	Woolliams—(24).
		(Quorum 10)

ORDERS OF REFERENCE

Extracts from the Votes and Proceedings of the House of Commons:
March 15, 1966:

“On motion of Mr. McIlraith, seconded by Mr. Hellyer, it was resolved—That a Special Joint Committee of the Senate and the House of Commons be appointed to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either House;

That 24 Members of the House of Commons, to be designated by the House at a later date, be members of the Special Joint Committee, and that Standing Order 67(1) of the House of Commons be suspended in relation thereto:

That the Committee have power to engage the services of such technical, clerical and other personnel as may be necessary for the purpose of the inquiry;

That the Committee have the power to send for persons, papers and records, to examine witnesses, to report from time to time, and to print such papers and evidence from day to day as may be ordered by the Committee, and that Standing Order 66 be suspended in relation thereto; and

That a Message be sent to the Senate requesting Their Honours to unite with this House for the above purpose, and to select, if the Senate deems it so advisable some of its Members to act on the proposed Special Joint Committee.”

“By unanimous consent, on motion of Mr. McIlraith, seconded by Mr. Hellyer, it was ordered—That the order of the House of Monday, February 21, 1966 referring the subject-matter of the following bills to the Standing Committee on Justice and Legal Affairs, namely:—

Bill C-16, An Act to provide in Canada for the Dissolution of Marriage (Additional Grounds for Divorce).

Bill C-19, An Act to provide in Canada for the Dissolution and the Annulment of Marriage.

Bill C-41, An Act to amend the British North America Acts, 1867 to 1965, (Provincial Marriage and Divorce Laws).

Bill C-44, An Act to provide in Canada for the Dissolution of Marriage.

Bill C-55, An Act to provide in Canada for the Dissolution of Marriage.

Bill C-58, An Act respecting Marriage and Divorce.

Bill C-79, An Act to amend the Dissolution and Annulment of Marriages Act (Additional Grounds for Divorce).

be discharged, and that the subject-matter of the same bill be referred to the Joint Committee of the Senate and the House of Commons on Divorce.”

March 16, 1966:

“By unanimous consent, on motion of Mr. Stewart, seconded by Mr. Byrne, it was ordered—That the subject-matter of Bill C-133, An Act to extend the grounds upon which courts now have jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief, be referred to the Special Joint Committee on Divorce.”

"By unanimous consent, on motion of Mr. Stewart, seconded by Mr. Byrne, it was ordered—That the subject-matter of Notice of Motion No. 11 be referred to the Special Joint Committee on Divorce."

March 22, 1966:

"On motion of Mr. Pilon, seconded by Mr. McNulty, it was ordered—That a Message be sent to the Senate to acquaint Their Honours that this House will unite with them in the formation of a Joint Committee of both Houses to inquire into and report upon divorce in Canada, and that the Members to serve on the said Committee, on the part of this House, will be as follows: Messrs. Aiken, Baldwin, Brewin, Cameron (*High Park*), Cantin, Choquette, Chrétien, Fairweather, Forest, Goyer, Honey, Laflamme, Langlois (*Mégantic*), MacEwan, Mandziuk, McCleave, McQuaid, Otto, Peters, Ryan, Stanbury, Trudeau, Wahn and Woolliams."

LÉON-J. RAYMOND,
Clerk of the House of Commons.

Extracts from the Minutes of the Proceedings of the Senate:

March 23, 1966:

"Pursuant to the Order of the Day, the Senate proceeded to the consideration of the Message from the House of Commons requesting the appointment of a Special Joint Committee of the Senate and House of Commons on Divorce.

The Honourable Senator Connolly, P.C., moved, seconded by the Honourable Senator Roebuck:

That the Senate do unite with the House of Commons in the appointment of a Special Joint Committee of both Houses of Parliament to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either House;

That twelve Members of the Senate, to be designated at a later date, act on behalf of the Senate as members of the said Special Joint Committee;

That the Committee have power to engage the services of such technical, clerical and other personnel as may be necessary for the purpose of the inquiry;

That the Committee have the power to send for persons, papers and records, to examine witnesses, to report from time to time, and to print such papers and evidence from day to day as may be ordered by the Committee, and to sit during sittings and adjournments of the Senate; and

That a Message be sent to the House of Commons to inform that House accordingly.

After debate, and—

The question being put on the motion, it was—

Resolved in the affirmative."

March 29, 1966:

"With leave of the Senate,

The Honourable Senator Beaubien (*Provencher*) moved, seconded by the Honourable Senator Inman:

That the following Senators be appointed to act on behalf of the Senate on the Special Joint Committee of the Senate and House of Commons to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, namely the Honourable Senators Aseltine, Baird, Belisle, Bourget, Burchill, Connolly (*Halifax North*), Croll, Fergusson, Flynn, Gershaw, Haig and Roebuck; and

That a Message be sent to the House of Commons to inform that House accordingly.

The question being put on the motion, it was—

Resolved in the affirmative.”

May 10, 1966:

“Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Roebuck, seconded by the Honourable Senator Croll, for the second reading of the Bill S-19, intituled: “An Act to extend the grounds upon which courts now having jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief”.

The question being put on the motion—

In amendment, the Honourable Senator Connolly, P.C., moved, seconded by the Honourable Senator Hugessen, that the Bill be not now read the second time, but that the subject-matter be referred to the Special Joint Committee on Divorce.

After debate, and—

The question being put on the motion, it was—

Resolved in the affirmative.”

J. F. MacNEILL,
Clerk of the Senate.

MINUTES OF PROCEEDINGS

TUESDAY, November 1, 1966.

Pursuant to adjournement and notice the Special Joint Committee of the Senate and the House of Commons on Divorce met this day at 3.30 p.m.

Present: For the Senate: The Honourable Senators Roebuck (*Joint Chairman*), Baird and Fergusson—3.

For the House of Commons: Messrs. Cameron (*High Park*) (*Joint Chairman*), Brewin, Fairweather, Forest, MacEwan, McCleave, Peters, Stanbury and Wahn—9.

In attendance: Dr. Peter J. King, Special Assistant.

The following witnesses were heard:

The Canadian Bar Association:

Perrault Casgrain, Q.C., President.

A. Gordon Cooper, Q.C., Dominion Vice-President.

Ronald C. Merriam, Q.C., Secretary.

The transcript of the discussion which took place on September 2, 1966 during the 1966 Annual Meeting of the Canadian Bar Association in Winnipeg, Manitoba on the subject of Divorce was ordered to be printed as appendix no. 6 to these proceedings.

Briefs submitted by the following are printed herewith as Appendices:

7.—Richard B. Holden, Barrister & Solicitor, Montreal, Que.

8.—Victor La Rochelle, C. A., Quebec, Que.

9.—The Single Parents Associated, Toronto, Ont.

10.—The Magna Carta Club, Vancouver, B.C.

At 5.25 p.m. the Committee adjourned until Tuesday next, November 8, 1966 at 3.30 p.m.

Attest.

Patrick J. Savoie,
Clerk of the Committee.

THE SENATE
SPECIAL JOINT COMMITTEE OF THE SENATE AND
HOUSE OF COMMONS ON DIVORCE
EVIDENCE

OTTAWA, Tuesday, November 1, 1966.

The Special Joint Committee of the Senate and House of Commons on Divorce met this day at 3.30 p.m.

Senator Arthur A. Roebuck and Mr. A. J. P. Cameron (*High Park*), Co-Chairmen.

The Co-CHAIRMAN (*Senator Roebuck*): I understand that Mr. Brewin has something to say on the question of a quorum. We discussed this question for a few minutes at the last meeting but were far from unanimity and I thought we should let it stand over. Mr. Brewin, do you wish to make your statement now?

Mr. BREWIN: I thought it was a suggestion of your own, Mr. Chairman, that we reduce the quorum to 7. I made a motion to that effect and it passed by a small majority and you, sir, suggested that it be not pressed at that time. I would like to renew the motion as soon as possible because it seems to me unreasonable to keep distinguished witnesses, or even undistinguished witnesses, if we have such, waiting while we try to muster ten persons here.

There are so many other things going on—the House sitting and many other committees meeting—that it is unrealistic to maintain a high quorum, particularly at this stage of the proceedings when we are hearing submissions. Later, when we come to make decisions, it will be desirable to get back to the full quorum so that we shall not have decisions made by a small group; but so long as we hear witnesses we are wasting their time if we do not proceed at once to hear them.

These gentlemen who are going to speak to us have been waiting here for a quarter of an hour now and we could have saved their time as well as our own had we started promptly.

It is only realistic to recognize as a fact of life that there is pressure upon people's time and I would like therefore to have the opportunity to put the motion to the vote again.

The Co-CHAIRMAN (*Senator Roebuck*): We will put it now. Mr. McCleave, have you something to say?

Mr. McCLEAVE: No, Mr. Chairman, except to say that I second the motion. We have a fantastic number of committees working diligently and it is humanly impossible to expect seven people to waste time when they have other things to attend to. I second the motion.

The Co-CHAIRMAN (*Senator Roebuck*): Have you anything to say on the question, Mr. Co-Chairman Cameron? I see you are leaving the room.

The Co-CHAIRMAN (*Mr. Cameron*): I am going to see if I can get some more members.

Senator FERGUSON: I voted against the motion on the last occasion, but I understand the argument in favour of it. On the other hand, if we are to have distinguished, or even not so distinguished, witnesses to give us the benefit of their opinions, I suggest that it is hardly reasonable to think that seven out of 36 members are enough to hear those opinions. Moreover, I do not think it is

doing the witnesses a great honour to reduce the quorum to the extent proposed. However, I will not vote against the motion.

The CO-CHAIRMAN (*Senator Roebuck*): I do not think our visitors should be concerned very much about the people who listen to them, because it is the record that is important, and the record of what they say is exceedingly so.

Honourable members will be interested, perhaps, to know that our first thousand copies of the first and second meetings are already exhausted. We shall have to get another thousand copies and it will be necessary to increase the number we print in the future. So that the actual number of those present is not as important as it might be otherwise. Furthermore, the briefs that will be presented to this small group of seven or ten, or whatever it may be, will be studied by that group in private, and it is the information upon which we shall act, and let us hope that the Government will act on our recommendations.

There is something really vital in the reading of these briefs and the argument that goes on among the group of members listening to them.

Now that we have a quorum I will put the motion. It has been moved by Mr. Brewin and seconded by Mr. McCleave that we reduce the quorum from ten, both Houses being represented, to seven, both Houses being represented. Are you ready for the question? I grant that it is due to our visitors that there should be a greater body here to listen to them; I agree with that. But, as Mr. Brewin has said, we must face the facts of life, and since this is one of the facts of life we must accept it and do the best we can with it.

Mr. PETERS: This is a negative attitude. We have twelve committees meeting in the House of Commons today and this is a stupid situation that cannot exist much longer. Every time you reduce the quorum you make it possible for the Government to get away with it for another few weeks.

Mr. STANBURY: That is nonsense. All the evidence is printed, and Mr. Peters should read it carefully.

Mr. PETERS: I will read it.

The CO-CHAIRMAN (*Senator Roebuck*): I might point out that the Joint-Committee on Consumer Prices, which has been sensational and of great popular interest, reduced its quorum to seven because they were embarrassed by the ten.

Are you ready for the question? There are two opposed.

(The motion was agreed to.)

The CO-CHAIRMAN (*Senator Roebuck*): Ladies and gentlemen, let us go on with our program for the day. We have three very distinguished visitors before us today representing the Canadian Bar Association. They are the President, the Vice-President, and the permanent fulltime Secretary. I will ask the President to address us; he has a few remarks to make; then the Vice-President will present the brief; and after that I hope we shall have a few words from the Secretary.

First of all I would like to put on the record that the President is Mr. Perrault Casgrain, Q.C., who was born in Quebec City on January 18, 1898. He was educated at Laval University, B.A., LL.L. He is the senior partner of the firm of Casgrain, Casgrain and Crevier. He was Crown Prosecutor, District of Rimouski, 1920-36; created K.C. in 1930; served in the First World War with 1st Canadian Tank Battalion April 1918, transferred to 10th Reserve Battalion Canadian Infantry June 1918; Member of the Legislative Assembly Quebec, 1939-44; Minister without Portfolio, Province of Quebec, 1942-44; member of The Canadian Bar Association since 1920, President 1966-67; President Quebec Rural Bar Association, 1943-44; sometime member Board of Quebec Bar Examiners, Bâtonnier of Lower St. Lawrence Bar and member of Council for Bar of Province of Quebec.

Mr. Casgrain is here with us, and may I ask him to address the committee.

Mr. Perrault Casgrain, Q.C., President, The Canadian Bar Association: Mr. Co-Chairman, I thank you for the kind words with which you have introduced the President of the Canadian Bar Association.

Our Association, as you are aware, is interested in all branches of the law, and mostly in the progress of the law. We have a number of problems arising and we do not reach a decision very rapidly. We have subsections working in the province and these subsections report to the Dominion section.

These sections have each a special branch of the law which they study and which is attended by members of the Bar. We are most cognizant of, and interested in, these various branches of law being studied. The report is made to the Council of the Association, which comprises a great number of lawyers from every province in Canada who discuss the matters to be brought before the Annual Meeting which takes place once a year in a different city in Canada. Thus, people who were not at some section meeting or other, nor at the Council meeting, can attend at the Annual Meeting where they get the benefit of previous discussions and can also express their views and freshen up on various matters with new points of view.

If after the Annual Meeting we are not satisfied that we have had a sufficient majority, or that we have studied any matter as extensively as we should have done, or that we are speaking with one voice, then we postpone further study until another year.

This may not seem very much Twentieth Century or Atomic Age in character, but I am stating it merely as one of the facts of life, to quote an honourable gentleman who used that expression a moment ago, in order to give you an idea of the workings of our organization.

By reason of the number of subjects we have to treat, it is impossible for the President or the Secretary to explain all the conclusions reached and the reasons for those conclusions on each matter that comes before the Canadian Bar Association. This is the reason why, this morning, I was spokesman for the Canadian Bar's point of view on matters that come before the Committee of the House of Commons.

One of our most distinguished members, a gentleman who has been assiduous in the work of the Association, highly respected at the Bar, with wide experience, our Vice-President Mr. Gordon Cooper, Q.C., from Halifax, will present our brief; and I believe he has the right to answer whatever questions you may see fit to ask.

The Co-CHAIRMAN (Senator Roebuck): Thank you, Mr. Casgrain. I understand from what you say that the recommendations you make are not hastily arrived at but are the result of mature consideration by the Association. That is the substance of what you have said?

Mr. CASGRAIN: Yes.

The Co-CHAIRMAN (Senator Roebuck): Thank you. Are there any comments before Mr. Cooper presents the brief?

Mr. McCLEAVE: In previous years the Bar has talked this problem at general meetings but it has never passed resolutions.

Mr. CASGRAIN: Resolutions have been passed but the matter was left in abeyance for a few years and brought forward again. I do not mean to suggest that we have studied it every year.

The Co-CHAIRMAN (Senator Roebuck): Thank you, gentlemen. It is now my pleasant duty to introduce Mr. Gordon Cooper to the committee.

Mr. Cooper was born in Saint John, New Brunswick, on December 11, 1908, was educated at King's College School, Windsor, Nova Scotia, Dalhousie University, B. Com. 1931, Rhodes Scholar from Nova Scotia in 1932, Oxford University, B.A. 1934, B.C.L. 1935. He is a partner of McInnes, Cooper and Robertson; Chairman, Board of Governors King's College School; member Rhodes Scholar Committee of Selection for Nova Scotia; read law with Lovett, Macdonald and McInnes; called to the Bar of Nova Scotia 1938; member Nova Scotia Barristers' Society; member of The Canadian Bar Association since 1938, Dominion Vice-President 1966-67.

That is a distinguished career, Mr. Cooper, and no doubt you have many years to add to that outstanding record.

Mr. McCLEAVE: May I say, Mr. Co-Chairman, I believe this gentleman's name is A. Gordon Cooper. Is that correct?

Mr. COOPER: That is correct.

The CO-CHAIRMAN (*Senator Roebuck*): Thank you, for the correction, Mr. McCleave. Ladies and gentlemen, Mr. Cooper.

Mr. A. Gordon Cooper, Q.C., Vice-President, The Canadian Bar Association: Mr. Chairman, I should like first of all to file a copy of the resolution, duly certified by Mr. Merriam, the Secretary, and ask, if this is in accord with your practice, that it be received and filed with the committee.

The CO-CHAIRMAN (*Senator Roebuck*): That will be done, Mr. Cooper. Will you read the brief?

Mr. COOPER: I should first like to read the Resolution. I believe that copies have been circulated, but I should nevertheless like to refresh your memories:

BE IT RESOLVED:

That the grounds for divorce in Canada be:

1. Adultery, sodomy or bestiality, or conviction upon a charge of rape;
2. Cruelty (as defined below);
3. Desertion without just cause for a period of three years immediately preceding commencement of the proceedings;
4. Voluntary separation of the husband and wife for a period of three years immediately preceding the commencement of proceedings provided that the Court shall be satisfied that:
 - (i) There is no reasonable likelihood of a resumption of cohabitation, and
 - (ii) The issue of a decree will not prove unduly harsh or oppressive to the defendant spouse.
5. Incurable unsoundness of mind where the afflicted spouse has been continuously under care and treatment for a period of five years immediately preceding the commencement of proceedings.
6. Wilful refusal to consummate the marriage. (*Definition of Cruelty*)
Cruelty shall include any conduct that creates a danger to life, limb or health and any conduct that in the opinion of the Court is grossly insulting and intolerable, being of such a character that the person seeking the divorce cannot reasonably be expected to be willing to cohabit with the other spouse who has been guilty of such conduct.

BE IT FURTHER RESOLVED:

That no decree of divorce shall issue unless and until the Court is satisfied as respects every child of the marriage and of the family who is under the age of sixteen years that:

- (i) Arrangements for the care and upbringing of such child have been made and are satisfactory or are the best that can be devised in the circumstances.

BE IT FURTHER RESOLVED:

That the defences of condonation and collusion constitute discretionary and not absolute bars to matrimonial relief.

This resolution was passed by The Canadian Bar Association at the 48th Annual Meeting on September 2, 1966.

In speaking to this resolution I wish first to bring to your attention and to the attention of the members of the committee the fact that the law relating to divorce, with a view to its reform, has been of concern to the Canadian Bar Association ever since the Association was first organized in 1914 and to review briefly resolutions passed and action taken by the Association up to the present year and, secondly, to deal with the events which have taken place in 1966 culminating in the passing of the resolution at the Annual Meeting of the Association in Winnipeg on September 2. That is the resolution which I have just read.

As long ago as 1914 a committee known as the Committee on Administration of Justice and Legal Procedure was named by the Association to consider appropriate subjects and areas of the law for study by the Association, and at the 1916 Annual Meeting the committee presented a report covering a number of matters including the question of divorce. In 1916, as is no doubt well known to the chairman and members of this committee, the Ontario courts had no jurisdiction in divorce, the jurisdiction of the courts of the three Western Provinces was in question and the result was that most divorces obtained in Canada had to be obtained by private Act of Parliament.

I may say by way of an aside that Nova Scotia passed the first divorce Act in 1758, and one of the causes for divorce under that statute was desertion without cause for three years, and in 1761 desertion was taken out of the statute, leaving two grounds, adultery and cruelty, which Nova Scotia has had ever since that time. It is the one jurisdiction in Canada where divorce can be obtained on the ground of cruelty.

The committee of which I have been speaking recommended in 1916, and I quote from the recommendation: "That a Court should be constituted in preference to the present costly and uncertain procedure"—that is, the procedure of getting private Acts of Parliament.

The committee reported further at the 1918 Annual Meeting and included in its report the following recommendation: "That the Parliament of Canada be requested to enact uniform grounds of divorce and the administration of the law be entrusted to Superior Provincial Courts, provided that this shall apply only to such provinces as pass acts putting the law into force."

A resolution in precisely the same language was placed before the meeting and after considerable discussion was adopted. It was re-affirmed in 1919.

Thereafter reports, recommendations and resolutions dealing with much the same subject matter, namely, a general statute setting out the grounds for divorce and conferring jurisdiction for its administration and urging enactment of such a statute came before the Annual Meeting of 1920, 1921 and 1928 and were respectively adopted and passed.

That, perhaps, is the first phase where the Association dealt with divorce. The next phase may be said to begin in 1944, because at the Annual Meeting specific grounds for divorce were set out in a recommendation contained in the report of the section on the administration of civil justice, namely, in addition to such grounds as exist for granting dissolution (a) desertion without cause for

a period of at least three years; (b) gross cruelty; (c) incurable unsoundness of mind existing for at least five years; (d) upon legal presumption of death.

The report of the section, including the recommendation as to extended grounds for divorce, was adopted by the Annual Meeting.

Resolutions re-affirming these extended grounds were passed at the 1946 and 1947 Annual Meetings and it appears from the record of the Association that the 1946 resolution had been forwarded by the President to the then Minister of Justice and an acknowledgment was received from the Minister.

In 1951 the Annual Meeting by a narrow margin defeated a resolution extending the grounds for divorce to desertion without cause for at least three years, cruelty and incurable insanity requiring care and treatment for five years, but in 1954 a resolution was introduced again, and was passed, favouring such extensions. After a full debate a copy was forwarded to both the then Prime Minister and the then Minister of Justice. There is a long preamble to the resolution passed in 1954 and it sets out clearly matters of jurisdiction and other matters before the actually operative part of the resolution is reached, but I do not deem it necessary to read into the record the entire resolution.

The Association has therefore on many occasions prior to 1966 considered this question of divorce, which of necessity is somewhat contentious and for many years has been on record with the Government as favouring an extension of the grounds for divorce. That is the first part of what I have to say, speaking to the resolution.

I now turn to the events of 1966. Earlier this year we accepted, very gladly, an invitation to make representations to this committee, and in order to be certain that the views expressed to the committee would represent the current thinking of the Association, this whole subject was again considered.

Three of the provincial branches at their 1966 meetings passed resolutions in favour of extended grounds for divorce, namely, Ontario, British Columbia and New Brunswick.

I am not putting these resolutions before this committee because the Association, as the President has so truly said this afternoon, speaks with one voice, and the one voice of the Association in this matter is the resolution which I have read. The views therefore of the Association are contained in the resolution before you and I should like to refer to the steps preceding the passing of this resolution.

The Civil Justice Section of the Association organized a panel discussion which was held in Winnipeg on August 31, 1966, during the course of the Annual Meeting at which a resolution was presented in much the same terms as the resolution before you.

Those who had organized the panel considered it desirable to point up the discussion and give it impetus by actually introducing before those attending the panel a definite resolution. This panel consisted of Mrs. Dorothy McArton, Executive Director of the Family Bureau of Greater Winnipeg, a private family service agency functioning primarily in marriage counselling, a graduate in social work of the University of Toronto; Father Halpin, Vice-Chancellor of the Roman Catholic Archdiocese of Winnipeg, whose duties include the enforcement and instruction in the marriage laws of his Church within the diocese; Professor Julien Payne, Assistant Professor of Law at the University of Western Ontario and Editor of the most recent revision of *Power's The Law of Divorce in Canada*; and Mr. Douglas Fitch, a practising barister of Calgary. The Chairman of the panel was Mr. E. C. Leslie, Q.C., of Regina, a Past-President of the Association.

The discussion at that meeting was very full. Members of the panel put forward their views very clearly on the whole question of reform of the laws

relating to divorce, and there were many questions and comments from the floor, and amendments to the resolution were proposed. In the end the resolution before the panel was passed.

Following that panel discussion the resolution so passed went forward to the Annual Meeting of members held on September 2. It was there fully debated and subsequently passed with an amendment to the first ground of divorce and an amendment in one other particular.

I should mention that at that Annual Meeting at which the resolution was passed there were approximately 250 members of the Association present. The resolution passed—the Secretary will correct me if I am wrong, but I do not think I am—by a large majority.

I can confidently say, after all the discussion that has taken place, the actions by provincial branches, and so on, that the subject has been thoroughly canvassed by the Association, and this resolution can be put forward with every confidence as representing the considered views of the Association.

I have before me transcripts of the discussion of the Annual Meeting at which the resolution was finally passed. There was a very full debate there despite the fact that there had preceded it the exhaustive discussion in the panel.

I might refer again briefly to the resolution:

BE IT RESOLVED:

That the grounds for divorce in Canada be:

1. Adultery, sodomy or bestiality, or conviction upon a charge of rape.

Some expression of opinion was given to the effect that sodomy or bestiality would come within the definition of cruelty in any event, and that it was unnecessary to set it out specifically. However, it was felt that in the interest of clarity, even if there were some repetition, or an expression of specific grounds which were included in a general ground, nevertheless those specific grounds should be set out in Section 1.

The CO-CHAIRMAN (*Senator Roebuck*): May we ask questions as we go along?

Mr. COOPER: Certainly.

The CO-CHAIRMAN (*Senator Roebuck*): Sodomy and bestiality are included in the causes or grounds for divorce in the act that was passed giving the Courts of Ontario the power of dissolution.

Mr. COOPER: The 1930 act?

The CO-CHAIRMAN (*Senator Roebuck*): Yes; and we have always considered them within the range of our jurisdiction in Parliament. And conviction upon a charge of rape, and adultery: we have always considered these within our jurisdiction.

Mr. COOPER: There was some discussion on the question of conviction upon a charge of rape. I mentioned that the resolution was amended in two particulars when it got to the Annual Meeting. The resolution in the panel discussion concerned adultery, sodomy or bestiality; or conviction upon a charge of rape" now appears. It was thought that the wording should be changed to appear, as it now does in fact appear, "or conviction upon a charge of rape".

The CO-CHAIRMAN (*Senator Roebuck*): I should point out that what I said covered Ontario and perhaps some of the other provinces, perhaps not.

Mr. COOPER: I think I am correct in saying that was also the thought of a good many people present at the meeting.

Mr. PETERS: Suppose a woman is raped and the man is convicted. Does this give her husband the right to divorce on the basis that the rape has established the commission of adultery, notwithstanding that it was involuntary?

Mr. COOPER: What is intended in ground No. 1 by "conviction upon a charge of rape" is conviction of the husband on a charge of rape of somebody other than the spouse.

Mr. PETERS: If you put in "conviction," when it comes into court it becomes a public matter and raises problems and there is apparently no way of protecting a female if she is the injured party.

The Co-CHAIRMAN (*Senator Roebuck*): A woman has never yet been convicted of rape.

Mr. PETERS No; but the man is convicted and the woman is named. Is it adultery then?

Mr. COOPER: I don't know that I get the point.

Mr. WAHN: Would attempted rape, incest and homosexuality be additional grounds?

Mr. COOPER: Not under the heading of No. 1.

Mr. WAHN: I should think that attempted rape would fall into the same classification as rape. If divorce is granted on the ground of rape it should be granted on the ground of attempted rape.

Mr. COOPER: I am not prepared to say that the resolution supported that proposition. I can only go as far as the resolution went—conviction upon a charge of rape.

Mr. STANBURY: Would it not seem reasonable to qualify the ground "conviction upon a charge of rape" by saying, "after the time allotted for appeal"? The conviction might be reversed.

Mr. COOPER: I do not think there would be a practical difficulty if the conviction on the charge of rape were under appeal.

Mr. STANBURY: Have you discussed the question whether or not there should be some qualification?

Mr. COOPER: No.

The Co-CHAIRMAN (*Senator Roebuck*): This says conviction upon a charge. Would that exclude the possibility of a petition supported by all the evidence of rape on the part of the defendant, though the matter has never gone to court and there has been no conviction notwithstanding that there is evidence of the intention?

Mr. COOPER: Under the wording of the first ground, conviction is what would be required where rape is involved.

The Co-CHAIRMAN (*Senator Roebuck*): If a circumstance of that kind had come before the committee when we were hearing cases we would have considered it adultery and granted a divorce.

Mr. COOPER: That might well be with something falling short of rape.

The Co-CHAIRMAN (*Senator Roebuck*): Something falling short of conviction might fall with the term adultery.

Mr. McCLEAVE: On a point of order: The witness earlier mentioned a transcript of proceedings where they had discussed these grounds. I wonder if the Bar would be kind enough to leave it with the Steering Committee. We were given authority to select certain documents that would be helpful, which could be printed as an appendix. This would be most helpful to us in our deliberations.

The Co-CHAIRMAN (*Senator Roebuck*): Was a record kept?

Mr. COOPER: A record was kept of the panel discussion and we have Minutes of the Annual Meeting at which the Resolution was passed. I defer to the Secretary in this matter but, with respect, I do not think we would want to have printed as part of the record of this committee the names of those who spoke at the meeting of the Association expressing their views.

Mr. CASGRAIN: It was part of the proceedings of the Annual Meeting where the debate took place and I think it can be put at your disposal. The book has not yet been printed but we will furnish an advance copy.

Mr. McCLEAVE: It is a public document, as I understand. Every year the Bar prints the proceedings, and places and names are mentioned.

Mr. Ronald C. Merriam, Q.C., Secretary, the Canadian Bar Association: We like to keep our counsel, but this question went to the Annual Meeting and the proceedings will appear in due course in the booklet that has been referred to, and if we can be of assistance by taking out that part of the discussion relating to divorce we shall be happy to do so.

Mr. CASGRAIN: We will not wait until the book is printed; we will give it to you at once.

Mr. PETERS: Does this include the panel discussion?

Mr. MERRIAM: No.

Mr. PETERS: It would be interesting.

Mr. MERRIAM: You would not get anything more out of the panel discussion than appeared at the full meeting of 250 members. You will find interesting information there.

(See Appendix "6")

Mr. BREWIN: I wanted to ask Mr. Cooper— if this is the proper time to ask general questions—whether the Bar Association considered the rather interesting suggestions put forward by a committee appointed by the Archbishop of Canterbury recently.

The Co-CHAIRMAN (Senator Roebuck): May I ask, Mr. Brewin, that that question be deferred until we reach No. 4?

Mr. BREWIN: Yes.

Mr. COOPER: The next ground is cruelty, the definition of which has been given in the resolution. It was felt that it would be preferable to do this than to leave the matter to the common law to determine what cruelty is.

The Co-CHAIRMAN (Senator Roebuck): Will you discuss the definition?

Mr. McCLEAVE: What was the source of the definition? Was it drawn up by a committee at the time or did it come from a decided case?

Mr. COOPER: I cannot answer that accurately. I understand that it is the definition that is used in some jurisdictions with respect to matters of judicial separation, but I would not like to be held to any particular source because I do not know.

Senator FERGUSON: Under "cruelty," Mr. Cooper, you mentioned the practice in Nova Scotia. You said that Nova Scotia is the only province in which divorce is granted on the ground of cruelty. Are many divorces granted on that ground in Nova Scotia?

Mr. COOPER: I cannot give statistics but I may say there are more and more as the years go on, whereas fifteen or twenty years ago they were very infrequent. They are increasing but I cannot give you statistics as to actual numbers.

Senator FERGUSON: On one occasion I asked this question in the Divorce Committee of the Senate and a senator from Nova Scotia investigated and came

back with the information that, though it was in the law, up to that time there had been only one case in which divorce had been granted on that ground.

Mr. COOPER: I don't know how long ago that would be.

The Co-CHAIRMAN (*Senator Roebuck*): Can you answer the specific question whether or not the number of cases has increased in modern times?

Mr. McCLEAVE: It has. There used to be about two or three a year twenty years ago; now it is several dozen a year.

Mr. PETERS: Is there a tendency in Nova Scotia today towards accepting in the courts cruelty of a nature other than physical? Is there any laxity in the enforcement of the provision with respect to physical cruelty?

Mr. COOPER: I have not had personal experience in the past few years in reported cases, but I have had cases on the ground of cruelty, and I do not wish to express opinions which Mr. McCleave might know are ill-founded. He may have more information on that point than I.

The Co-CHAIRMAN (*Senator Roebuck*): Could you let us know later on whether this definition of cruelty comes from some authoritative source or whether it was drawn by the Bar Association as their own invention?

Mr. COOPER: That information, sir, can be supplied; I am sure.

The Co-CHAIRMAN (*Senator Roebuck*): I have no more questions.

Mr. COOPER: The next ground is desertion without just cause for a period of three years immediately preceding commencement of the proceedings. There was a suggestion that it should be five years; on the other hand it was contended that three years was too long; in the end, however, three years was settled upon as being the appropriate period.

Mr. STANBURY: Would imprisonment for an extended period following conviction in a case other than rape be deemed a ground? I do not see in the resolution anything under which that might fall. My question arises out of the possibility of your placing conviction on a charge of rape above conviction in consequence of some other offence as a reason for the dissolution of marriage.

Mr. COOPER: There was some discussion, but frankly I cannot recall how it went. However, it will appear in the transcript. Perhaps the Secretary can remember where I do not, but I believe a discussion did take place on that point.

Mr. STANBURY: Was there a discussion as to conviction for other offences?

Mr. COOPER: Imprisonment but not a discussion of specific offences.

Mr. STANBURY: You did not include as a ground imprisonment for any particular length of time? Is it intended that that should fall within this ground as desertion without just cause?

Mr. COOPER: I cannot say specifically whether that was intended to fall within this provision.

Mr. STANBURY: Can you say it was not intended?

Mr. COOPER: I believe the Secretary wishes to address himself to this question.

Mr. MERRIAM: My recollection of the discussion surrounding this particular point is this. There are two objections to it, according to the views expressed, one being that it is the sort of thing that conceivably could lend itself to abuse by the wife. One of our eminent judges, who took part in the discussion, raised this very question. He said it would be a simple thing in certain instances for a woman who was looking for a divorce to railroad, or almost to railroad, her husband into a criminal charge.

A second point—and this became a social question—was that if the wife, on her husband's conviction, automatically obtained the right to divorce, it might

make the rehabilitation of that criminal ten times as difficult, in fact almost impossible. For these reasons they felt it would be unwise, certainly at this stage, to recommend that this be an additional ground for divorce.

Mr. BREWIN: I consider the social aspect a very important one. I have great respect for Mr. Stanbury, but surely conviction on a charge of rape is there from the point of view of evidence and not because social policy is involved. The conviction is evidence and on the strength of that evidence the marriage is broken up. It is dangerous to become involved in terms of imprisonment or, for that point of view, to equate murder, for example, with rape.

Mr. STANBURY: I am trying to get information. I suggest that the inclusion of rape is perhaps not the question. I am still concerned about whether or not a term of imprisonment for any time has been considered sufficient to serve as a ground for divorce. If a man has to serve twenty years, is this to be considered a ground for divorce? You have dealt with the question of conviction for rape. Do I take it that imprisonment for any length of time is not *per se* considered a ground for divorce?

Mr. MERRIAM: No.

The CO-CHAIRMAN (*Senator Roebuck*): My information is that imprisonment was one of the causes passed by the Commons in England and thrown out by the Lords on the ground that has been mentioned just now—that it would render rehabilitation more difficult. Furthermore, the time pronounced by the judge in passing sentence is not the final word: the Crown still has the power of pardon, together with ticket of leave.

Mr. WAHN: Should not habitual criminality be a ground for divorce? It would seem to be a logical principle.

Mr. COOPER: That is not one of the grounds set out in the resolution.

The CO-CHAIRMAN (*Senator Roebuck*): Do you know whether habitual criminality was considered?

Mr. COOPER: The question of habitual criminality was not specifically considered, to the best of my recollection.

The CO-CHAIRMAN (*Senator Roebuck*): Mr. Brewin, you had a question to ask. Do you wish to ask it under No. 4?

Mr. BREWIN: Actually, Mr. Chairman, my question relates to something broader than just 4. As I understand it, the gist of the proposal which was put forward by this committee in England, which included many distinguished lawyers, was to substitute for the idea of individual matrimonial offences the concept of factors contributing to the breakdown of the marriage. This broadens the question. For a single act of adultery might well not produce the breakdown of a marriage, and there might still be reasonable hope of rehabilitation; on the other hand, there are many acts such as voluntary separation without any reasonable likelihood of the resumption of cohabitation which would certainly come within the concept of a breakdown of marriage.

In the various suggestions here there is much that is reminiscent of the recommendations of the committee to which I have referred: for example, the requirement about satisfactory arrangements in regard to the children of the marriage, and making condonation and collusion not absolute bars. If in actual fact the marriage has broken down, the court has to determine the question and then the decree is made.

It is a new concept and, I think, an extremely interesting one, and I wonder whether your committee, Mr. Cooper, has been able to direct its mind to that, which is an alternative to the idea of the individual ground and the particular offence. It gets away from the guilty party concept, which is an artificial one. Has your committee given any thought to that?

Mr. COOPER: In the panel discussion to which I have referred there was reference to the marriage-offence basis for divorce as opposed to the marriage-breakdown concept of which Mr. Brewin has spoken. In the end the membership was not prepared to adopt the marriage-breakdown concept, and it may well be that the resolution, when related to these two ideas, is somewhat of a hybrid.

The reference that Mr. Brewin has made to such a marriage is interesting in that an amendment was made to that section of the resolution when the committee got into the General Meeting, having regard to every child of the marriage and to the family.

There may be children in relation to whom the parties stand *in loco parentis*, and it was felt, as it was in England, that such children also should be protected. That, as I see it, is another aspect of the marriage-breakdown as opposed to the mere marriage-offence concept.

I can only say that there two concepts were discussed, and I have mentioned Mr. Fitch as a member of the panel. He particularly dealt with it in the course of the panel discussion.

The social worker Mrs. McArton, who spoke clearly, put the welfare of the children, as would naturally be expected, ahead of the mere act—or perhaps I should say an isolated act—of adultery. There again, perhaps, that smacks of the marriage-breakdown concept rather than the marriage-offence concept.

Mr. CANTIN: On the question of children and family was there any discussion on the panel with a view to reconciling Article 185 of the Quebec Civil Code and this new concept?

Mr. COOPER: No, there was not; Article 185 of the Quebec Civil Code was not referred to. The Secretary has just brought to my attention a passage from a discussion with Professor Payne during the course of the panel dealing with the question of cruelty. For the purpose of the record I will mention it now.

Professor PAYNE: Could I have one further comment, Mr. Chairman, and I'll try and restrain myself. The point was made from the floor earlier that the definition of cruelty set out in the memorandum is too vague. This definition broadly corresponds to cruelty as defined in Saskatchewan and Alberta for purposes of remedy in cases of judicial separation or alimony. If it is too nebulous in the context of divorce, then presumably it is also too nebulous in the context of judicial separation or alimony. I think it works in the Provinces of Alberta and Saskatchewan, and it can work if it were introduced as a ground for divorce in Canada.

Mr. MACEWAN: May I ask Mr. Cooper a question in regard to ground No. 4, with special reference to the second paragraph, which reads: "the issue of a decree will not prove unduly harsh or oppressive to the defendant spouse". Could you go into that in a little more detail, Mr. Cooper, and indicate what you mean as far as the wife is concerned? Has that any reference to alimony?

Mr. COOPER: I could not go into detail on that without getting into the realm of personal views. I do not recall any specific discussion to which I can point dealing particularly with 4 (ii) as representing the consensus of the Association. I cannot at the moment give you an answer to your question as representing the views of the Association. I do not know whether the President or the Secretary can add to what I have said.

Mr. CASGRAIN: As Mr. Cooper has said, it is difficult for a witness to answer every question you put because, when a witness undertakes to answer a question, he must be careful not to leave the impression that he is speaking for the Association unless he has authority to do so or to present a resolution and explain it. We are always faced with questions with respect to which we have to be careful to distinguish between giving our own opinion and giving the con-

sidered view of the Association. We must be careful in our statements and it is for that reason that Mr. Cooper may seem somewhat diffident at times.

The Co-CHAIRMAN (*Senator Roebuck*): There is no prohibition against giving your personal views and if you make it clear that they are your own views you have avoided any difficulties.

Mr. COOPER: All I can add to what I have already said is that I understand this 4 (ii) comes from the English report, which I believe is the report that has already been referred to as the Archbishop of Canterbury's.

Senator FERGUSON: On the matter of children, could Mr. Cooper tell us whether the committee gave consideration to the question of establishing as a ground for divorce on the part of the wife the fact that there has been persistent failure by the husband and father to provide for the support of the family?

Mr. COOPER: No. There was no specific consideration given to the advisability of introducing the non-support of children as one of the grounds for divorce.

Mr. McCLEAVE: I have two questions on section 4. I hold the very strong opinion that in section 4 lies the only hope of cutting out the fabricated divorce case in our courts. Would you agree with me in that assessment?

Mr. COOPER: Expressing a personal view, I would agree with you.

Mr. McCLEAVE: My second point is this. Since No. 4 seems to be getting rather close to the marriage-breakdown theory that has developed in modern times, did the Association give any thought to a possibly unique type of approach, and that is that both parties should have the right to petition. In other words, we get away from the marriage-fault concept, so that the parties could not go around afterwards saying he divorced her or she divorced him. That would not happen under this type of approach.

Mr. COOPER: That was not specifically considered. There was some discussion, and perhaps some fear expressed, that we might in the end have divorce by consent. But there again I am drawing on my personal recollection. The consensus of the meeting was that we were not prepared to go to the extent of divorce by consent. I believe that is virtually, if not actually, the situation in New York State at the moment, or their latest statute leads to that; but there is no thought here that we wish to go that far.

Mr. STANBURY: I understand Mr. McCleave to be suggesting that petition might be made by both parties, and by the simple fact that petition is made by both parties, consent is given. But consent is not a ground for divorce.

Mr. McCLEAVE: The ground is the voluntary separation.

Mr. STANBURY: The matter might be put in issue by both parties and an independent arbiter decide whether or not there was ground for dissolution. But that is hardly divorce by consent.

The Co-CHAIRMAN (*Senator Roebuck*): Ladies and gentlemen, shall we go on to No. 5?

Mr. COOPER: No. 5 reads: "Incurable unsoundness of mind where the afflicted spouse has been continuously under care and treatment for a period of five years immediately preceding the commencement of proceedings." I have no particular comment with respect to ground No. 5.

Mr. McCLEAVE: Usually a rider has been placed in this type of ground as to institutional care. Did the Bar decide that care and treatment could be other than in an institution?

Mr. COOPER: I do not recall any mention specifically of the word institution or any discussion around it.

Mr. STANBURY: Was any attempt made to distinguish rehabilitation of a patient in a mental institution from treatment of someone in a penal institution?

Mr. COOPER: There was discussion as to the progress being made in the treatment of people in mental institutions, but in the end, after that discussion, this particular provision No. 5 was passed.

Mr. McCLEAVE: I believe it is a medical fact that 98 per cent of cures occur in the five-year period and after that you can almost give a person up as being incurable.

Mr. COOPER: The sixth ground is wilful refusal to consummate the marriage.

The Co-CHAIRMAN (*Senator Roebuck*): The law has been administering for some years the provision with respect to the inability of one or other of the spouses to consummate the marriage; but wilful refusal to consummate is another matter. There is a leading case in England where two students got married and decided—it was by mutual consent—that they would not consummate the marriage until after their graduation. After graduation they came and asked for an annulment on the ground that the marriage had not been consummated and the Court said: No; that was a voluntary matter.

We have carefully refrained from declaring nullity except when the failure to consummate was due to the inability of one or the other to consummate; not because they wilfully refused to do so.

Mr. PETERS: Under No. 4 there is a time limit of three years immediately preceding the commencement of proceedings. But all, one party has to do is to say, "I am not interested," and it does not need time. This is not wilful refusal. There is no time limit. It could be by agreement.

The Co-CHAIRMAN (*Senator Roebuck*): As long as it is wilful. Was that considered, Mr. Cooper? Was it intended to widen the grounds for nullity?

Mr. COOPER: There was no extended discussion on that particular ground and all I can do is merely to repeat the words "wilful refusal," which as I understand them mean deliberate, intended refusal to consummate.

Mr. STANBURY: As I understand Mr. Peters, he is saying that according to the present wording of the resolution the wilful refusal might be for a week, a month or a year, which could be more serious than separation or desertion for three years, and there seems to be no immediate limit in the definition.

Mr. PETERS: A man might say, "I will not sleep with my wife any more, period" and she might agree: "I won't let you anyway".

The Co-CHAIRMAN (*Senator Roebuck*): We had a case where a man was married and immediately on leaving the church he kissed his wife good-bye and took ship for Europe, and we held it was not wilful but was due rather to the fact that he was crazy. We granted the annulment.

Mr. WAHN: Was declaration of death considered?

Mr. COOPER: It was discussed. It was referred to—let us put it that way—but not included.

Mr. WAHN: Was there any reason for not including it?

Mr. COOPER: I cannot recall the conclusion.

The Co-CHAIRMAN (*Senator Roebuck*): We have considered a number of grounds recommended by the Bar Association. Was alcoholism, habitual drunkenness, considered?

Mr. COOPER: No, except in so far as habitual drunkenness might fall under the definition of cruelty.

The Co-CHAIRMAN (*Senator Roebuck*): They might live apart for a number of years.

Mr. PETERS: Was any consideration given to the matter of domicile?

Mr. COOPER: It was thought, in the rather slight discussion that took place on this point, that this question was one that might very well be left in abeyance for the time being. I think I am safe in saying that the general feeling was that we had gone fairly fully into the extended grounds that have been set out here and did not wish at this point to deal extensively with the question of domicile, and so it was not included.

The CO-CHAIRMAN (*Senator Roebuck*): Are there any further questions arising out of the resolution?

Mr. STANBURY: Was there any reference in this matter to the resolution of 1919 with respect to common grounds in all the provinces?

Mr. COOPER: The constitutional aspects were not discussed, certainly to my knowledge and recollection. Personally, I do not think that there would be difficulty constitutionally in the passage of this legislation. I should think jurisdiction could be given the Superior Courts of the provinces.

Mr. STANBURY: I think the practice has been that Parliament has legislated requesting the provinces, and I notice you did seem to recognize this as constitutional practice, but you are not suggesting that there should be any legislation in this field, which awaits the opting in of the province, or that there is any difficulty constitutionally in simply establishing common grounds across the country unilaterally by the Parliament of Canada?

Mr. COOPER: This is a resolution dealing, not perhaps entirely but almost entirely, with the extension of grounds for divorce, and it is not intended to be a draft statute.

Mr. STANBURY: There was no rejection of any provision such as that contained in the resolution of 1919?

Mr. COOPER: There was no rejection.

The CO-CHAIRMAN (*Senator Roebuck*): There are further matters in your brief, Mr. Cooper. Could you cover them now?

Mr. COOPER: There is this, Mr. Chairman; though I thought I had read it, there is no harm done in reading it again:

BE IT FURTHER RESOLVED:

That no decree of divorce shall issue unless and until the Court is satisfied as respects every child of the marriage and of the family who is under the age of 16 years that:

- (i) Arrangements for the care and upbringing of such child have been made and are satisfactory or are the best that can be devised in the circumstances.

That follows the English legislation and it was thought proper to be included.

The CO-CHAIRMAN (*Senator Roebuck*): It is not the practice of the courts there, as of our courts here, and the Parliamentary Court, just as it is expressed in this resolution?

Mr. COOPER: I cannot answer for all the provinces. All I can say is: it was felt that the interests of the children are very vital to the matter of divorce and therefore any statute that might be passed on divorce should contain such a provision.

The CO-CHAIRMAN (*Senator Roebuck*): In any divorce we have granted in Parliament in many years now we have never overlooked the welfare of the children, and on every occasion we have gone into that phase of the matter.

Mr. COOPER: I am quite aware that there are lawyers here from Ontario who know more about this than I do and they can correct me if I am wrong, but

I believe steps have been taken recently in this province towards this end through the Official Guardian. There was mention in discussion at the Annual Meeting that there was some difficulty with respect to the Official Guardians Office to deal adequately with the subject. But I speak, of course, not from any knowledge at first hand on this point.

The Co-CHAIRMAN (*Senator Roebuck*): I do not think there is much room for argument.

Mr. WAHN: Was any consideration given in the discussion to preventing hasty divorce and providing for reconciliation through marriage counsel?

Mr. COOPER: There was discussion of the point.

Mr. WAHN: There is a provision in England that there shall not be divorce, except under very unusual circumstances, in the first three years of the marriage.

Mr. COOPER: There was discussion of the suggestion that there should be no divorce in the first three years, but that suggested provision was rejected—or, let me say, not adopted.

Mr. WAHN: Was any reason given for the rejection of it? I understand it is in the English statute.

Mr. COOPER: I cannot recall the specific reasons. The general purport of the discussion on that point was that within the three years there might be compelling reasons for divorce: However, I cannot say that I am quoting the exact words of the discussion.

Mr. PETERS: Was there any discussion on the constitutional aspect of whether the changes which it is suggested should be implemented by the Dominion would constitute substantive legislation, with enabling legislation from the provinces. Was there any constitutional argument as to whether this involved rights in respect of ancillary problem—children, property, alimony?

Mr. COOPER: There was no discussion of the constitutionality of such a statute.

The Co-CHAIRMAN (*Senator Roebuck*): There are two problems that arise out of the question Mr. Peters has asked. In fact, he has asked two questions: one is whether a decree of separation *a mensa et thoro* is included in the words of the British North America Act in connection with marriage and divorce; and the second is whether these matters of alimony, division of property and perhaps some other things are ancillary to divorce. I may inform the committee that I have written to the Attorneys General of both Manitoba and Ontario asking for their advice on this question and I am fairly sure we shall have an exhaustive memorandum from both Attorneys General.

Mr. McCLEAVE: We hope they agree in their opinions.

The Co-CHAIRMAN (*Senator Roebuck*): Perhaps that is too much to ask for. Thank you, Mr. Cooper. Now we must hear a word from Mr. Ronald Merriam. Lawyers here will be interested to know that Mr. Merriam practised in the City of Ottawa until 1962 when he became full-time Secretary of the Canadian Bar Association. Mr. Merriam graduated from Queen's University in arts and from Osgoode Hall in law and is a member of the Law Society of Upper Canada. I have pleasure in welcoming him.

Mr. MERRIAM: In view of the fact that Mr. Casgrain and Mr. Cooper have thoroughly covered the subjects that have been discussed, I do not propose to add anything to what they have said. I simply wish to thank the committee for allowing me to be here this afternoon.

Mr. McCLEAVE: Mr. Merriam, you have attended Annual Meetings of the Association over a long period of time. Is it a fair assessment that the attitude of this conservative segment of society is changing rapidly?

Mr. BREWIN: Not as conservative as some might think.

Mr. MERRIAM: There is a noticeable change in its attitude. Certainly the discussion in Winnipeg in the last year was very different and much more sympathetic in its recognition of the almost essential need for an extension of grounds for divorce, or amendments to out laws of divorce.

Mr. CASGRAIN: It is the consensus of members of all provinces that divorce is necessary.

Mr. McCLEAVE: Perhaps I tread on dangerous ground, and if so I apologise to you in advance. Previously there has been some religious feeling mixed in with the opinions held by priests. Is it disappearing?

Mr. CASGRAIN: I think it is true, since the teachings of the Roman Catholic Church are now quite clear that we live in a pluralistic society and no religion can impose its laws on people of other religious creeds.

The Co-CHAIRMAN (*Senator Roebuck*): May I ask my Co-Chairman to express the sentiments of us all.

The Co-CHAIRMAN (*Mr. Cameron*): I am sure Mr. Casgrain, the President of the Canadian Bar Association, Mr. Cooper, the Vice-President, and Mr. Merriam, the Secretary, appreciate the response that their presentation has met with. The applause that marked the close of Mr. Cooper's brief was fully justified.

May I say that the justice and legal affairs Committee of the Commons enjoyed the same privilege of having these distinguished gentlemen appear before them to explain a certain resolution pertinent to a matter which was referred to that committee. We did benefit, and we shall continue to benefit, from their advice, which came to us with the authority with which they spoke.

They have presented their resolution and have given the background of it, and that resolution was carried by the Canadian Bar Association. It gives one a great feeling of confidence to know that when we come to a decision we shall have benefited from the wisdom of men like the President of the Canadian Bar Association, Mr. Casgrain, the Dominion Vice-President, Mr. Cooper, and the Secretary, Mr. Merriam.

On behalf of the committee I wish to express to these three gentlemen our appreciation, and our thanks, for the discharge of what is really a public duty.

The Co-CHAIRMAN (*Senator Roebuck*): I think that concludes our work for this day.

The committee adjourned.

APPENDIX "6"

THE CANADIAN BAR ASSOCIATION

Transcript of the discussion which took place on Friday, September 2nd, 1966 during the 1966 Annual Meeting of the Association in Winnipeg, Manitoba on the subject of Divorce.

Chairman: J. T. Weir, Q.C., LL.D., President of the Canadian Bar Association, 1965-66.

The CHAIRMAN: The second resolution, is on the topic of divorce reform. Again, it needs no mover or seconder and I think it had better be read.

"BE IT RESOLVED that the grounds for divorce in Canada be:

1. Adultery, rape, sodomy and bestiality;
2. Cruelty (as defined below);
3. Desertion without just cause for a period of three years immediately preceding commencement of the proceedings;
4. Voluntary separation of the husband and wife for a period of three years immediately preceding the commencement of proceedings provided that the Court shall be satisfied that:
 - (i) there is no reasonable likelihood of a resumption of cohabitation, and
 - (ii) the issue of a decree will not prove unduly harsh or oppressive to the defendant spouse.
5. Incurable unsoundness of mind where the afflicted spouse has been continuously under care and treatment for a period of five years immediately preceding the commencement of proceedings.
6. Wilful refusal to consummate the marriage.

Definition of Cruelty

Cruelty shall include any conduct that creates a danger to life, limb or health and any conduct that in the opinion of the Court is grossly insulting and intolerable, being of such a character that the person seeking the divorce cannot reasonably be expected to be willing to cohabit with the other spouse who has been guilty of such conduct.

BE IT FURTHER RESOLVED that no decree of divorce shall issue unless and until the Court is satisfied as respects every child of the family who is under the age of sixteen that:

- (i) arrangements for the care and upbringing of such child have been made and are satisfactory or are the best that can be devised in the circumstances, or,
- (ii) it is impracticable for the party or parties appearing before the Court to make any such arrangements.

BE IT FURTHER RESOLVED that the defences of condonation and collusion constitute discretionary and not absolute bars to matrimonial relief."

And I'm going to number these for the purpose of discussion: the grounds as 1, the definition of cruelty as 2, the arrangement for the children as 3 and the reference to collusion and condonation as 4, for the purposes of discussion. Now, does anyone wish to speak to the resolution?

From the FLOOR: Mr. President, may I ask a question, please? If my recollection is correct, in Banff in 1957 there was a similar resolution hotly

debated by some very senior and respected members of this Association and I think it may have been passed. I wonder if the chairman of the Civil Justice Section would tell us to what extent this resolution goes beyond the 1957 one.

The CHAIRMAN: I think, actually, the year was '54, that's our recollection.

T. C. WAKELING: The first item that we have here of adultery has of course always been standard and wasn't in that resolution. The reference to cruelty was in that previous resolution but there was no definition given for it and it would therefore probably have been the common law definition of cruelty which I understand has been worked out in some of the cases in such provinces as Ontario. Desertion was included in the 1954 resolution and also included the same period of three years as you see in this resolution. Item 4, under voluntary separation, was not included in The Canadian Bar Association resolution of '54. Item 6 on incurable unsoundness of mind was included—I'm sorry, item 6, wilful refusal, was not included. Going further, there was not included the definition of cruelty nor were the other two items that you see as to arrangements for the children or condonation or collusion included in the previous resolution. It was very short. It simply had a lengthy preamble and then said we think the grounds should be cruelty, desertion, incurable unsoundness of mind—should be extended to those fields.

From the FLOOR: I would like to ask the speaker if there was any reference to rape?

Mr. WAKELING: No, there was not.

From the FLOOR: And now, might I ask the speaker why there's any necessity for that now?

Mr. WAKELING: My only answer is that I understand rape, sodomy and bestiality are now grounds for a wife's petition and I think the answer is that we're just trying to make it abundantly clear, I suppose; there's probably no need to say adultery either—it's grounds now.

The CHAIRMAN: I think the problem, certainly my problem, is I don't know how rape can be committed between husband and wife, unless this is talking about rape of some third party, and I think that's it. It seems to me that's it. Would you qualify what the intention of the resolution is? Are we talking about something between the parties themselves or are you talking about a third party raping the wife and that being a cause for divorce?

Mr. WAKELING: I am not the draftsman of the resolution and, unfortunately, one of the draftsmen has had to leave and the other one is on T.V. at the moment, so that I have that difficulty and when we discussed it at our meeting of the Civil Justice Section, the point was not raised so I can't be too effective on this point.

From the FLOOR: Mr. Chairman, may we be told, please, though, since we weren't at the meeting of the Civil Justice Section, to what extent this was discussed, how many people were at the meeting and the approximate result of the vote which put this forward so that we'll at least have the advantage of knowing how extensively it was discussed and what was the opinion of those who discussed it.

Mr. WAKELING: I'd be very pleased to. As a matter of fact, it was my original intention to try to give an outline as to how this arose to this point. I'll be as brief as I can but the Province of Ontario had a sub-committee working on divorce reform over the past few years and resulted in the bringing forth of a resolution at the mid-winter meeting of the Law Society of Upper Canada, which resolution was duly passed and—

The CHAIRMAN: I'm sorry, Mr. Wakeling. For accuracy, it was the provincial Branch, of course.

Mr. WAKELING; i'm sorry, the provincial Branch. It was passed in not just this form but I could go on to tell you later just in what fashion it varies. It appeared desirable that we have a program on this matter and the desirability was principally on the fact that there was the establishment of the Joint Committee of the Senate and House of Commons to go into the matter of divorce reform. When it became known that we intended to have a panel on this, following the discussions that had taken place at the Ontario Branch meeting, it was made known to me that probably it would be best if a resolution arose from this panel discussion because there had not been a voice of The Canadian Bar Association in the form of a resolution since 1954 and the committee had been formed to hear the voices of all organizations that wanted to be heard and it seemed reasonable and natural that we should be one of those. So it was requested of the legal members of this panel—Mr. Douglas Fitch of Calgary and Mr. Julian Payne of London, Ontario—that they draw up a form of resolution which they felt would be reasonably acceptable to the Canadian Bar and which would serve as a focal point for the discussions of those at the panel.

I think it's fair to say that there is a considerable body of opinion which would favor a marriage breakdown concept, which this is not. I think it would be fair to say, however, that most of those who also have considered the marriage breakdown concept are those who are most interested in the subject and have done the most research on it but they feel that it is a little bit far out at the moment in that the Canadian research has probably not reached a point where we could say that The Canadian Bar Association could go in favor of a marriage breakdown concept, and this, therefore, is somewhat of a hybrid; I don't think it represents the true wishes of those members of the panel who brought forward this resolution but they support it in general as being the most forward-looking resolution they felt could probably be properly passed by The Canadian Bar Association.

Now, at the meeting itself I didn't take a count of noses but perhaps there were 50 in attendance. During the discussion which took place, I think while it wasn't discussed point by point (that is there was a social worker, a priest of the Catholic Church and two lawyers on the panel—Mr. Leslie was chairman) it wasn't discussed point by point but was discussed in a very general way. There were a few amendments that came forward. In paragraph 3, under desertion, there was an amendment that it be changed from three to five years. This amendment was defeated; I think it was felt that three years was long enough or should be a reasonable period for desertion but five would perhaps be more of a penalty and an inhibiting factor. There was a second amendment brought forward on paragraph 5 under the heading of incurable unsoundness of mind and they felt that it should be cut off right after the word "mind"; simply "an incurable unsoundness of mind" and it leaves all the other bit of five years and so on out of it, on the basis that science has reached a point that they no longer need five years to know whether there is incurable unsoundness of mind. That was defeated. And I think it's fair to say that some of these were defeated by a fairly narrow margin. There was another amendment to paragraph 5 which suggested that we acknowledge the fact that unsoundness of mind is only one part of a disease factor and we shouldn't separate it as giving it special consideration and that, therefore, anybody who had an incurable disease which incapacitated him or her would be a grounds for divorce by his or her spouse. This was soundly defeated. There was another amendment suggesting that there be no divorce for the first three years. This was following Australia's procedure; this was defeated. And the resolution then put, with all the amendments having been defeated, it was carried virtually unanimously.

Now, the Ontario one does not contain the definition of cruelty—the one passed at the Mid-Winter meeting that I referred to—does not give a definition

of cruelty. It did not contain the last two parts. The one on the bottom of page 1 is one that the social welfare people particularly endorse because they feel that it is the tendency of lawyers and courts to give too little concern to the third party that enters into divorce proceedings; namely, the child. On page 2, the matter of condonation and collusion, it was felt that condonation as it now stands hampers reconciliation and the panel were firmly of the opinion that reconciliation is the positive part of matters pertaining to divorce, which is being overlooked and ignored largely and collusion, because it is not clear in the minds of many what collusion consists of, may also be somewhat of a bar to reconciliation because we're not sure whether some items that are collusion are not also condonation.

This, therefore, I think is the summary of what took place and the general statements that were made at the Civil Justice Section meeting.

SYDNEY PERLMUTTER: With respect to the second page, I was wondering why no reference was made to the third "c"; namely, connivance. Personally, I would prefer to see connivance and collusion remaining absolute bars to the granting of divorce and that, I think, would pretty well take care of the question with respect to rape which was mentioned earlier.

Mr. WAKELING: Well, I think it was felt that connivance should remain an absolute bar. My understanding of it is that the parties simply devise the means to come before the court and these are simply to be made clear that they are discretionary bars so the court will have a right to look into those aspects of it and will not be compelled to throw out something that—a divorce that might otherwise be granted.

The CHAIRMAN: Was it your suggestion that you proposed an amendment to strike "collusion" from it or not?

Mr. PERLMUTTER: Yes. I would so move to that effect.

The CHAIRMAN: Just to take out the words "and collusion" in the last paragraph? Anyone second that amendment?

R. C. BRAY: I second it.

The CHAIRMAN: Thank you, Mr. Bray.

From the FLOOR: May I speak to the amendment?

The CHAIRMAN: Yes, sir.

From the FLOOR: I just wonder why, instead of striking out "collusion", you wouldn't put in "connivance" because I would have thought, if you look at item 4, you could say that there was connivance every time that happened because it looks to me like they agree to live apart for three years.

The CHAIRMAN: I didn't—well, I shouldn't say what I think "connivance" means but do you want to amend it again?

From the FLOOR: No, I was just hopeful that the amendment would be defeated.

The CHAIRMAN: All right, that's fine. The other microphone, please.

JOHN P. PALMER, Q.C.: I think it should be said, Mr. Chairman, that this discussion of divorce is particularly important, with the Joint Committee of the Senate and House of Commons of Canada convening for the first time in many years to consider divorce and I understand that they have asked this Association for a submission as to the grounds for divorce. Is this correct?

The CHAIRMAN: Yes. We've had the regular invitation letter.

Mr. PALMER: And that is why I feel it is most important that this resolution be given every possible thought and consideration if it is going to go forward. I feel, as regards the first ground, that the word "rape" is entirely inappropriate. Does that mean that a wife who has been raped is to be divorced?

The CHAIRMAN: As I understand it, no one is defining the word "rape", not even the chairman of the Section, so we could take an amendment from you now that that be removed.

Mr. PALMER: I go beyond that, Mr. Chairman. The word "sodomy" is a word of ill-defined meaning and having discussed this problem in New Brunswick—I was on a committee there—the wording which we came up with was largely derived from the new New York State statute and ground 1—I would move that this be amended to read as follows: "Any act of normal or deviate sexual intercourse—

The CHAIRMAN: Sorry, could I have your words again?
Any act of what?

Mr. PALMER: "Of normal or deviate sexual intercourse voluntarily participated in by the spouse with another person or with an animal."

The CHAIRMAN: This is in substitution for "Adultery" is it? If I understand your amendment, it's to take out all of item 1 and substitute the words you've suggested and I'm going to read them to see that I've written them down correctly: "Any act of normal or deviate sexual intercourse entered into voluntarily with another person or an animal." Have I got it down correctly?

Mr. PALMER: Yes.

The CHAIRMAN: All right, just a minute, just a minute. We must have order. Do you have a seconder? There is a seconder from New Brunswick, will he give us his name?

FREDERICK S. TAYLOR: My name is Taylor and I come from the same place as Mr. Palmer.

The CHAIRMAN: Mr. Taylor seconds the amendment. Mr. Freeze, did you want to speak?

Ralph St. J. FREEZE, Q.C.: Mr. President, I think when we discussed it in New Brunswick, I think we had two or three extra words there, "with a person other than the spouse".

The CHAIRMAN: All I can say is, Mr. Freeze, if this is passed, I'm going to be fortunate not to be the president who has to explain it to the Minister of Justice.

Mr. FREEZE: As I understand it now, to have normal intercourse with your wife, the way it was stated a moment ago, this would be grounds, and it wasn't clarified. I don't think the words were there to clarify it, "with a person other than the spouse".

Mr. PALMER: I accept Mr. Freeze's change. I haven't got our final wording with me here just now.

Mr. WAKELING: Mr. Chairman, may I just clarify, I think for the sake of those who drafted it, that this was never intended to be the last draft of the legislation on the subject. It's supposed to give in substance what we're trying to suggest be the stand of the Canadian Bar Association and we wouldn't really expect—there might be places throughout this where you would want the final draft to submit to legislation somewhat different.

The CHAIRMAN: I think we appreciate that but I think there is a substantial difference between the acts of adultery, sodomy and bestiality and words like "deviate sexual intercourse" and such. I do suggest the amendment has substance, Mr. Wakeling. It's not just wording, this is not just wording. There is certainly some difference in the principle being stated; therefore I think it has to be put to the meeting. Is there any other comment on the whole matter of the resolution? Yes?

From the FLOOR: I'd like to bring one point up. I think that the discussion of "deviate sexual intercourse" would probably fall into the definition of

cruelty, of any conduct that is grossly insulting and intolerable. I believe that was discussed at the section meeting. I say that for what it's worth.

The CHAIRMAN: Thank you. Yes, Mr. Moore?

E. L. MOORE: The briefest possible comment. I was at the discussion and, as I recall it, that item was passed over as being declaratory in the present law in most provinces of Canada. I think therefore—

The CHAIRMAN: Let me put it this way: I know of no provinces where rape is matrimonial offence.

Mr. MOORE: I agree, Mr. Chairman, but this was the way it was passed.

The CHAIRMAN: I see. Right. Thank you. Yes, Dean Leal?

H. ALLAN LEAL, Q.C., LL.D.: I recognize, Mr. Chairman, that this is a hard act to follow but I'm really here in an effort to get some information on a point raised by Mr. Wakeling. I thought he said, during his able discussion of this resolution by the Civil Justice Section, that they had rejected the principle of marriage breakdown and yet I found it extremely difficult to see how that coincides with item No. 4 in what you, sir, have described as the first part of this resolution. I think it is normally conceded that the dichotomy here is between marital offences or faults as they are sometimes called in matrimonial matters on the one hand and marriage breakdown on the other. I would have thought—and this probably is no more than to tell the outside world that we really do know what we're talking about—I would have thought that item No. 4 deals with marriage breakdown and, if that is to be included, maybe we ought to think about it in those terms because it is a substantial extension of the existing grounds.

The CHAIRMAN: Thank you, Dean Leal.

G. R. D. GOULET: Mr. Chairman, I have a suggestion on how to put this thing into proper form: after the word "Be" in the first line, put "broadened to include" and then delete item No. 1. I think that would solve the problem.

The CHAIRMAN: I'm sorry. Would you mind repeating that? I don't think I was able to follow it.

Mr. GOULET: My suggestion was that the resolution be amended to read: "Be it resolved that the grounds for divorce in Canada be amended to include the following" and then delete "Adultery, rape, sodomy and bestiality" and carry on from there.

The CHAIRMAN: So the key word is "amended".

From the FLOOR: Mr. Chairman, could I suggest that perhaps we view the grounds separately as they are numbered paragraphs right through?

The CHAIRMAN: Well, I have no objection to that but I think I have to let anyone who wishes to speak to the whole matter first deal with it.

A. E. BROTMAN, Q.C.: I am vitally interested in this question and I, just at the present time, wanted to make an appeal to those who are proposing amendments, I serve the right to speak on the main resolution a little later, if you don't mind.

The CHAIRMAN: No, sir, I'm sorry. At the moment, I think I must ask you to take your opportunity to speak on either or both parts. I don't think I can hear anyone twice until we have exhausted the discussion with everyone who wants to speak on it.

Mr. BROTMAN: I'll follow your direction.

A. R. MICAY, Q.C.: May I make a suggestion, Mr. Chairman? It seems obvious to me that what is meant by No. 1 is not suspicion but proof of a conviction of rape.

The CHAIRMAN: All right, well, you can discuss that with the gentleman that's moved the amendment.

Mr. BROTMAN: Mr. Chairman, ladies and gentlemen: I want to point out—I'm a lawyer from Winnipeg, Province of Manitoba—that Manitoba is operating under a divorce law that's older than Confederation. The law in force in Manitoba is the law of 1857, that's nine years older than Confederation, and that there is a strong movement for reform in the divorce law and this is why I am going to speak in favor of the resolution. Directing myself to those moving amendments, I would like to point out to you that there are four or five hundred lawyers in this hall who could give four or five hundred amendments. Now, this has been drafted by the committee that studied it and, if accepted by the Government, the Legislative Counsel of the Government will study it and I think we're going to lose a lot of time and perhaps not make any progress today in a matter vital to thousands of people throughout Canada. The lawyers, as well as parliament, have engaged themselves in debate about the abolition of the death penalty that may apply to four, five or six murderers per annum throughout Canada but here we have a subject affecting thousands of people and it's time that this Association took a stand.

Now, in appealing to these movers, I am doing so with the hope of trying to get something passed here and, therefore, if we're going to lose time in drafting and in asking questions that perhaps most of us should know or the answers to these questions, we lose a lot of time. Now, a friend right behind me pointed out that No. 1 is declaratory of the law. This is not introducing any law. As Mr. Micay just pointed out, it should read: "conviction for rape" but the petitioner would—that is a ground for suing at the present time but the petitioner would have to prove a little more than conviction and therefore this really should read "conviction for rape" though I'm discouraging amendments. The other ones, sodomy and bestiality, I think are right in The Matrimonial Act of 1857, so that we're not passing anything new in No. 1. In No. 1, we're not passing anything new at all. It is declaratory as my friend here has said.

Now, the other new grounds: cruelty, desertion, incurable unsoundness of mind, these grounds have been accepted in England. They've been accepted in Australia. They're in force in the United States and I want to add this, that Canada is the most backward in its legislation relating to law in the whole English-speaking and French-speaking world, the most backward in every part of the British Commonwealth. Therefore, we as an Association should take cognizance of this and support the heads of the Government. I think the Government will want to do something progressive in this and there have been some objections in this Association, perhaps 20 or 25 years ago, to any amendments of the divorce law but I see progress has been made and I'm very much strongly in favor of this progress.

Now, the other part at the bottom there from somebody who wanted to devise a resolution dealing with arrangements regarding the children, this is something absolutely new and, while it looks fine on the surface, still I wouldn't like it to interfere with the other part of the resolution adding the grounds of cruelty and desertion. The committee has studied voluntary separation. This is something new to me but I accept it. Therefore, Mr. Chairman and members, I urge you most strongly to deal on the matter of principle. Are we in principle in favor of extending the grounds for divorce? If we are, we should pass this resolution today and I appeal to my brother lawyers not to get too technical and try and pass on the grounds of divorce and satisfy this crying need for thousands of Canadians.

From the FLOOR: Mr. Chairman, I just want to comment on that. Although Manitoba has a relatively modern statute of 1857 under which it operates, in the Maritime Provinces the statutes date back to about 1790 and, unfortunately, sodomy and bestiality are not grounds in New Brunswick or Nova Scotia.

The CHAIRMAN: Mr. Deschênes, yes.

Jules DESCHÊNES, Q.C.: Coming from Montreal, Mr. Chairman, and accordingly from the Province of Quebec where we have no divorce courts, I might say that I am still more ignorant of these matters than my New Brunswick friends. Dealing, nevertheless, Mr. President, with the principle of the resolution, there are two points I would very much like to make. The first one is that this resolution in certain quarters, and especially in the province where I come from, might appear to raise certain difficult questions. I would like to make it clear, in plain and simple words, that quite irrespective of personal convictions of those members of the Bar who share my religious Roman Catholic convictions, nevertheless it is now our feeling that, in view of the pluralistic state of the society in which we are living, this is no ground for any of us to try and impose upon anyone else convictions which are not shared outside of our Church, and accordingly, I for my part will not register a vote against this resolution because of this particular ground. However, this is my second point, I feel, Mr. President, that paragraph 4 of this resolution, quite irrespective of any question of moral conviction, is—

The CHAIRMAN: Mr. Deschênes, can I interrupt just to say this: because I appreciate that there must be all sorts and shades of opinion in this room about the definition of cruelty, about the voluntary separation aspects, I propose, as the chairman, when we come to vote, to put the resolution before you in the parts that I think represent the shades of opinion, so it is not necessary to have a series of amendments saying "Strike out 3" or something of this kind, just to avoid—

Mr. DESCHÊNES: Will we have a chance of saying why such a paragraph should be struck off, Mr. President?

The CHAIRMAN: I think I'd like you to say that now.

Mr. DESCHÊNES: The reason why I would suggest that paragraph 4 be deleted is that, as I was on the point of saying, I think that this paragraph is bringing us dangerously close to divorce by mutual consent.

FROM THE FLOOR: That's the original No. 4?

Mr. DESCHÊNES: Well I'm speaking about the text which has just been distributed, No. 4 being the one which begins with the words "Voluntary separation of the husband and wife", and I submit respectfully, Mr. President, that whatever our moral convictions are aside from this paragraph and on the balance of the resolution, we should not import into our Canadian law, divorce by consent. I do heartfully share the views expressed by Dean Leal a moment ago and I would, since he has not done so, make it a formal motion that paragraph 4 be deleted.

The CHAIRMAN: Well, as I say, because of the way the resolution will be put, I don't need to receive your formal motion.

Mr. LEAL: Mr. President, a point of order. I was not speaking for or against divorce by consent. I was simply seeking clarification and perhaps Mr. Wakeling would be disposed to answer my question if in fact the committee felt that paragraph 4, as it appears on the sheet that I have and the worthy vice-president from Quebec, is in fact in their view marriage breakdown or, to put it the other way, divorce by consent delayed for three years.

The CHAIRMAN: I don't know whether Mr. Wakeling cares to answer that. I would permit him a second or two to answer it if he cares to.

Mr. WAKELING: I would only say that I mentioned this was a bit of a hybrid. Those who had formed it would perhaps be said to be favoring a marriage breakdown concept. If you take that entirely, you don't have any grounds for divorce, you simply recognize that the marriage has failed and society should no longer require them to live together. We don't think we're at a point where we can endorse that. We think we have taken some parts of that and put it into the

grounds for divorce. We've suggested that, if the family had broken down, that the marriage is broken down and it is not likely to be reconciled and it's carried on for three years, this should be accepted as a grounds for divorce. We think that the Association might be prepared to go that far and we hope they will.

B. M. PAULIN: Mr. Chairman, may I speak to this resolution?

The CHAIRMAN: Yes.

Mr. PAULIN: I wish to speak, sir, to the first paragraph or the first branch of it dealing with the adultery, rape and the other points. It's been suggested by some members that this first branch of the resolution is declaratory of the law and nothing else but I respectfully submit that the law is not the same from one jurisdiction to the next. There are pre-Confederation statutes and there are shades of differences and the amendment which has been moved to this first branch of the resolution has not met with the solemnity which the importance of the resolution really deserves. I would move a further amendment in order to clarify the fact that, if this Association does pass this resolution and if it does come before the authorities in Ottawa, that they'll be able to look at it and see what we as an Association mean. I think it would be a mistake to leave it to the judges to say as the cases come before them what these different grounds actually mean and I therefore move, sir, that the first branch of the amendment—of the resolution be amended to read: "Adultery or conviction upon a charge of rape, sodomy or bestiality".

FROM THE FLOOR: Mr. Chairman.

The CHAIRMAN: Yes? Is there a seconder for that?

FROM THE FLOOR: I'll second that.

The CHAIRMAN: Thank you.

E. H. S. PIPER, Q. C.: Mr. Chairman, in view of all the amendments that have been forthcoming on this resolution, would it be possible, sir, that perhaps, the Chairman of the Civil Justice Section and the Resolutions Committee get together and see if, perhaps, this whole subject can be reworded and resubmitted to us tomorrow morning.

The CHAIRMAN: Mr. Piper, that doesn't seem to have found much favor with the meeting. Do you want me to put it to a resolution?

J. F. O'SULLIVAN: Mr. Chairman, I had not intended to speak on this subject but, when Mr. Deschênes expressed his point of view that there ought not to be dissent to the resolution, I feel it necessary to record some dissent.

The CHAIRMAN: I think, in fairness to Mr. Deschênes, I don't think he did suggest there should not be dissent. He suggested there should not be dissent on purely religious grounds because of the feelings of Roman Catholics in respect to divorce.

Mr. O'SULLIVAN: Mr. Chairman, with respect, for well over a hundred years, our society in Canada has respected and safeguarded the institution of Christian marriage and Christian marriage means a union between husband and wife which is indissoluble except, as many Christians believe, on the grounds of adultery. Now, that institution has been protected by our law and the proposal here is to take away from that institution the safeguards of our divorce law. It may be that, in a pluralistic society, we ought to have a personal law according to the various groups in the country and their ideas of what marriage should be but I should think there are many in the country who would deplore the taking away of the safeguards, that parliament and the law now give to this institution, by recognizing a form of marriage insolubility. I regret very much that we should be supporting a resolution to take away the safeguard and substitute for it the safeguarding of a form of marriage which is not Christian marriage, which is a form of marriage that the movers of the resolution think ought to be preferred.

The CHAIRMAN: Thank you. Again, I'll mention the fact to those who are clustered around the doorway, that there are seats in the front which are certainly sufficient to accommodate them.

FROM THE FLOOR: With all due respect to Mr. O'Sullivan, I don't quite understand how a hundred years of a law being in the statute book makes it valid. I also do not see how the passing of a new law will force any man to live differently than his convictions. I don't see why a Christian who believes that there should only be divorce by adultery, on the grounds of adultery rather, will have to go out—I don't see anywhere here where it says that a man will have to go out and get a divorce on a three-year separation. For his own personal life, he can still only seek divorce on the grounds of adultery or, if such convictions drive him, he can eliminate divorce completely from his own personal life. I don't see how a law in the statute book could force everybody in a pluralistic society not to live according to his convictions.

The CHAIRMAN: Thank you.

P. L. BEAUBIEN: Mr. Chairman, I am prompted to rise to my feet in view of the remarks of Mr. O'Sullivan. I think it should be said, for the record, that the Decree of Religious Liberties took the position that it be not for the state to impose—it is not for the state to impose the religious convictions of one church on the rest of society. The Bishops of New York have said that they will not oppose divorce reforms. The Cardinal Archbishop of Boston said exactly the same thing and the Cardinal Archbishop of Montreal said the same thing and I intend to support this resolution.

P. G. FURLONG: I'd like to oppose Mr. Paulin's amendment. I don't think he intends this to go that far but I wouldn't want any suggestion—anyone to take an inference that this Association was suggesting that we would have to have a conviction for rape before that type of adultery could be a ground for divorce. I think adultery is included in rape whether there is a conviction or not.

With respect to the definition of cruelty, I'm not debating the merits of this but I don't know what the definition means. It says, "any conduct that in the opinion of the Court is grossly insulting and intolerable". Personally, I think that is much too broad and too open to very general interpretation. There's no suggestion whether the conduct should extend over a minimum period of time, or whether it has to be on one occasion. I don't know what it means, Mr. Chairman. I'm not opposed to it but I don't know what this cruelty means.

The CHAIRMAN: Thank you.

Mr. PAULIN: A point of order, Mr. Chairman.

The CHAIRMAN: Yes, we can't refuse a point of order. Go ahead.

Mr. PAULIN: With regard to what Mr. Furlong has just said concerning the amendment I proposed to the first branch of the resolution, in my respectful submission, conviction upon a charge of rape, sodomy or bestiality of course would not be upon one's spouse and Mr. President, in my submission, if sodomy or bestiality is practised on a spouse, clearly, in my submission, that is within the definition of cruelty as it now stands in the resolution.

The CHAIRMAN: Well, you're only confusing me, sir. You moved an amendment. Are you withdrawing it or—

Mr. PAULIN: Not at all, sir. I'm just speaking to the point which my friend, Mr. Furlong, raised.

FROM THE FLOOR: Mr. Chairman, I don't do very much domestic relations law but in fact I happen to have procured a divorce which was heard in camera by Chief Justice McRuer in Ontario upon grounds of sodomy by the husband with another male. I suggest that this amendment requiring a conviction, would require that wife to have prosecuted her husband and obtained a conviction?

There's no reason why you shouldn't be able to prove an act of sodomy in a civil action through the courts, the same as you always have.

The CHAIRMAN: Further comment? Are you ready that we should deal with the resolution? Well, this is going to present a problem to the chair and I hope those who feel I am maybe not dividing it in the right places will make their objection known before the vote but it would seem to me that the most direct amendment that we have to face is the one proposed with reference to No. 1 and that is that the document be amended to read: "Be it resolved that the further grounds for divorce in Canada be" and then drop to No. 2 and leave 1 out altogether. Now, that is the amendment I took from—I'm afraid I've forgotten the gentleman's name, in the back of the room, and I think it is the most, on this first branch, the most devastating and therefore I will put it first. I think it changes the whole resolution and therefore has to be put as the first amendment. Now, the question therefore is—. Mr. Lawson?

D. J. LAWSON, Q. C.: Mr. Chairman, I wonder if you could inform the meeting, if this is either defeated or passed, what the next resolution will be to be put before the meeting.

The CHAIRMAN: The next resolution to be put before the meeting, I think, would be that of Mr. Paulin, conviction on a charge of rape, sodomy or bestiality. I think that is the least change in the next section, if that order is satisfactory to you.

FROM THE FLOOR: Mr. Chairman, would you permit an amendment to have No. 1 read "Adultery, proof of a conviction for rape or sodomy and bestiality" because I'm not familiar with any rape that isn't also adultery and I think this just deals with the question.

FROM THE FLOOR: If a woman is raped, she isn't committing adultery.

FROM THE FLOOR: She's not committing rape, either.

FROM THE FLOOR: No, but there would be no one guilty and so proof of a conviction would enable the innocent wife to get a divorce on the basis of the conviction.

The CHAIRMAN: I'll receive that and come to it in due course. Now, the first amendment I'm putting to you is the one that we literally strike out No. 1 and leave the common law to deal with that, or the varying laws of the provinces to deal with that point. Those in favor of the first amendment? Contrary? Carried. My apologies—let the record say "lost".

The second amendment, then, I think may become—it's less than the other one of Mr. Micay's, that is that the first item read: "Adultery, conviction for rape, sodomy and bestiality".

Mr. PAULIN: That is my resolution, Mr. Chairman. An amendment was proposed to it a moment ago. I think it was "Adultery, sodomy or bestiality or conviction for rape". Was that the amendment? I will withdraw my motion in favor of the one that was just made.

The CHAIRMAN: Well, just a minute. Mr. Micay, just follow with me. That's just a change in the order of the words. Let's put it clearly: "Adultery, sodomy and bestiality or conviction for rape"?

FROM THE FLOOR: That should be sodomy or bestiality or conviction for rape.

The CHAIRMAN: All right. Change the "and" to "or". All right, now are we clear on what we're voting on? This is to make item 1 of the resolution the words just suggested, "Adultery, or sodomy or bestiality or conviction for rape". Those in favor? Contrary? I declare the resolution carried.

Now, in view of that, I think I still have to put a complete alternative set of language which was put forward by the mover from New Brunswick who was going to give me a piece of paper with it on. Have you been able to do that? I

appreciate that this is not as regular as it should be but I think I have to give you the choices because it was put forward at the same time.

FROM THE FLOOR: Unless he wishes to withdraw it.

The CHAIRMAN: Well, I was inviting that but he hasn't seen fit to do so.

Mr. PALMER: I think it's a preferable language. I'm still fighting over what "sodomy" and "bestiality" are. I'm not an expert on them.

The CHAIRMAN: Well, do you want me to put it to the meeting? Yes. Now, in substitution for 1 as it's just been developed, the words: "Adultery"—now will you follow me, Mr. Palmer, because I don't have your note—"Adultery or any act of normal" sorry, it just begins: "Any act of normal or deviate sexual intercourse voluntarily participated in with a person or an animal".

From the FLOOR: "Person other than the spouse".

The CHAIRMAN: "Other than the spouse, or an animal". I'll put the question. Those in favor of that substitution for item 1 as we've enacted it? Contrary? I declare that lost.

I think that deals with all the amendments to No. 1. Now, item 2 I think has to be put in two bases: one, cruelty as we know it, the common law concept of cruelty or, alternatively, cruelty as defined in whole paragraph 2 under the Definition of Cruelty. In view of the fact this comes to us as the resolution first, I'll put that first, that the resolution read: "Cruelty as defined below" with the definition that's before you and then, alternatively, I will put simply the word "cruelty" giving it its common law definition. Those in favour of the drafted definition of cruelty? Contrary? I declare that substituted and I don't think there's any point in putting the second alternative.

The third, "Desertion without just cause for a period of three years immediately preceding commencement of proceedings". So far as I am aware, I have no amendment to this paragraph. Those in favor of item 3? Contrary? I declare item 3 carried.

Item 4, there's no amendment proposed but there is obviously a difference of opinion on this. I put it in its form and the words are the grounds for divorce be "Voluntary separation of the husband and wife for a period of three years immediately preceding the commencement of proceedings provided that the Court shall be satisfied that:

- (i) there is no reasonable likelihood of resumption of cohabitation, and
- (ii) the issue of a decree will not prove unduly harsh or oppressive to the defendant spouse."

Those in favor of that fourth ground for divorce? Contrary? I think I better have a count. Would you mind lowering your hands. Would those in favor of that ground please raise their hands and Mr. Hunt, would you act as the teller on the left hand side of the aisle, and Mr. DuMoulin, would you act as the teller on the right hand side of the aisle. The negative, please. I declare the motion carried.

Then, No. 5, "Incurable unsoundness of mind where the afflicted spouse has been continuously under care and treatment for a period of five years immediately preceding the commencement of proceedings." Those in favor of putting in No. 5? Contrary? I declare that carried.

Six, "Wilful refusal to consummate the marriage." Those in favor? Contrary. I declare that portion carried.

I don't need to deal with the definition of cruelty. You've already voted on that. I drop down to the paragraph that begins "Be it further resolved" down to the word "arrangements" at the bottom of the page: "Be it further resolved that no decree of divorce shall issue unless and until the Court is satisfied as respects every child of the family who is under the age of sixteen that:

- (i) arrangements for the care and upbringing of such child have been made and are satisfactory or are the best that can be devised in the circumstances, or,
- (ii) it is impracticable for the party or parties appearing before the Court to make any such arrangements."

From the FLOOR: Mr. Chairman, before you put that, we're walking into a trap. In England, there is a rule—it appeared in the "All England" about four years ago. Judges have ordered that no more decrees absolute will be given where the solicitor has failed to plead whether or not there are children of the family. I wrote immediately to the solicitor to ask him what he meant by children of a family and I said, "Do you mean in counter-distinction to the children of a marriage?" and he said, "Yes, we find in England there are, say, three children of the marriage and there's the little brother of one of the spouse or a child in whom they have got into the position of being in loco parentis." The judges have found that they have dealt with the custody and maintenance of the little ones who were children of the marriage and didn't know about the little one who was a child of the family within the English meaning and that poor little fellow is left to wait, and the judges of England have said, "If you don't plead, in addition to children of the marriage, what about children of the family, you don't get any decree absolute". So I changed my pleadings and after saying that there are three children of the marriage, I say there are no other children of the family. So, sir, if we try to keep close to the British law, English law, let us be clear. Are we talking about children of the marriage or are we talking about children of the family in the English sense?

The CHAIRMAN: I'm sorry, I don't get your point. Are you suggesting we should amend it to read "child of the marriage" or are you suggesting—

From the FLOOR: I'd like it abundantly clear. I'd like to say "every child of the marriage" and "every child of the family".

The CHAIRMAN: Do you want to put an amendment—let me see if I understand you—so that in the third line it will read: "every child of the marriage and of the family" who is under sixteen?

From the FLOOR: Because, sir, I intend to go to the Government of Alberta and get the Domestic Relations Act amended if I can, to include that. The late Judge Egbert asked me to do it and I have not done it yet.

The CHAIRMAN: Have you a seconder for your amendment? Mr. Osler seconds it. Therefore, the first issue to go before you is whether part 3, beginning "be it further" down to "arrangements", be amended in the third line to read "of the marriage and" so that line will read "every child of the marriage and of the family".

L. P. PIGEON, Q.C.: It should be "or".

From the FLOOR: No, "and".

Mr. PIGEON: Because the children of the marriage are children of the family, so it should be "or".

John H. OSLER, Q.C.: I don't think the meaning can be mistaken if we put them both in. It could be mistaken if we just left it.

The CHAIRMAN: All right. The mover, do you want "and" or "or"? "Of the marriage and of the family" or "Of the marriage or of the family"?

From the FLOOR: And.

The CHAIRMAN: Now, those in favor of the amendment recognizing that then, if the amendment is made, I will put the whole subject as amended or as not amended. Those in favor of adding the words "the marriage and of the

family"? Contrary? I declare the section amended. Now, I'll put the section. I'm not going to read it again. It begins: "Be it further resolved that no decree of divorce" down to the word "arrangements" at the end of sub-part ii. Those—Yes Mr. Diplock?

D. D. DIPLOCK, Q.C.: Mr. President, I recognize that the drafting is not necessarily rigid but I do want to point out that, as it stands, the way I read it, the resolution now says, "Be it further resolved that no decree of divorce shall issue unless" the Court is satisfied that it is impracticable for the parties appearing before the Court to make any such arrangements which I don't think was what the draftsmen intended.

The CHAIRMAN: What did they intend? You tell me.

Mr. DIPLOCK: Probably the intention would be satisfied if the judge of the Court were satisfied that arrangements or proper arrangements for the care and upbringing of such child are satisfactory. I would like to see it just so that that were effective.

The CHAIRMAN: Now, what do you want to do? Do you want to take out ii or do you want to amend sub-ii.

Mr. DIPLOCK: I want to take out ii and adjust the thing by amendment so that, following the word "that" and the colon, we have "satisfactory arrangements for the care and upbringing of such child have been made".

The CHAIRMAN: "Satisfactory arrangements for the care and upbringing of the child have been made."

Mr. DIPLOCK: And that's all. It may be that that's what it says but I don't like resolutions coming forward to this body—

The CHAIRMAN: All right, I think I understand your amendment. That's all I can do. Now, the suggestion is that the whole clause be amended now to strike out all words after the word "made" in the second line of sub-one so that—and I'd better read it all: "Be it further resolved that no decree of divorce shall issue unless and until the Court is satisfied as respects every child of the marriage and of the family who is under the age of sixteen that satisfactory arrangements for the care and upbringing of such child have been made." The motion is to strike out everything after that word "made".

From the FLOOR: Mr. Chairman: I think that instead of striking that out we continue one paragraph, sub-paragraph, "devised in the circumstances unless it be impracticable for the party or parties appearing before the Court to make any such arrangements".

The CHAIRMAN: And then you're just adding the word "unless". I'll take that as a separate amendment.

From the FLOOR: "Unless it be" I think would be the proper wording.

The CHAIRMAN: All right. I'll try that. Do you have a seconder?

From the FLOOR: I was wondering if the maker of that last resolution would be prepared to insert the word "financially" before the word "impracticable".

The CHAIRMAN: I doubt if he is. We haven't got a seconder yet. Is there a seconder for that motion?

From the FLOOR: I second.

The CHAIRMAN: Thank you. All right, now I'll put the first of these two amendments.

From the FLOOR: May I speak to the amendment?

The CHAIRMAN: Yes, you may.

From the FLOOR: Just briefly. Harking back to the session that took place in this room the other day, Professor Payne, who I take it was responsible for

this part, said he obtained this wording which we have before us from the Australian statute and the last part, he explains, contemplates the case where the wife is the petitioner and the husband is either in a position or of a mind that he cannot or will not make arrangements and she is in no position to make them.

From the FLOOR: Mr. President, may I speak against the amendment?

The CHAIRMAN: Yes.

From the FLOOR: It seems clear to me that it may be that arrangements for the care and upbringing of such child cannot be made by other parties or by the parties to the proposed divorce. It merely is a time factor and let's put it on that ground. It also may very well be that it is impracticable for the parties themselves to make such arrangements but this should not be a reason for delaying the divorce. I think the wording here is what they intend and what we all intend, except perhaps the amender.

From the FLOOR: Mr. Chairman, I feel that the amendment is completely inconsistent with divorce on the grounds of insanity where one of the parties is incarcerated perhaps in a cell, or inconsistent with desertion and I move against it.

CHARLES D. GONTHIER: Mr. Chairman, I'd like to support the amendment. I feel that the children have as much, if not more, right to be taken care of as the consorts. They are the prime purposes of the marriage and they have been brought into the world and they are entitled to be cared for, whether it be the fathers themselves who care for them personally or whether they get the assistance of state authorities, yet they have a responsibility and that should be a condition of the divorce. It is up to them or society to provide for these children and, as parents of the children, they have a prime responsibility, if they can't attend to these matters themselves, to see that someone else does.

The CHAIRMAN: Thank you, Mr. Gonthier. Are we ready for the question? And the question is that the clause, part 3 end with the word "made" in the first sub-section. Mr. Diplock's amendment. Those in favor? Contrary? I declare that amendment lost.

The second amendment I don't think was seconded so I don't need to put it.

From the FLOOR: It was.

The CHAIRMAN: Was it seconded? All right, I'm sorry. Then I must put it. The second amendment is that the numbering be taken out of the sub-two clauses and that it read: "are satisfactory and are the best that can be devised in the circumstances unless it be impracticable for the party or parties appearing before the Court to make any such arrangements." Does everybody follow the amendment?

From the FLOOR: No.

The CHAIRMAN: I'm sorry, I'll read it again.

From the FLOOR: I heard it, sir, but I don't understand it.

The CHAIRMAN: The question is, am I putting it to you in the language that it was suggested to me, not whether it appeals to you or not. All right, Mr. Trivett, I think, is entitled to speak.

W. L. S. TRIVETT: Mr. Chairman, does "arrangements" then not come to mean strictly arrangements between the parties, which was not meant by this committee?

The CHAIRMAN: I can't answer that, sir. Are you ready for the question? Those in favor of this amendment to take out the numbering and put in "unless it be" impracticable? Those in favor? Contrary? I declare that amendment lost.

Now, I put the whole section with only one amendment to it and that is the words "the marriage and", therefore going from "Be it further resolved" down to "arrangements".

JOHN H. OSLER, Q.C.: Before you do that. Im afraid I may be very stupid but I'm not satisfied that we are all happy about how it now reads. It seems to me, if you will receive it, it would be a useful amendment to take out the part ii because, whether or not it's impracticable for the parties to do it, somebody has to do it. A divorce should not be permitted if the Court is not satisfied that somebody has made these arrangements.

The CHAIRMAN: All right, Mr. Osler. That's another variation and I'm prepared to put it. This is a further proposed amendment, assuming you have a seconder, I think you have in Mr. Pigeon, that the words—now the section read, beginning with "Be it further resolved that no decree of divorce" down to the word "circumstances" and the words "or", "ii" and all that follow it be struck out. Is that clear? Those in favor of that amendment? Contrary? We'll have to have a count. I'm sorry. Those in favor of the amendment? Would the tellers please count? I must confess I think, since I asked for a count, maybe the lateness of the day has caused some people to change their minds. I'll now declare it carried.

Now, the last clause of this section and there's one amendment to it, that the words "and collusion" be taken out. I'm sorry, Mr. Osler, are you drawing my attention to the fact that the subject matter of page 1 is different from the subject matter of page 2?

Mr. OSLER: No, no, the resolution as amended has not yet been put the way you've been putting the other ones.

The CHAIRMAN: Oh, I'm sorry. Thank you for drawing it to my attention. Therefore, I put number 3—the third part, as amended so that it has the words "the marriage and" in and ends with the word "circumstances". Those in favor of that clause? Contrary? I declare it carried.

Then, turning to page 2 I think I have only one amendment and that was the words "and collusion" come out of the second line so it is "Be it further resolved that the defences of condonation and collusion constitute discretionary and not absolute bars . . ." and you will appreciate, whether you take it out or leave it in, I will still put the whole clause, amended or unamended, to you. Those in favor of taking out the words "and collusion"? Contrary? They remain in.

Then I put the whole clause, "the defences of condonation and collusion". Those in favor of introducing this section of the resolution? Contrary? I declare part 4 carried. That ends the consideration of that item.

APPENDIX "7"

PRIVATE BRIEF TO THE SPECIAL JOINT COMMITTEE OF THE SENATE
AND HOUSE OF COMMONS ON DIVORCE

by

RICHARD B. HOLDEN, Barrister & Solicitor,
360 St. James Street West,
MONTREAL 1, Quebec.

A. Procedure:

It is submitted that the procedure to obtain a parliamentary divorce for residents of Quebec and Newfoundland is overly complicated and too expensive. All of the forms should be shortened and simplified and the filing fee reduced to \$100.00. If the respondent cannot be located, service through the newspapers should be permitted. Publication in the Canada Gazette could also be dropped except where personal service cannot be effected.

B. Grounds:

The following grounds, if alleged and proved, should be sufficient for the granting of a divorce decree:

(1) Legal separation pursuant to a judgment two years after the date thereof.

(2) Insanity, alcoholism, desertion and/or imprisonment provided it has continued for a period of 2 years.

(3) Adultery.

In connection with paragraph (2) there must be a physical separation of the parties for at least one (1) year.

C. Alimony and Costs:

If constitutionally possible, the Federal Commissioner (in his discretion), should have the power to order the payment of alimony and costs against the guilty party. He should also have some authority in the realm of custody where no provincial court of agency has ruled on this matter.

Respectfully submitted.

MONTREAL, this 21st day of June, 1966

APPENDIX "8"

PRIVATE BRIEF TO THE SPECIAL JOINT COMMITTEE OF THE SENATE
AND HOUSE OF COMMONS ON DIVORCE

by

VICTOR LA ROCHELLE, L.S.C., C.A., Lic. ès Sc.
535 Grande-Allee East, QUEBEC (4), Que.

Honourable Members of the Committee:

In the following memorandum I will make some suggestions which could concur to the betterment of laws on divorce. I shall divide the present paper into three (3) parts:

- (a) My personal experience;
- (b) General principles on nullity of marriage and divorce;
- (c) Recommendations drawn from (A) with modern or present tendencies;
- (d) Exhibits.

(A) MY PERSONAL EXPERIENCE:

At the age of 36 on May 2nd 1951 I got married. The spouse had then 21 years of age. I had to earn my studies because my parents, who had fourteen children, were financially poor. The marriage was broken by the spouse 89 days after its origin and *thirty* days after the return of wedding.

That marriage which was forced on me happened too quickly. While I was practicing my profession as a Chartered Accountant and a Licensed Trustee I was overburdened by my work which is particularly important at the end of April and must satisfy the fiscal requirements. My family suggests me to abandon the daughter of a carpenter and to marry the daughter of a lawyer who became Judge some time after the beginning of my frequentations with that lady. For the spouse's family who was without any financial ressources that marriage was a monetary transaction. That girl was in love with another man.

The spouse knew also that I didn't love her at the time of the marriage and that I planned to return to my former friend. The girl tried everything to hasten and conclude the marriage.

Before the engagement the bride's mother hasten to Montreal and bought all the trousseau for her daughter. She fixed the date of the marriage. Seeing my hesitations the family made me known that I would be sued if I broke the engagement : "that would be funny if Victor broke the engagement, we would have to sue him."¹

Other facts briefly described prove that it was *A Money Transaction* for the bride.

The marriage contract prepared by the father who was a lawyer mentions that the wedding gifts of the two spouses would belong to "*Mademoiselle*" the future bride.

B) The father who had a sick heart insisted to cancel half of his insurance contracts, contrary to the logic and advices of insurance companies.

C) The bride after having obtained jewels for more than \$2,200.00, a wedding trip to Europe, at her return to Canada consult often her Doctor Gynecologist to ascertain that she was pregnant and the very day when she knew it definitely I received an action in separation.

¹ Mentioned at the file of the religious Tribunal as mentioned at the testimony of the mother's spouse. Page 77.

My furniture was seized. It was evaluated at \$6,000.00 and was given to her by marriage contract. She insisted however through her lawyer to obtain not the furniture itself but the \$5,000 dollar price representing its evaluation.

D) She seized at the issuance date an amount of \$5,000.00 which has been given to her by marriage contract.

E) She fought ferociously to obtain a tremendous alimony.

F) Judge Antonio Garneau of Montreal who was, without my knowing, the uncle of her sister's husband determined the alimony at \$300.00 monthly before the closing date of the Tribunals in June after having heard my case in camera at the Quebec Justice Court.

I well received an action in separation but she contested the action in nullity of marriage before the Civil Courts. However she claimed the nullity of marriage before the Religious Tribunal. I regularly received a seizure which is publicised in the local papers when the three hundred dollar alimony is not paid on time, alimony unique in amount for the region in Quebec. Alimony fixed by her father's friends.

G) Other judges following rendered judgments in the present legal cause:

- (i) the late Judge Alfred Dion who replaced on the bench her father Judge Valmore Bienvenue former deputy of Bellechasse County:
- (ii) Judge André Taschereau who confirmed the judgment at \$300.00 for the Quebec Court of Appeals:
- (iii) Judge Fauteux of the Supreme Court of Canada who forbid me as mentioned in the exhibits to bring as an explanation the *FACT* that Uncle Antonio Garneau had originally fixed the alimony at \$300.
- (iv) In the action of nullity of marriage Judge Elie Salvas appointed for the Salvas Commission constituted by Honorable Jean Lesage former associate of Valmore Bienvenue refused my action of nullity of marriage.
- (v) Judge Robert Taschereau, cousin of André Taschereau, of the Supreme Court of Canada, former deputy of the County of Bellechasse rejected my appeal concerning the actions of separation and of nullity of marriage.

H) Before the Religious Tribunal the bride desired to obtain the nullity of marriage but under the condition of obtaining the maintenance of the alimony and other monetary advantages. She invokes tacitly the two articles of the Civil Code of the Province of Quebec:

- (i) Article (163): "the marriage which has been declared "Null" produces however the civil effects either for the spouse or for the children when it is contracted in good faith."

To obtain the advantages of that article she has argumented that I wanted to continue my frequentations after the marriage with my former friend. However she knew that I didn't love her and that she dragged me towards the marriage forcefully.²

That marriage took place through cunning methods and hardship on me because I had a good office.³

In an appeal to Rome, the Sacred Roman Rota has refused her pretentions to obtain the nullity of marriage.

- (ii) Article (164): "if the good faith exists only for one spouse the marriage produces civil effects only for that spouse and the children born from that marriage."

² She declares that fact in a letter which is in my possession. Moreover consult a letter from Lille, May 15th., 1951, which she has brought for in her action in separation.

³ "My husband (Mrs. Valmore Bienvenue) wanted to know if Victor had a good office." See the religious file, page 77.

After having been refused of the advantages of that article she claims Article (163) because the doctors in their findings have affirmed that at the time of the marriage I was sick. She is the author of that sickness provoked by indignant methods used by herself and by her family.

Here is the conclusion of the finding concerning that file scrutinized by a medical doctor:

"After having studied with attention all that file I arrived at the conclusion strictly and definitely that we are in front of a consentment obtained from the spouse through violence and abnormal circumstances herein described."

B) GENERAL PRINCIPLES OF NULLITY OF MARRIAGE AND DIVORCE

Concerning the marital problem and divorce every member of the present Committee is intimately bound through rational conclusions that are to be found in order to get rid of the slavery from which women has enchained men in the course of centuries. Laws nowadays render the man a slave to his wife and her venal thing. Laws are regularly interpreted against the husband when a marriage contract is contested. "The law considers that marriage is a contract through which the husband voluntarily but irrevocably sells himself to his wife." In brief, the career of a woman very often, for the marriage Institution, is to install herself as a parasite on man. That was the case for my bride who has never worked. She has, however, a robust health. My personal experience has taught me that it is impossible for a husband to submit pleadings that he could win against his wife. The wife could even use the money withdrawn from her husband under the alimony provision to pay for "her little friend expenses."

In a judgment read at the Quebec Court of Justice I have extracted the following stupid remarks where a husband cannot even bring for his defence the reason that could obtain for him a legal separation:

"In his plea defendant accuses his wife of adultery. Such an accusation by itself could serve as the basis of an action in separation though there was nothing else in the record, I would be inclined to maintain plaintiff's action *for this reason alone.*"

In my humble opinion, we should define the word MARRIAGE if we want to legislate upon its dissolution. The marriage could be defined as follows:

DEFINITION

The gift and acceptance at the time of marriage by two persons of opposite sex of their bodies and souls (because a spiritual union as well as a corporal one should exist). Those two essential elements must intervene in the marital contract.

If one party wants only the monetary financial advantages without giving the loving element, the soul, which constitutes an essential element of the contract, that latter one is only *legalized prostitution*. In that, we are confronted with the Anglo Protestant Theses which is the moral one and the logical one.

It is essential for the Federal State which want to study the Divorce problems or the nullity of marriage to determine if the contract has been validly concluded. If ever we find that at the origin the contract was deficient there would be a motive of nullity superior to any other element of nullity or divorce. That contract which is the most important during a man's life must be made in all serenity and absent of all vices. A horse trader sees his contract cancelled when he has sold a sick horse in a fraudulent manner! What about a fraudulent marital contract?

What are the recent developments taking place in the world for the amendments of the divorce laws?

The following studies are in the making throughout the world:

1. Vatican II has recently affirmed in a decree that two elements are necessary for the constitution of a marriage contract:

- (i) The acceptance of the procreation of children;
- (ii) The mutual love of the spouses at the time of marriage.

Body and soul must be given. If at the time of marriage there was no mutual love of a spouse there was accordingly no spiritual union and, therefore there could not be any marriage or gift of one self to the other party.

2. The Chambers of Commerce of the Province of Quebec at their last Congress demanded the establishment of "Civil Marriage" and legislation about divorce.

3. The State of New York after 179 years has amended their divorce legislation in adding several new motives including the separation of the spouses after a two year period.

4. The Church of England through a commission directed by the Archbishop of Canterbury has recommended the modification of the laws on divorce.

In a report published after studies extending during a period of two years and a half, the thirteen members comprising religious members, lawyers and sociologists recommended that the *UNIQUE BASIS of Marital Rupture should be the only criterion to grant a divorce.*

"THE WHOLE IDEA OF THE GUILTY PARTY AND THE INNOCENT PARTY SHOULD BE GOT RID OF, BISHOP MORTIMER TOLD A PRESS CONFERENCE BEFORE PUBLICATION OF THE REPORT. THE REAL ISSUE IN EVERY DIVORCE CASE IS IN FACT THE STATE OF A MARRIAGE RELATIONSHIP. THE OFFENSE IS ONLY A SYMPTOM OR AN EXCUSE OR A MEANS OF BRINGING THE MARRIAGE BEFORE THE DIVORCE COURT".⁴

5. The Canadian Bar⁵ at its Winnipeg Congress has accepted a resolution to modify the laws on divorce. Certain members have even declared that the Canadian legislation on divorce or the legislation either the Franco Canadian or the Anglo Canadian one was the most obsolete in the world. The Bar has suggested to increase the number of motives and, in particular, we should consider as a motive for divorce the separation of spouses during a period of three years.

6. Even at the religious point of view the following authorities have given the opinion that divorce should be granted:

- (i) At the Vatican Council II Archbishop Zoghby of Egypt has recommended that the Church grants a nullity to the innocent party;
- (ii) Mr. l'Abbé Poisson, P.S.S. suggests that the Catholic Church revise its laws on the nullity of marriage:

"We should easily understand that an ecclesiastical lawyer in frequent contacts since more than 8 years with unhappy couples asking or not a nullity of marriage, appreciates greatly the audacity of a pastor who invites the Church to rethink the concrete implication of the indissolubility of marriage. To restudy the evangelical foundation of that law. To restudy the patristic teachings on the subject, to alleviate the ecclesiastical tribunals of a procedure more juristic than humanistic, of a procedure, the windings of which conduct more often to the maintenance of a disorder than the installation or the restauration of an order broken or contested."⁶

⁴ *The Gazette*, Friday, July 29th., 1966.

⁵ M^e El. A. Brotman de Winnipeg à l'Association du Barreau Canadien au congrès de Winnipeg, *La Presse*, 3 septembre 1966.

⁶ *Monde Nouveau*, Volume XXVII, Numéro 3, Mars 1966, Page 83.

- (iii) Cardinal Roberts of England declared that thousands of marriages are void and that the Church has not the necessary tribunals to restudy their case.

(C) RECOMMENDATIONS

The Federal State has through the Constitution jurisdiction on divorce matters. It has the right to study and legislate on Divorce. It has therefore the obligation to render justice to citizens in order that their person, their property, be preserved or restored. Because the marriage is also a civil contract all that affects the civil rights is also a matter of the State.

The motive of adultery is not the only logical criterion nor equitable to grant a divorce. The fact of adultery can be an element definitely less important than the causes. The motives often reveal the authentic author of the adultery.

First Recommendation

We must define the marriage in its constitutive and essential elements. How can we dissolve or legislate legally on marriage if we have not defined what is marriage?

Second Recommendation

One of the motives, the surest, to grant a divorce is to determine if the civil contract has been valid, if the contract has been created peacefully and normally, without difficulty, without harshness. Because it is the most important human contract, we should attach to its birth as a civil contract the greatest care.

Third Recommendation

To look for the motive of a divorce is an exercise in futility. One must know if the marriage really exists or not? If the marriage is dead, if the two parties admit the fact, it shouldn't be necessary to consider the "divorce by consent" as reluctant. The admission of the failure of a marriage by the two parties is the best criterion of a divorce. Those are the conclusions of an English Committee and the law of the New York State recently approved by the Legislation.

Fourth Recommendation

I totally agree with the suggestion of the Canadian Bar to consider as a right motive the voluntary separation of the spouses during a period of three years.⁷

Fifth Recommendation

It is impossible for one party to remake his life if one has to continue to be financially hypothecated. When a divorce is granted one must be definitely cleared of monetary obligation; otherwise one is unable to live his life anew. In numerous American States the husband is liberated of all monetary obligations. One must remember often that for a woman marriage is a money matter, a financial mean to be supported by a man which has been fraudulently brought into marriage.

Sixth Recommendation

In the Province of Quebec where there is no divorce courts and where the legal separations are numerous, in order to give justice to the citizens I suggest that the Committee on Divorce obtain a list of judicial separations for the last

⁷ La Presse, 3 septembre 1966.

three years. In that way he could determine the causes of separation and hardships taking place.

Seventh Recommendation

This one is an incidental recommendation. When the citizens of a country have been jeopardized by a judgment they think unjust and which has been rendered during abnormal circumstances those citizens should be able to refer their case to the Tribunal of the United Nations, an impartial one! The case to restudy the causes for the Nations reciprocally fighting is referred to the Tribunal of Lahaye; such must be the case for an individual.

Eighth Recommendation

I am at your disposition to present before your Committee of legislation on divorce my sundry points of view on the matter of divorce.

GENERAL CONCLUSIONS

The personal case here above described has been one of the most matrimonial contested case in Canada. The bride, a parasite, has fought for the nullity of marriage on the precise condition that it pays. She is in a better state being now separated than she would be if she were obliged to do as other women are doing, working for their family. At the Religious Tribunal the husband should not be deprived:

- (a) of defending himself if he desires to, according to Canonical Canon 1655.
- (b) That a curator, hypocritical comes forcefully represent the party to deform the facts or present them at its will.

As a bankruptcy law exist to liquidate the financial enterprises unhealthy, there must be a law to destroy and cancel civil marriages effectively dead.

In the Province of Quebec the wife prefers to conserve through the legal separation a perpetual mortgage or bondage on her husband's body. She becomes that way her parasite and assures her subsistence without ever working giving as a justification that her husband has broken her life. "What about the husband's one". He who does not work does not deserve to eat declares St-Paul.

The spouse thirty days after the wedding return destroys a career that took a quarter of a century to build! She receives a comfortable alimony and lives since 15 years in "farniente".

Respectfully submitted,

VICTOR LA ROCHELLE, L.S.C., C.A., LIC. ES SC.

Quebec, September 16, 1966

APPENDIX "9"

BRIEF TO THE SPECIAL
JOINT COMMITTEE OF THE SENATE AND
HOUSE OF COMMONS ON DIVORCE BY
SINGLE PARENTS ASSOCIATED,
P.O. Box 204, Station "T", Toronto 19, Ontario.

SUMMARY

1. Single Parents Associated is an organization devoted to the social service and mutual assistance of single parents and their children. Our central Toronto group is composed of 200 men and women who are divorced, separated or widowed and have children. Most of us are raising our children alone. In the six years since we have been in existence our meetings have also been attended by several thousand other people in the same circumstances.

2. Single Parents Associated is convinced that the present Marriage and Divorce Act is not appropriate to the way Canadians live today. The philosophy of specifying a guilty party is unrealistic. It inhibits possibilities of reconciliation and causes deterioration in the relationship of one or both parents to the children.

3. Single Parents Associated is of the opinion that physical separation for a minimum period of one year should constitute the grounds for divorce; the separation is to be continuous before proceedings can be commenced. There should be an exception in the case of hardships which we have indicated in the body of our Brief, in which case petition should be commenced at discretion of the Court. We suggest the appointment of a marriage counsellor to be under the direction of the Court which would be empowered to attempt reconciliation at any time on request of the Court or by one of the parties. We are also of the opinion that action should be taken in the province of domicile of either husband or wife.

Brief:

4. Single Parents Associated is concerned about the plight of other men and women who are separated and unable to divorce, as well as our own members. Because the Census lists separated people as "Married," it is impossible to be sure how many men and women are living ambiguous lives, neither married nor single. Knowledge of lawyers and social workers indicates that there are hundreds of thousands.

5. The results of this situation are:

- (a) personal suffering for individual men, women and their children.
- (b) extra-legal arrangements to get divorce which are degrading and expensive.
- (c) common law relationships that, because of legal, social and moral pressures, are difficult to maintain and may harm children of the common law union. (See Appendix A.)
- (d) disrespect for the law in general, when (b) and (c) are used to circumvent divorce legislation.

6. We recognise that marriage is not only a convenience for a man and woman and their children. It is also a social institution, and must be protected as the basis of our society. We believe that the present divorce legislation fails to do that.

7. Statements from church groups, business, professional and social organizations indicate that Canadians want a change in the present divorce legislation.

8. The law of divorce would continue to be administered by existing provincial law courts under their own rules of procedure. Present provincial laws with regard to property rights, alimony, guardianship and maintenance of children would continue. But these changes would be made:

9. *Domicile.* Action may be taken in the province of domicile of either husband or wife.

10. *Grounds.* The members of Single Parents Associated are aware, many of them after hard and painful experience, that a marriage that contributes to the development of the husband and wife and their children, and to the society in which they live, derives from the commitment of both husband and wife. Further, that in the society we have now developed, with the ideals of freedom we strive for, no adult has the right to hold another in a relationship he or she does not want.

11. This implies safeguards for the welfare of the children, and against breaking up a marriage because of difficulties that in all marriages may cause temporary dissatisfaction.

12. Members of Single Parents Associated are also aware that the assignation of a "guilty party" is meaningless and often causes deterioration in the relationship of one or both parents to the children, often with tragic consequences for the children. (See Appendix B.)

13. We therefore propose that grounds for divorce be separation (a) that the parties to the divorce have agreed to separate and lived apart for a continuous period of one year. or (b) if there has been no agreement to separate, but one party has deserted the other, and they have continued to live apart, action may be brought by either party after a period of two years.

14. There will be an exception to the time limits in cases of hardship, which will include addiction to alcohol or narcotics, cruelty which causes actual harm or apprehension of physical harm, to the spouse, desertion, sexual offences, and conviction of crime.

15. The possibility of reconciliation should always be held in mind. The Court should adjourn proceedings and appoint a marriage counsellor if there seems to be a reasonable chance of reconciliation. Attempts to reconcile should not jeopardize the final granting of a divorce if they fail.

Appendix A.—Common Law Relationships

An estimated 400,000 Canadians are living in common law relationships as the term is used colloquially. That is, they are living together, often with children, and are accepted in their community as man and wife. This is the basis of our estimate:

- (a) Deryk Thomson, Executive Director of Vancouver's Family Service Agency, estimates there are five common law unions for every 95 legal ones. (There are approximately four million marriages in Canada.) He says: "It is very hard to tell the difference between a common law union and a legal one." His estimate is for the population in general, not only for the clients of his agency.
- (b) At the Catholic Children's Aid Society, Toronto, 20 per cent of the families currently under the protection department are common law unions.
- (c) At the non-denominational Children's Aid Society, Toronto, 25 per cent to 30 per cent of the families are common law unions.

A majority of these people are prevented from marrying because one or both parties is already married to someone else and cannot, under Canadian law, get a divorce.

Appendix B.—A child's attitudes to a missing parent.

A World Health Organization report, "Maternal Care and Mental Health" by John Bowlby, M.A., M.D., 1951, refers to the influence on a child of a parent who, though apparently out of a child's life, is nonetheless recalled and admired. This feeling may be supplanted later by more realistic ones, but the first positive feelings are necessary before a child can develop, identify himself with his own sex, and establish satisfactory relationships with the opposite sex. This is difficult or impossible if one parent has been labelled "guilty," and is continually presented to him as such.

APPENDIX "10"

BRIEF OF THE SPECIAL JOINT COMMITTEE OF THE SENATE AND
HOUSE OF COMMONS ON DIVORCE

The Magna Carta Club,
P. O. Box 2352,
Vancouver 3, B.C.

Objectives:

The creation of laws and statutes founded on logical, human and just principles for the contracting and dissolution of marriages.

Nature of Group:

A non-profit organization which consists of persons aware of the inequality of justice and the inefficiency of the present laws, and who are imbued with an earnest desire to promote new laws and/or statutes enabling honourable conclusions for all concerned to incompatible and impossible marriages.

TO THE SPECIAL JOINT COMMITTEE OF THE SENATE AND
HOUSE OF COMMONS ON DIVORCE

Sirs:

We have read The Proceedings of the above Committee to date and we have no doubt as to the abilities of the gentlemen who have so far spoken; they are prodigious. However, it is a matter of disappointment to us that the learned gentlemen are discussing the old laws instead of constructively discoursing upon the creation of new ones.

We earnestly hope that the knowledge of the old laws so displayed, will be expertly used in wording and drafting an instrument of the statute along the lines of that outlined below, capable of the enactment of justice for man and woman equally.

1. Divorce

1.1 There should be no recriminations about this, both parties are guilty of an error of judgment, outlook, or adaptability, etc. and who can say which one is more punishable than the other? Each should welcome the opportunity to start again.

1.2 Upon the termination of the union, there should be an equal division of the accumulated material effects of the length of the marriage. Effects prior to marriage and personal effects remain the property of the individual, joint effects can be divided by agreement, or where no agreement can be arrived at, these effects should be sold and the money so obtained divided equally between them. Where one partner can show that by their sole unaided efforts without detriment to the welfare of the other, he or she has provided an article, then, he or she shall be entitled to the article.

1.3 The outcome of divorce is to render all divorced persons, in effect, either widow or widower, and no just claim can be made against a marriage that is dead, so there can be no legal or obligatory payment of alimony or maintenance to a partner by the other after a divorce. Freedom from a marriage partner cannot be achieved if one partner is held captive in law performing a task of no marriage significance.

2. Children

2.1 When there are children by the union, they shall be assigned to the parent most suitable emotionally, for their care and upbringing. The choice

should not automatically go to the mother, if the father with a little house-keeping help, will be the better choice. Whichever parent looks after the children, the other parent shall contribute to the childrens' upkeep commensurate with his or her income until each child is 18 years of age.

2.2 Care should be taken to impress upon the parents that neither shall attempt to influence the children against the other. Should this happen, then the children shall be removed from the care of both parents and arrangements be made for visiting periods at different times for each parent and for the same duration of time.

2.3 Should the child or children show signs of being adversely disturbed by the visits of either or both parents, then the visits shall cease but each parent shall continue to contribute towards the child's or children's upkeep as above.

3. Marriage

3.1 Divorce obviously germinates during marriage and marriage is the outcome of courting manoeuvres and courting is based on the concepts and influence of the parents. Whether they like it or not, generally speaking, the parents are directly involved in this, yet are reticent, or too biased, to help their own children with the facts necessary for a happy marriage.

3.2 It would seem therefore, that it is essential that all coming generations should receive tuition on marriage and sex in the schools, in order to break this chain of events and provide the adolescent child with what it requires to know from nature to develop themselves naturally.

3.3 It should be quite easy to organise classes, if only for the intention of truthfully answering questions and giving no evasive answers. The child will then be able to orientate quite naturally looking forward to, and accepting, marriage with the requirements of his or her partner fully understood. Also, an understanding of diffidence or forwardness as may be manifest in their partners actions will enable them to deal with awkward situations in a natural manner. This should in two, or at the most in three, generations eliminate the factor of ignorance that figures so largely in the breakdown of marriages of this era.

3.4 There have been, and are, a number of eminent observers and thinkers in this world, writing on their observations and thoughts without distorting their findings with preconceived notions of what they ought to be. We think these people, both from the medical and psychological fields will be delighted to contribute their knowledge towards the logical solution of the problem and a great deal of good would result for everyone.

3.5 Having now equipped our adolescent youth with sound knowledge, based on observations and careful marshalling of facts, the next step is the development of the art of selection of a marriage partner.

There will always be a number of doubtful ones, unable to make up their minds on these matters. To overcome this, we certainly think there should be in every community an authority available, outside of the field of tuition, where confidential advice can be sought, methods and procedures explained and all fears overcome, or confirmed and the path of courtship and marriage cleared of superstitious intrusions, without recourse to comedy minded newspaper columnists.

3.6 However, even after this selection procedure, there will be the poor unfortunates whose enjoyment of married life will be reduced and finally eclipsed by a succession of occurrences between themselves and their partner and this will eventually necessitate action to remove them from the influence of the other if they should so wish.

3.7 Marriage after all, is the union of the two bodies and all its parts not of the two souls. A marriage can no longer exist if there is a resistance to union at any time and this resistance can result from a number of things:—

- (a) The natural rejection of the partner who violates the contract and has union elsewhere.
- (b) Rejection due to fear of violence, cruelty to mind or body.
- (c) Rejection because of insanity or history of intermittent insanity.
- (d) Rejection caused by the desertion of the other partner.

3.8 We think it should be pointed out, at this stage, that perhaps a suggested time limit of three years be placed on any irregularities to the contract and that if, after this time has elapsed, the erring partner has not been divorced or action for divorce started, by the other refusing to take this action, then this should be sufficient evidence of mental cruelty for the original erring partner to divorce the other. Further, if it can be shown that divorce is immediately necessary to safeguard the well being of one partner from the other, then this should be carried out without delay.

3.9 It will appear too, that continuance of union after the realization of any of these irregularities of normal married life will, in effect, condone the behavior of the erring partner. However, if after a further period of time, say three years, it becomes apparent to the forgiving partner that the erring partner is not changing towards him/her, then a second opportunity should be given to terminate the marriage upon application.

4. Separation

4.1 It will be noticed in the foregoing that no mention has been made of "Separation Agreements" or the effects of separation.

4.2 We do not feel that separation as administered at present is anything more than an attempt to placate the religious scruples of the parties and in the future it should be only enacted by the religious bodies for their own needs without any civil, legal, or criminal liabilities.

4.3 Consideration should be given, however, to married couples at present legally separated and provision should be made in a separate law to deal with their predicament. We further think that separation of married couples will in time die out and this Separation Law will fall into disuse and can then be removed from the Statute Book without affecting the Laws of Marriage and Divorce as outlined above.

4.4 It should be evident that either of the persons living apart under legal separation should by virtue of the marriage being dead, be able to apply for a divorce after a period of three years of legal separation and have a divorce granted upon the establishment of the legality and the adherence to the terms of the document by the partner seeking the divorce.

4.5 Where either party may have broken this agreement, the divorce proceedings would be heard under the Marriage and Divorce Law as outlined above.

4.6 This should end the necessity of legal recognition of an anomaly and face saving device known as "Common Law Wives/Husbands" enabling individuals deprived of the joy and happiness of marriage, by the unknown whereabouts of their legal marriage partner, and allow them to enter the state of honourable matrimony with attendant uplift and reestablishment of integrity and character.

5. Conclusion

5.1 In conclusion, we realise that all the foregoing is logical, ethical and morally right and just. As men and women we say "Enough. Let's have done with prudery, politics, subterfuge, etc. and put this right".

5.2 We voted you to Parliament as our representatives and we are steadfast in our faith that you will defend us to overcome these antique forces resisting changes and allow the fresh air of logic to blow away this cluttering, restricting, clutching bigotry, fostered and nurtured in an atmosphere of ignorance, narrowmindedness and selfish greed. Let us remove the citizens of Canada from the unenlightened ranks of the world's peoples and place them again where their ancestors had once placed themselves;—in the front ranks of the tolerant enlightened civilizations.

W. J. Biggin-Pound, President

F. Bolster, Vice-President

Mrs. B. Geddes, Secretary

Mrs. H. D. Bolster

Mrs. J. I. McLeod

K. Reiner

Miss Hilary M. Evans

} Committee

September 30, 1966

~~FEB 8~~ 1967



First Session—Twenty-seventh Parliament
1966

PROCEEDINGS OF
THE SPECIAL JOINT COMMITTEE OF THE SENATE
AND HOUSE OF COMMONS ON

DIVORCE

No. 6

TUESDAY, NOVEMBER 8, 1966

Joint Chairmen

The Honourable A. W. Roebuck

and

Mr. A. J. P. Cameron, M.P.

WITNESS:

G. R. B. Whitehead, Barrister and Solicitor.

APPENDICES:

- 11.—Brief by G. R. B. Whitehead, Barrister and Solicitor, Montreal, Que.
- 12.—Brief by Canadian Federation of University Women, St. Catharines, Ont.
- 13.—Brief by Alfred J. Wicken, Q.C., Qualicum Beach, B.C.
- 14.—Brief by The Family Service Association of Edmonton, Alberta.

ROGER DUHAMEL, F.R.S.C.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1966

MEMBERS OF THE
SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS
ON DIVORCE

FOR THE SENATE

Hon. A. W. Roebuck, Joint Chairman

The Honourable Senators

Aseltine	Connolly (<i>Halifax North</i>)	Flynn
Baird	Croll	Gershaw
Belisle	Denis	Haig
Burchill	Fergusson	Roebuck—(12).

FOR THE HOUSE OF COMMONS

Mr. A. J. P. Cameron (*High Park*), Joint Chairman

Members of the House of Commons

Aiken	Forest	McQuaid
Baldwin	Goyer	Otto
Brewin	Honey	Peters
Cameron (<i>High Park</i>)	Laflamme	Ryan
Cantin	Langlois (<i>Mégantic</i>)	Stanbury
Choquette	MacEwan	Trudeau
Chrétien	Mandziuk	Wahn
Fairweather	McCleave	Woolliams—(24).

(Quorum 7)

ORDERS OF REFERENCE

Extracts from the Votes and Proceedings of the House of Commons:
March 15, 1966:

“On motion of Mr. McIlraith, seconded by Mr. Hellyer, it was resolved—that a Special Joint Committee of the Senate and the House of Commons be appointed to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either House;

That 24 Members of the House of Commons, to be designated by the House at a later date, be members of the Special Joint Committee, and that Standing Order 67(1) of the House of Commons be suspended in relation thereto;

That the Committee have power to engage the services of such technical, clerical and other personnel as may be necessary for the purpose of the inquiry;

That the Committee have the power to send for persons, papers and records, to examine witnesses, to report from time to time, and to print such papers and evidence from day to day as may be ordered by the Committee, and that Standing Order 66 be suspended in relation thereto; and

That a Message be sent to the Senate requesting Their Honours to unite with this House for the above purpose, and to select, if the Senate deems it so advisable, some of its Members to act on the proposed Special Joint Committee.”

“By unanimous consent, on motion of Mr. McIlraith, seconded by Mr. Hellyer, it was ordered—That the order of the House of Monday, February 21, 1966 referring the subject-matter of the following bills to the Standing Committee on Justice and Legal Affairs, namely:—

Bill C-16, An Act to provide in Canada for the Dissolution of Marriage (Additional Grounds for Divorce).

Bill C-19, An Act to provide in Canada for the Dissolution and the Annulment of Marriage.

Bill C-41, An Act to amend the British North America Acts, 1867 to 1965, (Provincial Marriage and Divorce Laws).

Bill C-44, An Act to provide in Canada for the Dissolution of Marriage.

Bill C-55, An Act to provide in Canada for the Dissolution of Marriage.

Bill C-58, An Act respecting Marriage and Divorce.

Bill C-79, An Act to amend the Dissolution and Annulment of Marriages Act (Additional Grounds for Divorce).

be discharged, and that the subject-matter of the same bill be referred to the Joint Committee of the Senate and the House of Commons on Divorce.”

March 16, 1966:

“By unanimous consent, on motion of Mr. Stewart, seconded by Mr. Byrne, it was ordered—That the subject-matter of Bill C-133, An Act to extend the grounds upon which courts now have jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief, be referred to the Special Joint Committee on Divorce.”

"By unanimous consent, on motion of Mr. Stewart, seconded by Mr. Byrne, it was ordered—That the subject-matter of Notice of Motion No. 11 be referred to the Special Joint Committee on Divorce."

March 22, 1966:

"On motion of Mr. Pilon, seconded by Mr. McNulty, it was ordered—That a Message be sent to the Senate to acquaint Their Honours that this House will unite with them in the formation of a Joint Committee of both Houses to inquire into and report upon divorce in Canada, and that the Members to serve on the said Committee, on the part of this House, will be as follows: Messrs. Aiken, Baldwin, Brewin, Cameron (*High Park*), Cantin, Choquette, Chrétien, Fairweather, Forest, Goyer, Honey, Laflamme, Langlois (*Mégantic*), MacEwan, Mandziuk, McCleave, McQuaid, Otto, Peters, Ryan, Stanbury, Trudeau, Wahn and Woolliams."

LÉON-J. RAYMOND,
Clerk of the House of Commons.

Extracts from the Minutes of the Proceedings of the Senate:

March 23, 1966:

"Pursuant to the Order of the Day, the Senate proceeded to the consideration of the Message from the House of Commons requesting the appointment of a Special Joint Committee of the Senate and House of Commons on Divorce.

The Honourable Senator Connolly, P.C., moved, seconded by the Honourable Senator Roebuck:

That the Senate do unite with the House of Commons in the appointment of a Special Joint Committee of both Houses of Parliament to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either House;

That twelve Members of the Senate, to be designated at a later date, act on behalf of the Senate as members of the said Special Joint Committee;

That the Committee have power to engage the services of such technical, clerical and other personnel as may be necessary for the purpose of the inquiry;

That the Committee have the power to send for persons, papers and records, to examine witnesses, to report from time to time, and to print such papers and evidence from day to day as may be ordered by the Committee, and to sit during sittings and adjournments of the Senate; and

That a Message be sent to the House of Commons to inform that House accordingly.

After debate, and—

The question being put on the motion, it was—

Resolved in the affirmative."

March 29, 1966:

"With leave of the Senate,

The Honourable Senator Beaubien (*Provencher*) moved, seconded by the Honourable Senator Inman:

That the following Senators be appointed to act on behalf of the Senate on the Special Joint Committee of the Senate and House of Commons to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, namely, the Honourable Senators Aseltine, Baird, Belisle, Bourget, Burchill, Connolly (*Halifax North*), Croll, Fergusson, Flynn, Gershaw, Haig, and Roebuck; and

That a Message be sent to the House of Commons to inform that House accordingly.

The question being put on the motion, it was—

Resolved in the affirmative.”

May 10, 1966:

“Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Roebuck, seconded by the Honourable Senator Croll, for the second reading of the Bill S-19, intituled: “An Act to extend the grounds upon which courts now having jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief”.

The question being put on the motion—

In amendment, the Honourable Senator Connolly, C.P., moved, seconded by the Honourable Senator Hugessen, that the Bill be not now read the second time, but that the subject-matter be referred to the Special Joint Committee on Divorce.

After debate, and—

The question being put on the motion, it was—

Resolved in the affirmative.”

J. F. MACNEILL,
Clerk of the Senate.

REPORT OF COMMITTEE

Extracts from the Minutes of the Proceedings of the Senate: November 7, 1966:

The Honourable Senator Roebuck, from the Special Joint Committee of the Senate and House of Commons on Divorce, presented their third report as follows:—

MONDAY, November 7th, 1966.

The Special Joint Committee of the Senate and House of Commons on Divorce makes its third Report, as follows:

Your Committee recommends that its quorum be fixed at seven (7) members, provided that both Houses are represented.

All which is respectfully submitted.

A. W. ROEBUCK,
Joint Chairman.

With leave of the Senate,

The Honourable Senator Roebuck moved, seconded by the Honourable Senator Fergusson, that the report be adopted now.

After debate, and—

The question being put on the motion, it was—

Resolved in the affirmative.

J. F. MACNEILL,
Clerk of the Senate.

Extracts from the Votes and Proceedings of the House of Commons: November 8, 1966:

Mr. Cameron (*High Park*), seconded by Mr. Brewin, moved,—That the Third Report of the Special Joint Committee of the Senate and the House of Commons on Divorce, presented to the House on Thursday, November 3, 1966, be concurred in.

After debate thereon, the question being put on the said motion, it was agreed to, on division.

Accordingly, the said Report was concurred in, and is as follows:

Your Committee recommends that seven (7) of its members constitute a quorum, provided that both Houses are represented.

LÉON-J. RAYMOND,
Clerk of the House of Commons.

MINUTES OF PROCEEDINGS

TUESDAY, November 8, 1966.

Pursuant to adjournment and notice the Special Joint Committee of the Senate and the House of Commons on Divorce met this day at 3.30 p.m.

Present: For the Senate: The Honourable Senators Roebuck (*Joint Chairman*), Aseltine, Baird, Belisle, Burchill, Denis, Fergusson, Flynn, Gershaw and Haig—10.

For the House of Commons: Messrs. Cameron (*High Park*) (*Joint Chairman*), Aiken, Baldwin, Brewin, Cantin, Fairweather, Forest, Mandziuk, McCleave and Otto—10.

In attendance: Dr. Peter J. King, Special Assistant.

The following witness was heard:

G. R. B. Whitehead, *Barrister & Solicitor*.

Briefs submitted by the following are printed herewith as Appendices:

11.- G. R. B. Whitehead, Barrister & Solicitor, Montreal, Que.

12.- Canadian Federation of University Women.

13.- Alfred J. Wickens, Q.C., Qualicum Beach, B.C.

14.- The Family Service Association of Edmonton, Alberta.

At 5.30 p.m. the Committee adjourned until Tuesday next, November 15, at 3.30 p.m.

Attest.

Patrick J. Savoie,
Clerk of the Committee.

THE SENATE
SPECIAL JOINT COMMITTEE OF THE SENATE AND
HOUSE OF COMMONS ON DIVORCE
EVIDENCE

OTTAWA, Tuesday, November 8, 1966.

The Special Committee of the Senate and the House of Commons on Divorce met this day at 3.30 p.m.

Senator Arthur W. Roebuck and Mr. A. J. P. Cameron (*High Park*) Co-Chairmen.

Co-Chairman Senator ROEBUCK: Honourable Senators and Members of the House of Commons, Members of the Committee on Divorce, I understand that a resolution was passed in the House of Commons a few minutes ago reducing the quorum to seven. The same resolution has already been passed in the Senate. We have here very many more than the quorum and I suggest that we proceed forthwith.

We have with us, ladies and gentlemen, a very distinguished member of the Bar, both of England and of the Province of Quebec, in the person of Mr. George Robert Beethom Whitehead, and for the sake of the record I wish to put on something of his qualifications for being here, so that you may know who it is that is speaking to you.

Mr. Whitehead was born in Berlin, Germany, on March 22, 1897, the son of Sir James Beethom Whitehead, K.C.M.G., of the British Diplomatic Service, who was then serving at the Berlin Embassy.

Mr. Whitehead accompanied his parents in various foreign countries until at the age of ten he was sent to a boarding school in England. He graduated in law from Oxford University in 1920, although his attendance at Oxford was interrupted by war service in the British Army from 1915 to 1919.

Mr. Whitehead was called to the Bar of England, Lincoln's Inn, in 1921 and practised in the Chancery Division of the High Court of Justice until 1935, concerned with equity and corporation matters. While divorce work was not included, from 1927 onward he received briefs in the Divorce Court because about that time the divorce work had increased to the extent that the regular Divorce Court Bar could not deal with it all. It is a small body of divorce specialists.

In this way, Mr. Whitehead learned divorce law and practice, with the assistance of the regular members of the Divorce Court Bar from 1927 to 1935; and he gained a considerable insight into the problems and practice of the Divorce Court.

In 1935 Mr. Whitehead spent some time in Italy and in 1939, largely because of the war in Ethiopia, he came to Canada, settled in Montreal, and commenced the study of Quebec law.

In March of 1941 Mr. Whitehead accepted a position in the legal branch of the Department of Munitions and Supply at Ottawa where he served until 1946, during which time he became Assistant Director General of the Branch. From 1946 to 1948 he served in the Legal Department of the War Assets Corporation in Montreal, where he became head of the Department.

In 1944 he was admitted to the Quebec Bar and was awarded the M. B. E. on the Canadian list in July 1946.

Mr. Whitehead is still a member in good standing of the Bar of England and of the Bar of Quebec. He has continued to keep his interest in the divorce law of England and has maintained his touch with his old friends of the English Bar, some of whom are now judges. He still has trusteeships in England and I am sure that we will find him quite familiar with both the English law and practice in regard to the subject which this committee is studying.

Honourable Senators and members of the committee, I have sincere pleasure in presenting to you Mr. Whitehead.

Mr. George Robert Beethom Whitehead, M.B.E., B.A. (Oxon.) of the Bar of England (1921) and the Bar of Quebec (1944): Mr. Chairman, ladies and gentlemen, as a new Canadian I should like to say how much I appreciate being asked to address this committee, especially on a matter of so much importance. I will try to stick to things which have been within my professional knowledge, because of course you have many people who will discuss every aspect of this problem with you; but I think it is helpful to consider how they have tried in England to consider the same sort of problems which are being discussed in Canada now. In order to show how that was done, I will start with a brief historical introduction. I will read the brief, omitting one or two paragraphs which I shall summarize. That will save time. They will appear in the printed proceedings.

1. Before 1857 no Court in England had power to grant divorces *a vinculo matrimonii* (enabling either spouse to marry again in the lifetime of the other). The Ecclesiastical Courts of the Church of England had power to grant decrees of (1) nullity (for impotence or consanguinity, or because the supposed marriage had been found to be bigamous), (2) divorce *a mensa et thoro* (now called judicial separation, which did not enable either spouse to marry again in the lifetime of the other), (3) restitution of conjugal rights, which was a decree enjoining a spouse who had deserted the other spouse to return to cohabitation, and (4) a decree of perpetual silence in a case of jactitation of marriage when anyone persistently and falsely alleged marriage with another. Divorce *a vinculo matrimonii* could be obtained only by private Act of Parliament. Such acts were seldom or never passed at the instance of the wife. If the husband wanted one he had first to bring an action for "criminal conversation" (i.e. adultery) in a civil court against the man with whom his wife had committed adultery; and the verdict in that action was treated as conclusive proof of the adultery, so that Parliament did not have to hear the evidence again. This procedure was wasteful of parliamentary time, and the expense led to complaints that there was one law for the rich and another for the poor; so in 1857 Parliament passed the Matrimonial Causes Act of that year, the material parts of which are set out in Appendix 3 to the proceedings of your committee for June 28, 1966. This act set up a civil Divorce Court for the first time, and transferred to it the matrimonial jurisdiction of the Ecclesiastical Courts. It also enabled the new court to grant a divorce *a vinculo matrimonii* to a husband whose wife had committed adultery or to a wife whose husband had committed sodomy, bestiality, rape, incestuous adultery or bigamy with adultery, or who had committed adultery and had also been guilty of cruelty or of desertion without reasonable excuse for two years or upwards. Some years later, on a re-organization of the courts in England, the Divorce Court became, as it still is, a part of the Admiralty, Probate and Divorce Division of the High Court of Justice. No further changes of substance took place until after the 1914-18 war.

2. At the end of the 1914-18 war women were given the parliamentary vote in England, and shortly afterwards the law was changed to allow a wife to divorce her husband on proof of adultery only, without having to prove cruelty

or desertion in addition. After this, no further changes of substance took place until the major reforms of 1937, hereinafter mentioned.

3. The position in England immediately before the reforms of 1937 was thus in most respects similar to the law as it is in Canada today. The principal points of difference were as follows: (a) In England a wife could not divorce her husband on the ground of cruelty alone, but in one of the Canadian provinces (Nova Scotia) she can do so. (b) In England a decree of divorce was in the first instance only a decree nisi, which did not dissolve the marriage. The petitioner could ask for a decree absolute which did dissolve the marriage and enabled the parties to marry again at the end of six months from the pronouncement of the decree nisi, but he or she was not bound to do so; and occasionally a petitioner would refrain from applying for a decree absolute, probably in order to force a financial settlement.

The respondent could not, at that date, apply for a decree nisi to be made absolute; but this has since been altered, and now under Section 7 (2) of the Matrimonial Causes Act, 1965 (hereinafter called "the Act of 1965") the party against whom the decree nisi has been made may apply to have it made absolute if the other party has not made such an application within three months after he or she became entitled to do so. (c) The King's Proctor, an official working under the direction of the Attorney General, could intervene in any case where it was thought advisable to have the case argued on behalf of a public authority. (Originally a proctor was a lawyer who performed the same duties in the Ecclesiastical courts as an attorney did in the Courts of Common Law or a solicitor the Court of Chancery.) A judge could—and he still can—ask for the assistance of counsel on behalf of the King's Proctor in any case in which he suspected collusion, or in an undefended case raising a new point of law which the judge wished to have argued on both sides. The unsuccessful party, or any other person, could ask the King's Proctor to intervene on the ground that there had been collusion, or that for any other reason the whole of the facts had not been before the court, but of course the King's Proctor used his own discretion as to whether or not to accede to such a request. This is still the rule in England, now under Section 6 of the Act of 1965. Though there is no Queen's Proctor in Canada, the Attorney General of Quebec was, in the late Premier Duplessis' time, given power to intervene in nullity cases where collusion was suspected.

The law as to connivance, conduct conducing to adultery, condonation and collusion was in 1937 practically the same in England as it is now in Canada. Connivance is where the petitioner has had the corrupt intention of promoting or encouraging either the initiation or the continuance of the respondent's adultery. It is an absolute bar to divorce. Conduct conducing is where, in the opinion of the court, the petitioner has been guilty of such wilful neglect, or misconduct, as has conduced to the respondent's adultery. It is a discretionary bar to divorce, the discretion being that of the judge. Condonation is the conditional forgiveness of all such offences as are known to, or believed by, the offended spouse, so as to restore between the spouses the *status quo ante*. Collusion is where the initiation of a divorce petition is procured, or its conduct provided for, by agreement or bargain, express or implied, between the parties or their agents. It was formerly an absolute bar to divorce in England, but since 1963 has been only a discretionary bar. (See paragraph 13 below). There has also been a change in the English law as to condonation. (See paragraph 12 below).

The next two paragraphs deal with divorce experience in England between 1920 or thereabouts and 1937. In consequence of people's resorting to hotels and producing "evidence" of adultery, which evidence was, to say the least, doubtful, thereby enabling the wife to get a divorce, it soon became clear that a good many of these so-called hotel divorces were collusive. In the end it became a scandal, and efforts to put a stop to that sort of thing having proved mainly unsuccessful,

Mr. A. P. Herbert, the Member of Parliament for Oxford University, took a hand in the matter.

(The brief continues:)

4. The experience of the courts in England between the two wars revealed certain weaknesses in the law of divorce as it then was. By far the greatest difficulty arose from undefended divorces on the ground of the husband's adultery. The change in the law which made this possible coincided with the break-up of many hasty war-time marriages and with the general relaxation of morals which had begun during the 1914-18 war and continued afterwards. Since neither desertion nor cruelty was a ground for divorce, many people whose marriages had broken up on one or other of these grounds were tempted to concoct evidence of adultery which would enable them to get a divorce.

Among many circles of the upper and middle classes it came to be considered that when neither party wished to live with the other again the husband ought, at the wife's request, to provide her with evidence of his adultery which would enable her to obtain a divorce against him, and that it would be uncharitable and ungentlemanly for him to refuse to do so. A custom grew up by which the husband wrote to the wife a letter saying: "Dear, I am given to understand that you desire your freedom. I enclose an hotel bill."—or words to that effect. The wife's solicitors then made inquiries at the hotel from which the bill had come; and at the trial the desk clerk from the hotel produced the hotel register, showing that the husband had occupied a room with a woman, signing the register as husband and wife, and a chambermaid described how she had taken early morning tea to the room and found them in bed together, or one of them in bed and the other partly dressed. This was accepted as sufficient evidence of adultery.

From time to time there was speculation as to whether in a particular case adultery had or had not really taken place; but it seems certain that it usually had, because otherwise the woman whom the husband had taken to the hotel would have been in a position to blackmail him by threatening to disclose the true facts to the King's Proctor and get the divorce decree rescinded before it was made absolute. At one time a question was faintly suggested as to whether or not adultery which had been committed simply to form the foundation for a divorce petition, and for no other purpose, was really within the meaning of the act: but in the case of *Woolf v. Woolf* L. R. 1931, p. 134, one of the judges in the Court of Appeal, without any dissent from his colleagues, said that adultery must be treated as a ground for divorce, whatever the motive for committing it might have been. In these circumstances it soon came to be considered among the generation who had grown up during and since the 1914-18 war that there was no real stigma on a man who had "given" his wife an "hotel divorce," though adultery on a wife's part was still considered disgraceful.

5. Many barristers who were practising in divorce cases at that period had serious misgivings about the system of "hotel divorces." Certain hotels in central London were so commonly resorted to for that purpose that one sometimes found, on arriving at the court and inquiring if one's witnesses were present, that they were engaged before another judge giving similar evidence in another case, and one was left anxiously hoping that the other case would be over before one needed the witnesses for one's own. Further, some floor waiters and chambermaids were giving evidence as mentioned above so frequently that one doubted whether or not they really were sure that the woman whom they had seen in bed on one occasion only, several months before, was not the petitioner whom they had seen for the first time in court that day. I remember one of the regular practitioners in the court telling me (after he had used the same hotel witnesses in three different cases on the same day) that he felt fairly sure that if he and his wife ever wanted to get divorced they could go and spend a night together at

that hotel, and that when the case came up for trial, three or four months later, some hotel witness would cheerfully swear that the woman who had been at the hotel with him was not the petitioner (his wife). The judges must, of course, have been as well able as anybody to see what was going on: and Lord Merrivale, the President of the Admiralty, Probate and Divorce Division, a judge of great experience, who commanded universal respect, tried for some time to insist that the name of the woman who had gone to the hotel with the husband should be supplied to the court, presumably so that the King's Proctor could make inquiries, if thought desirable.

As early as 1928, in the case of *Aylward v. Aylward*, 44 T.L.R. 456, he refused a decree in an hotel adultery case because he was not satisfied that adultery had been committed, at any rate with the woman who had been at the hotel; and he expressed himself in very strong terms about the whole "hotel adultery" system. Eventually he refused a divorce in a case (*Woolf v. Woolf*, cited above) where the husband, who was quite as anxious for a divorce as his wife, had spent two nights at an hotel with a woman whose name he refused to give, and Lord Merrivale, suspecting the case was collusive, was not satisfied that the woman who had been at the hotel had not been a near relative of the husband or someone else with whom he was unlikely to have committed adultery (see page 146 of the Report). The Court of Appeal would not support Lord Merrivale, and said that when a man and a woman who were not husband and wife shared an hotel room the usual inference must be drawn. (This decision was followed in Nova Scotia some years later in *Durrant v. Durrant* (1944) 3 D.L.R. 30, in which the Appellate Court reversed the decision of the trial judge, who had said that he suspected collusion and doubted if adultery had really been committed.)

One has to be prepared to accept the fact that if you are to allow divorce after three years there is always the possibility that where a couple had agreed that they wanted to get rid of each other a case might be brought, usually by the wife, on the ground of desertion; and no-one being in a position to contradict her she would get the divorce by consent.

6. During the 1930s Mr. A. P. Herbert, then Independent Member of Parliament for Oxford University, who was a well-known writer, determined to try to bring about reforms, and he wrote a satirical novel "Holy Deadlock" about an imaginary hotel divorce, which revealed the abuses of the system, of course with some exaggeration, but not very much. This book had a wide circulation and opened the eyes of the general public to what was going on. With its help, and after much consultation with his colleagues in the House of Commons, he was able to bring in and pilot through Parliament the Matrimonial Causes Act, 1937, which extended the grounds both for nullity and for divorce, but prevented divorce petitions from being presented during the first three years of the marriage, except for hardship on the petitioner or exceptional depravity on the part of the respondent. It is significant that one of the reasons for passing the act, stated in the preamble, was "the restoration of due respect for the law". In view of the terms of the Order of Reference to your committee, this memorandum deals only with the grounds for divorce. The new ones added by the act of 1937 were:

- (a) Desertion without cause for three years next before the presentation of the divorce petition.
- (b) Cruelty.
- (c) Incurable insanity.
- (d) Presumption of death of the other spouse.

This is not strictly a case of divorce, but rather of dissolution of marriage. I come now to paragraph 7. It may be observed that an undefended petition

for divorce for desertion may be virtually divorce by consent, because one has only the petitioner's word for it that he or she did not consent to the separation.

7. There is no statutory definition of desertion, and it has been described as not so much a withdrawal from a place as a withdrawal from a state of things. The (British) Royal Commission on Marriage and Divorce (Cmd. 9678, H.M.S.O. London, 1956) suggested the following definition, which seems as good as any: "a separation of the spouses which is against the will of one spouse and which is accompanied by an intention on the part of the other spouse without just cause permanently to end the married life together." The respondent can defend the petition by showing that he or she had valid cause for leaving, which need not necessarily be sufficient to amount to legal cruelty. In some cases it may even be held that the spouse who has remained in the matrimonial home is the deserter, because he or she deliberately drove the other out. The highwater-mark of these cases is probably *Winnan v. Winnan* L.R. 1949, P. 174, where the wife was found guilty of constructive desertion because she insisted (contrary to her husband's wishes) in keeping a large number of cats in the house, and told her husband that she preferred the cats to him. Now, under Section 1 (2) of the Act of 1965, any one period of not more than three months during which the parties resumed cohabitation with a view to reconciliation is not to be considered as interrupting the three years' desertion.

If the spouses originally parted by mutual consent, without any express agreement as to the duration of the separation, either of them may at any time put an end to the agreement to separate, and the other spouse will then be treated as being in desertion from that time onwards, so that the three years begin to run from the same time. It is otherwise if the separation was under the terms of a valid separation deed, the terms of which have always been observed. The deserting spouse may repent and offer to return to cohabitation during the three year period; and, if the Court considers that the repentance is sincere, it is a good defence.

8. Cruelty is a ground for divorce which in practice is apt to present many difficulties to the court trying the petition. Mental cruelty is included; and even in a country as comparatively homogeneous as England there are different sections of society whose ideas as to what conduct is tolerable and what is not differ considerably. Before 1937, when cruelty without adultery was a ground only for judicial separation, a wife who knew that even if she proved cruelty against her husband she would have to remain married to him was not likely to start proceedings unless his conduct was really hurting her beyond endurance, or at any rate she thought that it was; but it is not at all the same thing when she can hope to get a divorce which will leave her free to marry somebody else, and perhaps she already has in view the man whom she would like to have as her next husband. In such cases there may often be an element similar to what in personal injury cases is known as "compensationitis".

In England, in cases of cruelty, the petitioner has to show injury or apprehended injury to his or her health from the respondent's conduct; but where, as is usually the case, the injury takes the form only of a nervous condition which obviously must be making the petitioner very difficult to live with, there may often be a doubt as to whether the petitioner's nervous condition is due to the respondent's conduct or the respondent's conduct is due to the petitioner's nervous condition. In some cases, and particularly in defended cases where each party is asking for a divorce against the other, they are apt to drag out a long series of old unhappy memories which they hope will have a cumulative effect, beginning with the time the husband forgot the wife's birthday or the time she put him to shame by having one drink too many at his boss' cocktail party, and continuing with many other items of no greater importance, until at the end of the day even an experienced judge may find it hard to decide

whether this is a case of cruelty, which is a ground for divorce, or merely a case of incompatibility of temperament, which is not a ground for any relief at all. Until recent years it had been regarded as settled that cruelty must be shown to have been "aimed at," or intended to hurt, the other spouse or the children of the marriage; but in the cases of *Collins v. Collins* L.R. 1964 A.C. 644 and *Williams v. Williams* L.R. 1964 A.C. 698 the House of Lords held that if the conduct complained of was grave and weighty, and if the injury or apprehended injury to the petitioner's health was shown, there was no need to show an intention to injure or a guilty mind. This is a different approach to the question from that of Canadian law relating to cruelty as a ground for judicial separation. In Quebec, Articles 189 and 190 of the Civil Code do not require injury or apprehended injury to health as an element of cruelty, nor do the relevant statutes of Saskatchewan and Alberta.

This is a material point. Article 189 of the Quebec Civil Code says: Husband and wife may respectively demand the separation on the ground of outrage, ill-usage or grievous insult committed by one toward the other. Article 190 says: The grievous nature and sufficiency of such outrage, ill-usage and insult are left to the discretion of the court, which, in appreciating them, must take into consideration the rank, condition or other circumstances of the parties.

In Saskatchewan and Alberta cruelty is not confined in its meaning to conduct that creates a danger to life, limb or health, but includes any course of conduct that, in the opinion of the court, is grossly insulting or intolerable, or is of such a character that the person seeking the separation could not reasonably be expected to be willing to live with the other after he or she had been guilty of such conduct.

As we in the common law provinces well know, where decisions of upper courts of original jurisdiction are treated as binding, you are very apt to get cases where the husband has done exactly the same thing that somebody else did years before, which was held to be cruel, and the lawyer, addressing the judge on behalf of the petitioner, will say: The husband in this case has done exactly what Mr. "A" did years ago; that was held to be cruel, and this also must be cruel; therefore the case is proved.

But that does not always follow, because so much depends on the individual parties and on the communities from which they come. People's opinions differ. The Quebec Civil Code says that the grievous nature and sufficiency of the outrage, ill-usage and insult are left to the discretion of the court, which, in appreciating them, must take into consideration the rank, condition and other circumstances of the parties. That is what one might call the subjective approach: it is looking to see whether the parties are cruel, and not looking at the course of conduct and the act to see if that is cruel. You have two entirely different things. Sometimes difficulties are created, because a lawyer has to do his best for his client, and if he finds what he considers a parallel case that occurred fifteen years before, in which a particular course of conduct was held to be cruel, he will press it as hard as he can; and although the judge may feel that the two cases are not parallel, he may be reluctant to say, "I am not going to accept the argument that they are on all fours."

It has happened in England that people got divorces on the ground that others had done the same sort of thing before, without sufficient consideration of the circumstances in the case before the court.

I do not want to labour that point, but I should like to give two illustrations to show what I mean. One hundred and fifty years ago, or perhaps a hundred years ago, in England, the husband was the master of the household and the rest of the family had to obey him. Even now in the Anglican marriage service the wife is supposed to say that she will obey.

Among Anglo-Saxon Canadians, however, where husband and wife have been to university, marriage is a partnership, and if the husband now started to

assert authority in the way husbands could have done a hundred or a hundred and fifty years ago, and if he persisted, it would be said that he was cruel.

On the other hand, we have in Canada now many new Canadians coming from other countries, and those who come from southern European countries or Eastern European countries, particularly from the peasant class, still have very much the same ideas that our ancestors had a hundred years ago; the husband and father is the head of the family and the rest, including the wife, owe him obedience; and when he insists on it he is not, according to their ideas, unreasonable. He is only doing what his people have done from time immemorial, what everyone expects him to do; and to find him guilty of cruelty because he was doing what was natural and normal in his circumstances would not be right.

The Quebec approach avoids that, and Saskatchewan and Alberta would be to the same effect. But if you left it as it is, it would be very difficult to prevent a body of Canadian jurisprudence growing up to say what was cruelty and what was not, rather than whether this man was cruel or not.

Anyone who has had considerable practice before divorce courts must have come to realize that even among people of similar background and education opinions differ enormously as to what are acceptable practices in the matter of sexual intercourse between husband and wife and what are not. Some people regard as perversions what others regard as perfectly natural.

If the husband persists, in spite of the wife's protest, in practices which he knows she regards as abhorrent, that might be so inconsiderate as to amount to cruelty. But if the wife has co-operated in any such practice for years and complains only after husband and wife have quarreled on some other subject, it may be doubted whether it was because of cruelty, the real reason being that she was trying to use it for getting a divorce she should not have.

There is considerable danger in allowing a body of jurisprudence to grow up saying, such and such is cruelty. Because something was declared to be cruelty in the case of Mr. and Mrs. "A", it does not follow that it is cruelty in the case of Mr. and Mrs. "B". It is much more obvious to us who have practised in divorce courts than it is to the general public, but it is an important point, when it comes to a question of changing the law and you have to decide whether the approach is to be an objective or a subjective one.

I will return to the written brief, paragraph 9 on page 15:

9. Incurable unsoundness of mind was made a ground for divorce in England by the Act of 1937, if the patient had been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the divorce petition. The period of five years is not considered to be broken if the patient is lawfully on leave of absence from the hospital on trial. By an amendment made by the Divorce (Insanity and Desertion) Act, 1958 (now superseded by section 1 (3) of the Act of 1965) any interruption of the period of care and treatment for 28 days or less is to be disregarded for the purpose of determining whether or not such period has been continuous.

That is not the same as leave of absence. The 28-day period applies to the patient who is supposed to be discharged. It also applies to a patient who has escaped from the hospital and is recaptured, and that is not the same as being absent on leave. It was intended to fill the gap.

10. Presumption of death of the other spouse was made a ground for dissolving the marriage under the Act of 1937 (now superseded by Section 14 of the Act of 1965). A petition has to be presented to the court to have it presumed that the other spouse is dead and to have the marriage dissolved. If no other evidence of the death can be found, the fact that for a period of seven years or upwards the other party to the marriage has been continually absent from the petitioner, and the petitioner has no reason to believe that the other party has

been living within that time, is evidence that he or she is dead until the contrary is proved. Absence under a separation agreement does not bar the petition, though continued absence from the petitioner where the parties have bound themselves to live apart proves very little. There are rules of court which prescribe the steps which the petitioner must take to try to trace the missing spouse. The decree is in the first instance only a decree nisi, as in a divorce case; and if, after the decree nisi but before it has been made absolute, the other party is found to be alive an intervention can be made and the decree will be rescinded.

Co-Chairman Senator ROEBUCK: What happens to the children, if there are any, in that case?

Mr. WHITEHEAD: The children remain legitimate because the marriage is dissolved, not annulled. It is the same as divorce in that respect.

11. An essential element in the 1937 reforms was the provision that no divorce proceedings could be taken within the first three years of the marriage without special leave. The ground for this was that it was felt that the possibility of getting a divorce for a single act of adultery on the part of the husband was in many cases resulting in young people making insufficient effort to overcome the difficulties of adjustment which are to be expected at the beginning of married life, and in some cases was even leading them to enter on marriage without due consideration, in reliance on being able to get out of it again if they found that they were unsuited to each other. There was a relaxation of this rule during the 1939-45 war. But it was only temporary. The special leave required for presenting a petition in cases of exceptional hardship to the petitioner or exceptional depravity on the part of the respondent has to be obtained from a judge. Applications for such leave are heard in chambers, i.e. in private, and not in open court, so that there is no body of reported cases to show exactly what qualifies as exceptional hardship or exceptional depravity: but such applications are not very numerous, and it is believed that many of them are rejected.

Since I wrote this, further information has been received in Montreal; there is one more volume of reports from England. In the case of *W. v. W.* 1966 2 AER 889 the president held that the fact that the wife was pregnant by another man was not exceptional hardship, because nowadays a child can be legitimated by subsequent marriage even if the mother was married to another man at the time of the birth; and he went on to say that between January 11 and May 16, 1966, 47 applications for leave to present petitions were heard within three years, of which one was dismissed, three were adjourned, and in 43 cases leave was given to proceed.

Since the system was started they have begun to give leave frequently, because 43 out of 47 is a high proportion. At the time the bill was going through Parliament there was great discussion as to what was reasonable for starting proceedings within three years, and during the debates some unusable things came out.

One might mention some examples of exceptional hardship that were given in the parliamentary debates on the 1937 bill. Within a few months of marriage to a woman much younger than himself a man resumed relations with his former mistress; in another case a man married a widow who had a daughter and during the first year he seduced his step-daughter. That is so intolerable that it must be regarded as constituting an exceptional hardship and she should be allowed to take proceedings right away. In another case a man married a woman with money and after getting all she had he proceeded to desert her: that also is regarded as intolerable.

During the last war a man serving in the army found that his wife had gone with another man, and, suspecting that she had a child, he asked for leave to present a petition on the ground that he did not want to be responsible for the

child, as he would be legally if the wife was still married to him when the child was born. The case went to the Court of Appeal and the Court of Appeal would not grant the appeal because he should have brought an action for judicial separation, which he could do without waiting three years. That would eliminate the possibility of a recurrence of this sort of thing. After three years he could turn the judicial separation into a divorce. So at that time, in 1942, they must have been taking a strict view.

Co-Chairman Senator ROEBUCK: Do you think we would be wise in adopting the three-year provision outlined here, as in England?

Mr. WHITEHEAD: That is a very debatable point. In England the three-year provision made it possible to induce those who were opposed to any extension of the grounds of divorce to co-operate in passing the bill—so much so that they put Section 1 right in the forefront of the bill. In Canada there are many people who would not wish to see an extension of the grounds of divorce, and if you put in the three years, as in England, it might produce the same effect here as there. In England it had the effect of preventing the immature from rushing out and marrying again without stopping to see if they could make a go of it. One would have to know conditions in various Canadian provinces to make up one's mind what was the best thing to do about it. But that is what they did in England, and on the whole it seems to have proved beneficial.

Paragraphs 12 and 13 on page 17, deal with condonation and collusion, both of which are technical matters which are of importance to lawyers, particularly collusion. These paragraphs are rather long and are necessarily technical and with the chairman's permission I will ask that they be taken as read and incorporated in the printed proceedings. Those interested in the matter from a technical point of view will have no difficulty seeing what I mean, and those not in the legal profession may find them too technical.

Co-Chairman Senator ROEBUCK: You might say something about it.

Mr. WHITEHEAD: What I should like to say is this. The effect of condonation in the past was to preclude one from subsequent proceedings. But the law was broadened. For in the past no one who had sexual intercourse with his spouse after the offence complained about could say he had not condoned previous misconduct. Now that rule is no longer absolute because, if he resumes cohabitation with a view to reconciliation, that is not regarded as constituting condonation so as to prevent him afterwards asking for divorce if the attempt at reconciliation failed.

The law of collusion is much more difficult, because the way things have always been in England, and still are in Ontario, a lawyer has to be extremely careful, when making arrangements about provision for children, or financial provisions for the family during divorce proceedings, not to go so far as to leave the impression that this is a collusive arrangement whereby one party is in fact guilty of divorce.

Obviously some arrangement must be made; but a lawyer must scrutinize the arrangements to make sure that no person can say they are collusive. The difficulty was so great that eventually it was decided to authorize the lawyer or his client to put before the court the proposed agreement with the other side on various subjects—it might be custody of the children or financial provision—and if the court said it did not disapprove of that, they could sign the agreement and go ahead with the arrangement and there was no question of the divorce being blocked on account of collusion.

If the court said, "You cannot do that, it is not permissible," it was open to the lawyers concerned to say, "We will work out something else," or else they could abandon it altogether. But so long as you tell the court about it in advance and ask approval it is all right. If the court does not approve, all you have to do

is drop it. If the court approves, you can go ahead without fear of being found guilty of collusion.

That has led to satisfactory results. One cannot state how many cases there will be of that kind because they are always heard in chambers. Recently, towards the end of last year, a judge who had heard twelve of these cases or thereabouts gave judgment in open court with a view to giving people some indication of what they should or should not do in the future; and after explaining the really collusive bargain such as buying off a good defence, or promising a large settlement, which is as bad as ever, he indicated that an agreement which is really bona fide and intended to make provision for necessary intermediate matters would be approved of by the court and would not prejudice either side in its contentions, irrespective of whether the case was defended or not.

Co-Chairman Senator ROEBUCK: We have been following these rules for a long time in parliamentary divorce.

Mr. WHITEHEAD: That is most enlightening.

(The brief continues:)

12. The law as to condonation in England was amended by the Matrimonial Causes Act, 1963, (now superseded by Section 42 (2) and (3) of the Act of 1965), which provided that adultery or cruelty should not be deemed to have been condoned by reason only of a continuation or resumption of cohabitation between the parties for one period not exceeding three months with a view to a reconciliation. This act provided also that adultery which has been condoned should not be capable of being revived. Under the law as it was before 1963, a spouse's forgiveness of the other spouse's adultery was conditional on his not committing any further matrimonial offences; and, if he did commit any, (which might be cruelty or desertion as well as renewed adultery) the old cause of complaint was revived.

13. The law as to collusion in England was amended by the Act of 1963 (now superseded by Section 5 (2) of the Act of 1965) by a provision that on application made either before or after the presentation of a petition for divorce the court might take into consideration any agreement or arrangement made or proposed to be made between the parties, and might give such directions in the matter as the court thought fit. The object of this change was to relieve the lawyers for the parties of the difficulty which was continually arising in knowing where to draw the line between a bona fide agreement for the care of the children of the marriage, or for financial provision for the family pending divorce proceedings, on the one hand and collusion on the other hand.

Now, if the court approves the proposed agreement or arrangement it is freed from any taint of collusion. If the court does not approve it, the parties can amend it, or abandon it and work out a new one. This change has apparently proved very beneficial in England; and in *Nash v. Nash* L. R. 1965 p. 266 a judge who had heard in chambers a number of applications for approval of such agreements adjourned them into court for judgment (i.e. he gave judgment in public, so that his words could be reported) and said, in part:

"A collusive bargain is one which by its terms, express or implied, provides for the conduct of the suit in one respect or another. A survey of the cases which have developed and shaped the law as to collusion reveals that it is a concept of great range: within it will be found not only such morally offensive bargains as buying false evidence, buying off a defence believed to be good, bribing a reluctant wife to petition by the offer of generous provision after decree absolute, but also such morally inoffensive bargains as the making of reasonable arrangements for maintenance which include a term touching upon the conduct of the suit.

Collusion is no longer an absolute bar to relief. Collusion which contains no genuine offence will no longer debar the Court from proceeding to decree: but collusion which is a genuine offence remains objectionable, and, so long as it taints a suit, will be treated by the Court as an effective bar to relief."

Then, after describing at some length the criteria by which the court is guided in approving or disapproving such agreements, and dealing separately with each of the ten applications, the judge concluded as follows:

It will be apparent from the foregoing that since the enactment of the Matrimonial Causes Act, 1963, it is no longer appropriate to treat all collusion as mischievous or all who negotiate collusive bargains as mischief makers. A collusive bargain, which in the ordinary meaning of the word is corrupt, remains an offence legally and morally, e.g. the procurement of a decree upon a false case or improper pressure by financial bribes or threats upon a spouse to bring a suit or abandon a defence: but a collusive bargain, which represents an honest negotiation between the parties, which is not intended to deceive the court either by putting forward false evidence or suppressing or withdrawing a good defence and which takes its place in an agreement which is intended to make a reasonable provision for the parties according to its subject-matter, is a perfectly reputable transaction. There is no objection to solicitors and counsel negotiating such a bargain; their duty, in this context as in every other, is to apply their honest skill to the task in hand. If they do so and then place the results of their labour before the court in a spirit of unreserved candour, they will have lived up to the honourable tradition of their profession in a changing world, and will have discharged their duty to their clients, the court and the public—the public whose overriding interest is that the institution of marriage should not be undermined by an unworthy and disreputable market in its dissolution.

14. One further change in the divorce law in England has been made since 1937, viz. that now the evidence of a husband or wife is admissible in any proceedings to prove that marital intercourse did or did not take place between them during any period: but a husband or wife is not compellable in any proceedings to give evidence of the matters aforesaid. This rule is now embodied in Section 43 (1) of the act of 1965. For many years such evidence by either spouse had been excluded by a ruling of the House of Lords in *Russell v. Russell* L.R. 1924 A.C. 687.

15. This memorandum is submitted in the hope that a comparison of the law of England before and after 1937 with the present law in Canada may be of assistance to your committee. The only suggestion which I venture to submit is that your committee might feel able to recommend some relaxation of the rule about collusion in divorce cases, perhaps on lines similar to those of the English legislation of 1963 (now superseded by Section 5 (2) of the Act of 1965) as described in paragraph 13 above. This might present constitutional difficulties in Quebec and Newfoundland, but in the provinces which have divorce courts it probably would be of considerable assistance to lawyers and their clients who have to deal with the incidental arrangements rendered necessary by divorce proceedings.

That is the end of the brief. Subject to any questions you may wish to ask, ladies and gentlemen, that is all I have to say.

Co-Chairman Senator ROEBUCK: Are there any questions?

Mr. OTTO: Mr. Whitehead, I was interested in your comments on the three-year interval.

Mr. WHITEHEAD: I think it is important.

Mr. OTTO: I gathered from your remarks that the reason for that three-year hiatus after marriage, and the emphasis upon it, is really the welfare of any children that may have been born of the marriage. In other words, not much attention is paid to the children, and the object of this is to allow for reconciliation and to impress upon the immature particularly that marriage ought not to be taken too lightly.

Mr. WHITEHEAD: I think it is fair to say so.

Mr. OTTO: It seems to me, however, that there could not have been much emphasis placed upon the children because, as I think you will agree, it is more likely there will be children after the expiry of the three-year interval than before. In the drawing-up of this rule was there any discussion regarding the consequences of it so far as the children are concerned?

Mr. WHITEHEAD: I do not think that was discussed very much at the time, because in England they dealt with the question of the custody of children, and provision for them, in the same Act of Parliament that deals with divorce, because they do not have the constitutional problems we have in the Provinces of Quebec and Newfoundland. But there was not much said in relation to that particular provision. Of course, any children there might be in the first three years would be quite young unless the parents had married after having the children first. When the divorce came the children would be left with the wife.

Mr. OTTO: You are speaking of 1937?

Mr. WHITEHEAD: After 1937.

Mr. OTTO: I take it this was passed in 1937?

Mr. WHITEHEAD: Yes; this was passed in 1937.

Mr. OTTO: By 1937 fairly complete documentation was available as to the effects of divorce upon the children. Was this considered at all when this rule was drawn up and passed? I am speaking not necessarily of the custody of the children; I am also concerned with the psychological consequences to the children as a result of divorce.

Mr. WHITEHEAD: The psychological aspect of divorce as regards the children was not discussed in Parliament at the time. The sociologists were well aware of it, of course, but I do not think it penetrated far into the ranks of parliamentarians or of lawyers, who were much more concerned with the questions of custody and material provision for the children.

Mr. OTTO: In the matter of cruelty, Mr. Whitehead, you asked whether cruelty should be considered objectively or subjectively, and in this connection you referred to new Canadians coming from other parts of the world where different customs prevailed—for example, where the authority of the master of the household, I think you said, was taken for granted and implicit obedience was expected. I gather from your comments that you favour the objective point of view. The question arises in my mind: how far can we go? Let us presume that it was the custom in the country of origin that the husband might beat his wife regularly every Sunday. The question is: When they come to Canada, are you saying that the courts should look upon cruelty entirely objectively, entirely in relation to the previous customs of people, or are we to consider, and should the courts apply, in their definition of cruelty, the measure of standards in Canada?

Mr. WHITEHEAD: It is very difficult to say that you must draw the line absolutely on one side or the other. I think it would be correct to allow the court to make it very largely a question of subjective approach, whether this particular man was cruel to this particular woman, rather than say that such and such an act is necessarily cruel, and therefore, if the husband has acted in that manner the act was cruel and there should be divorce.

Co-Chairman Senator ROEBUCK: That is to say, we should leave it to the courts.

Mr. WHITEHEAD: Yes; but I am quite sure the courts do retain their liberty.

Co-Chairman Senator ROEBUCK: As regards the province of Quebec, Mr. Whitehead, you mentioned an article of the Civil Code which you said was necessary as a precaution. What was the wording?

Mr. WHITEHEAD: It is Article 190: "The grievous nature and sufficiency of such outrage, ill-usage and insult are left to the discretion of the court, which, in appreciating them, must take into consideration the rank, condition or circumstances of the parties." That is Quebec. I do not think it could be expressed much better than that, if you adopt that approach to the question. Where you have various people coming from various communities, who take entirely different views of things, you must judge by their own standards.

Mr. OTTO: Are you suggesting that no general Canadian standards be set, except the standards of the two people concerned?

Mr. WHITEHEAD: That is probably putting it in an extreme form, but I go a long way in that direction, as they have done in Saskatchewan and Alberta, because they have a diverse population. The shoe will pinch somebody.

Mr. McCLEAVE: Could I recall two cases which happened in Nova Scotia, and ask the opinion of the witness. Both involved allegations of cruelty. In one, after fifty years or so of marriage, a husband struck his wife—the first time this had happened. In the second, after a few days of marriage, a husband hit his bride. The court decided in the case of the newlyweds that this was a terrible thing because he could be expected to beat her up again and again during the course of the marriage; whereas in the former case, where the husband had smitten his wife just once in fifty years, this was not likely to happen again. In the civilized parts of Canada the inference is that no one set of facts should be allowed to govern another set of facts.

Co-Chairman Senator ROEBUCK: I saw in the newspapers recently a report of a case that was decided in England where a wife was given a divorce because the husband insisted on tickling the soles of her feet, though he knew it made her hysterical.

Mr. WHITEHEAD: I saw that too. That is a rather extreme case and it got the highlight in the newspapers. He had been doing other things too. I thought that was going very far.

Mr. BALDWIN: Referring to page 17 of the brief, I find that by the 1963 act the doctrine of revived matrimonial offences is no longer effective. There is no more revival. Was there a discussion of that particular principle?

Mr. WHITEHEAD: The revival of condoned adultery has been completely abandoned. The forgiveness of the other spouse is now no longer conditional but absolute.

Mr. BALDWIN: Previously, although cruelty and/or desertion were not by themselves grounds for dissolution, an act of cruelty or an act of desertion could have revived the original adultery?

Mr. WHITEHEAD: Yes.

Mr. BALDWIN: Once you establish cruelty or desertion as grounds for dissolution, you do not need to go back to the original adultery. Is that one of the basic reasons for the change?

Mr. WHITEHEAD: It might be. I looked at the act to see whether the preamble gave any reason for the change but I did not see anything about it.

Co-Chairman Senator ROEBUCK: Perhaps we have been going too far. There was a case recently where the parties came together again for the benefit of the

children and later the wife abandoned the husband and children without reasonable cause and that revived the previous marital offence.

Mr. OTTO: In other words, the English law says now that condonation is no longer a defence to adultery in England? We still regard it as a defence.

Mr. McCLEAVE: It is discretionary, is it not?

Co-Chairman Senator ROEBUCK: Is it discretionary or absolute, Mr. Whitehead?

Mr. WHITEHEAD: Adultery which has been condoned always was a bar to divorce. The difference is that previously it could be revived; but now, once it has been condoned, it is absolute.

Co-Chairman Senator ROEBUCK: It is absolute?

Mr. WHITEHEAD: Yes.

Mr. McCLEAVE: On another topic, Mr. Whitehead has given us an excellent commentary on the law in England as it was until 1937 and the changes which were brought about in connection with the hotel type of cases. The Herbert law altered that situation, cutting down the number of what I would call, for want of a better expression, rigged chambermaid cases, as was so eloquently set forth this afternoon. Has there been an appreciable reduction of such cases in England?

Mr. WHITEHEAD: I do not think they have been entirely abolished but there has certainly been a reduction, because now it is done by way of desertion.

Mr. McCLEAVE: Are the Judges, and members of the English Bar to whom you have spoken, happy with the 1937 law?

Mr. WHITEHEAD: Everyone I know there thinks the 1937 law a great improvement on what went on before.

Mr. OTTO: I should like to ask Mr. Whitehead a question in connection with what I might call the processing of divorce cases. Would you say, Mr. Whitehead, that proceeding by way of adultery, apart from the question of collusion, is still the simplest way of going about it rather than going to the trouble of establishing cruelty, except possibly for separation?

Mr. WHITEHEAD: Yes, I would say so.

Co-Chairman Senator ROEBUCK: It is easier to prove adultery than cruelty.

Mr. WHITEHEAD: Yes.

Co-Chairman Senator ROEBUCK: What about desertion? That is easily proved?

Mr. WHITEHEAD: Yes. If the parties are agreed that they want to get rid of each other, at the end of three years they do not remember exactly how they did part. They may remember they had a row or several rows. Their recollections do not seem to be clear.

Mr. OTTO: It is possible collusion has been transferred from adultery to separation.

Mr. WHITEHEAD: I suppose there would be a certain amount of collusion as regards separation, because when there had to be desertion as well as adultery for divorce against the husband, the desertion might be collusive.

Co-Chairman Senator ROEBUCK: Have you further questions?

Mr. OTTO: I have one question in connection with the matter of the proctor. There is a Queen's Proctor under English law?

Mr. WHITEHEAD: Yes.

Mr. OTTO: In Ontario we have a Queen's Proctor in the person of the Attorney General. Has there been any appreciable lessening of collusion in the incidence of "hotel" cases?

Mr. WHITEHEAD: Certainly there has.

Co-Chairman Senator ROEBUCK: In Ontario the Attorney General has appointed someone to look into these matters as Queen's Proctor, but as far as I know we have never appointed anyone to discharge the function on a permanent basis as Queen's Proctor.

Mr. OTTO: The gentleman appointed has looked into three cases, I believe, or at any rate those are the ones that have been publicized. I am wondering how effective the Queen's Proctor has been with respect to collusion.

Mr. McCLEAVE: In Nova Scotia the judges of the Supreme Court decided to get rid of the proctor system.

Co-Chairman Senator ROEBUCK: Why?

Mr. McCLEAVE: They felt that to have a Queen's Proctor was simply to use a formula approach. Instead if there is any question or any doubt in their minds they will reserve judgement and ask the Attorney General's Department to intervene. In that sense it might be considered a substitute for the Queen's Proctor system. A number of years back they decided not to have the Queen's Proctor in court at all times for every case.

Co-Chairman Senator ROEBUCK: Do they have the Queen's Proctor in England for every case?

Mr. WHITEHEAD: No. The Queen's Proctor has some sort of deterrent effect because people are afraid that if they do anything stupid the Queen's Proctor will get after them.

Co-Chairman Senator ROEBUCK: Here, if an offence is committed we refer it to the Minister of Justice.

Ladies and gentlemen, have we probed the situation as far as you care to go? Do I take it that it is your wish to adjourn? If so, I should like to express, and so does my co-chairman, our appreciation of the brief that has been presented to us—the care with which it has been prepared and the skill shown in its presentation to us today. It has given us a considerable amount of information with regard to the English law which is very pertinent to the problem that is before us.

Mr. Whitehead, I should like to express the appreciation of all here of the effort that you have made on our behalf. Thank you.

Mr. WHITEHEAD: I appreciate that, Mr. Chairman, and I wish to thank you and the members of your committee for listening to me.

The committee adjourned.

APPENDIX "11"

Brief submitted to the Special Joint Committee of the Senate
and House of Commons on Divorce

by

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I was called to the Bar of England in 1921 and practised in London until 1935 in the Chancery Division of the High Court of Justice, dealing with equity matters. From 1927 onwards I began to take divorce cases also, because about that time the divorce work had increased so much that the regular Divorce Court Bar, who were a comparatively small group of specialists, could not deal with it all, and solicitors began briefing in divorce cases members of the Bar whose practice was normally in other Divisions of the Court. For this purpose I learned the practice in divorce cases, as it then was, and I was able to see at first hand the problems with which the Divorce Court Bar was having to deal. Paragraphs 1 to 8 inclusive and paragraph 15 of this Memorandum are based on my personal knowledge and experience. Paragraphs 9 to 14 inclusive are based partly on knowledge acquired from reading the Law Reports regularly as they come out and partly on a number of conversations which I had during visits to England with a lifelong friend, recently deceased, who sat for ten years or more after the 1939-45 War as "Divorce Commissioner" in London and in English Provincial cities, taking the place of a High Court Judge and hearing nothing but divorce cases, mostly defended ones.

1. Before 1857 no Court in England had power to grant divorces a vinculo matrimonii (enabling either spouse to marry again in the lifetime of the other). The Ecclesiastical Courts of the Church of England had power to grant decrees of (1) nullity (for impotence or consanguinity, or because the supposed marriage had been found to be bigamous), (2) divorce a mensa et thoro (now called judicial separation, which did not enable either spouse to marry again in the lifetime of the other), (3) restitution of conjugal rights, which was a decree enjoining a spouse who had deserted the other spouse to return to cohabitation, and (4) a decree of perpetual silence in a case of jactitation of marriage when anyone persistently and falsely alleged marriage with another. Divorce a vinculo matrimonii could be obtained only by private Act of Parliament. Such Acts were seldom or never passed at the instance of the wife. If the husband wanted one, he had first to bring an action for "criminal conversation" (i.e. adultery) in a Civil Court against the man with whom his wife had committed adultery; and the verdict in that action was treated as conclusive proof of the adultery, so that Parliament did not have to hear the evidence again. This procedure was wasteful of Parliamentary time, and the expense led to complaints that there was one law for the rich and another for the poor: so in 1857 Parliament passed the Matrimonial Causes Act of that year, the material parts of which are set out in Appendix 3 to the Proceedings of your Committee for June 28, 1966. This Act set up a civil Divorce Court for the first time, and transferred to it the matrimonial jurisdiction of the Ecclesiastical Courts. It also enabled the new Court to grant a divorce a vinculo matrimonii to a husband whose wife had committed adultery or to a wife whose husband had committed sodomy, bestiality, rape, incestuous adultery or bigamy with adultery, or who had committed adultery and had also been guilty of cruelty or of desertion without reasonable excuse for two years or upwards. Some years later, on a reorganization of the Courts in England, the Divorce Court became, as it still is, a part of the Admiralty, Probate and Divorce Division of the High Court of Justice. No further changes of substance took place until after the 1914-18 War.

2. At the end of the 1914-18 War women were given the Parliamentary vote in England, and shortly afterwards the law was changed to allow a wife to divorce her husband on proof of adultery only, without having to prove cruelty or desertion in addition. After this, no further changes of substance took place until the major reforms of 1937, hereinafter mentioned.

3. The position in England immediately before the reforms of 1937 was thus in most respects similar to the law as it is in Canada today. The principal points of difference were as follows:

(a) In England a wife could not divorce her husband on the ground of cruelty alone, but in one of the Canadian Provinces (Nova Scotia) she can do so.

(b) In England a decree of divorce was in the first instance only a decree nisi, which did not dissolve the marriage. The Petitioner could ask for a decree absolute which did dissolve the marriage and enabled the parties to marry again at the end of six months from the pronouncement of the decree nisi; but he or she was not bound to do so; and occasionally a Petitioner would refrain from applying for a decree absolute, probably in order to force a financial settlement. The Respondent could not, at that date, apply for a decree nisi to be made absolute: but this has since been altered, and now under Section 7 (2) of the Matrimonial Causes Act, 1965 (hereinafter called "the Act of 1965") the party against whom the decree nisi has been made may apply to have it made absolute if the other party has not made such an application within three months after he or she became entitled to do so.

(c) The King's Proctor, an official working under the direction of the Attorney-General, could intervene in any case where it was thought advisable to have the case argued on behalf of a public authority. (Originally a Proctor was a lawyer who performed the same duties in the Ecclesiastical courts as an attorney did in the Courts of Common Law or a solicitor in the Court of Chancery.) A Judge could (and he still can) ask for the assistance of counsel on behalf of the King's Proctor in any case in which he suspected collusion, or in an undefended case raising a new point of law which the Judge wished to have argued on both sides. The unsuccessful party, or any other person, could ask the King's Proctor to intervene on the ground that there had been collusion, or that for any other reason the whole of the facts had not been before the Court, but of course the King's Proctor used his own discretion as to whether or not to accede to such a request. This is still the rule in England, now under Section 6 of the Act of 1965. Though there is no Queen's Proctor in Canada, the Attorney-General of Quebec was, in the late Premier Duplessis' time, given power to intervene in nullity cases where collusion was suspected.

The law as to connivance, conduct conducing to adultery, condonation and collusion was in 1937 practically the same in England as it is now in Canada. Connivance is where the Petitioner has had the corrupt intention of promoting or encouraging either the initiation or the continuance of the Respondent's adultery. It is an absolute bar to divorce. Conduct conducing is where, in the opinion of the Court, the Petitioner has been guilty of such wilful neglect, or misconduct, as has conduced to the Respondent's adultery. It is a discretionary bar to divorce, the discretion being that of the Judge. Condonation is the conditional forgiveness of all such offences as are known to, or believed by, the offended spouse, so as to restore between the spouses the status quo ante. Collusion is where the initiation of a divorce petition is procured, or its conduct provided for, by agreement or bargain, express or implied, between the parties or their agents. It was formerly an absolute bar to divorce in England, but since 1963 has been only a discretionary bar; see paragraph 13 below. There has also been a change in the English law as to condonation; see paragraph 12 below.

4. The experience of the Courts in England between the two Wars revealed certain weaknesses in the law of divorce as it then was. By far the greatest difficulty arose from undefended divorces on the ground of the husband's

adultery. The change in the law which made this possible coincided with the break-up of many hasty war-time marriages and with the general relaxation of morals which had begun during the 1914-18 War and continued afterwards. Since neither desertion nor cruelty was a ground for divorce, many people whose marriages had broken up on one or other of these grounds were tempted to concoct evidence of adultery which would enable them to get a divorce. Among many circles of the upper and middle classes it came to be considered that when neither party wished to live with the other again the husband ought, at the wife's request, to provide her with evidence of his adultery which would enable her to obtain a divorce against him, and that it would be uncharitable and ungentlemanly for him to refuse to do so. A custom grew up by which the husband wrote to the wife a letter saying:

"Dear—,

I am given to understand that you desire your freedom. I enclose an hotel bill." or words to that effect. The wife's solicitors then made enquiries at the hotel from which the bill had come; and at the trial the desk clerk from the hotel produced the hotel register, showing that the husband had occupied a room with a woman, signing the register as husband and wife, and a chambermaid described how she had taken early morning tea to the room and found them in bed together, or one of them in bed and the other partly dressed. This was accepted as sufficient evidence of adultery. From time to time there was speculation as to whether in a particular case adultery had or had not really taken place; but it seems certain that it usually had, because otherwise the woman whom the husband had taken to the hotel would have been in a position to blackmail him by threatening to disclose the true facts to the King's Proctor and get the divorce decree rescinded before it was made absolute. At one time a question was faintly suggested as to whether or not adultery which had been committed simply to form the foundation for a divorce petition, and for no other purpose, was really within the meaning of the Act: but in the case of *Woolf v. Woolf* L.R. 1931, p. 134 one of the Judges in the Court of Appeal, without any dissent from his colleagues, said that adultery must be treated as a ground for divorce, whatever the motive for committing it might have been. In these circumstances it soon came to be considered among the generation who had grown up during and since the 1914-18 War that there was no real stigma on a man who had "given" his wife an "hotel divorce", though adultery on a wife's part was still considered disgraceful.

5. Many barristers who were practising in divorce cases at that period had serious misgivings about the system of hotel divorces. Certain hotels in Central London were so commonly resorted to for that purpose that one sometimes found, on arriving at the Court and enquiring if one's witness were present, that they were engaged before another Judge giving similar evidence in another case, and one was left anxiously hoping that the other case would be over before one needed the witnesses for one's own. Further, some floor waiters and chambermaids were giving evidence as mentioned above so frequently that one doubted whether or not they really were sure that the woman whom they had seen in bed on one occasion only, several months before, was not the Petitioner, whom they had seen for the first time in Court that day. I remember one of the regular practitioners in the Court telling me (after he had used the same hotel witnesses in three different cases on the same day) that he felt fairly sure that if he and his wife ever wanted to get divorced they could go and spend a night together at that hotel, and that when the case came up for trial, three or four months later, some hotel witness would cheerfully swear that the woman who had been at the hotel with him was not the Petitioner (his wife). The Judges must, of course, have been as well able as anybody to see what was going on; and Lord Merivale, the President of the Admiralty, Probate and Divorce Division, a Judge of

great experience, who commanded universal respect, tried for some time to insist that the name of the woman who had gone to the hotel with the husband should be supplied to the Court, presumably so that the King's Proctor could make enquiries, if thought desirable. As early as 1928, in the case of *Aylward v. Aylward*, 44 T.L.R. 456, he refused a decree in an "hotel adultery" case because he was not satisfied that adultery had been committed, at any rate with the woman who had been at the hotel; and he expressed himself in very strong terms about the whole "hotel adultery" system. Eventually he refused a divorce in a case (*Woolf v. Woolf*, cited above) where the husband, who was quite as anxious for a divorce as his wife, had spent two nights at an hotel with a woman whose name he refused to give, and Lord Merrivale, suspecting that the case was collusive, was not satisfied that the woman who had been at the hotel had not been a near relative of the husband or someone else with whom he was unlikely to have committed adultery (see page 146 of the Report). The Court of Appeal would not support Lord Merrivale, and said that when a man and a woman who were not husband and wife shared an hotel room the usual inference must be drawn. (This decision was followed in Nova Scotia some years later in *Durrant v. Durrant* (1944) 3 D. L. R. 30, in which the appellate Court reversed the decision of the trial judge, who had said that he suspected collusion and doubted if adultery had really been committed.)

During the 1930's, Mr. A. P. Herbert, then Independent Member of Parliament for Oxford University, who was a well known writer, determined to try to bring about reforms, and he wrote a satirical novel "Holy Deadlock" about an imaginary hotel divorce, which revealed the abuses of the system, of course with some exaggeration, but not very much. This book had a wide circulation and opened the eyes of the general public to what was going on. With its help, and after much consultation with his colleagues in the House of Commons, he was able to bring in and pilot through Parliament the Matrimonial Causes Act, 1937, which extended the grounds both for nullity and for divorce, but prevented divorce petitions from being presented during the first three years of the marriage, unless special leave was given on account of exceptional hardship on the Petitioner or exceptional depravity on the part of the Respondent. It is significant that one of the reasons for passing the Act, stated in the Preamble, was "the restoration of due respect for the law." In view of the terms of the Order of Reference to your Committee, this memorandum deals only with the grounds for divorce. The new ones added by the Act of 1937 were:

(a) Desertion without cause for three years next before the presentation of the divorce petition.

(b) Cruelty.

(c) Incurable insanity.

(d) Presumption of death of the other spouse. This is not strictly a case of divorce, but rather of dissolution of marriage.

7. There is no statutory definition of desertion, and it has been described as not so much a withdrawal from a place as a withdrawal from a state of things. The (British) Royal Commission on Marriage and Divorce (Cmd. 9678, H.M.S.O. London, 1956) suggested the following definition, which seems as good as any:

"A separation of the spouses which is against the will of one spouse and which is accompanied by an intention on the part of the other spouse without just cause permanently to end the married life together."

The Respondent can defend the petition by showing that he or she had valid cause for leaving, which need not necessarily be sufficient to amount to legal cruelty. In some cases it may even be held that the spouse who has remained in the matrimonial home is the deserter, because he or she deliberately drove the other out. The high-water-mark of these cases is probably *Winnan v. Winnan* L.R. 1949, P. 174, where the wife was found guilty of constructive desertion

because she insisted (contrary to her husband's wishes) in keeping a large number of cats in the house, and told her husband that she preferred the cats to him. Now, under Section 1 (2) of the Act of 1965, any one period of not more than three months during which the parties resumed cohabitation with a view to reconciliation is not to be considered as interrupting the three years' desertion.

If the spouses originally parted by mutual consent, without any express agreement as to the duration of the separation, either of them may at any time put an end to the agreement to separate, and the other spouse will then be treated as being in desertion from that time onwards, so that the three years begin to run from the same time. It is otherwise if the separation was under the terms of a valid separation deed, the terms of which have always been observed. The deserting spouse may repent and offer to return to cohabitation during the three-year period; and, if the Court considers that the repentance is sincere, it is a good defence.

8. Cruelty is a ground for divorce which in practice is apt to present many difficulties to the Court trying the Petition. Mental cruelty is included: and even in a country as comparatively homogeneous as England there are different sections of society whose ideas as to what conduct is tolerable and what is not differ considerably. Before 1937, when cruelty without adultery was a ground only for judicial separation, a wife who knew that even if she proved cruelty against her husband she would have to remain married to him was not likely to start proceedings unless his conduct was really hurting her beyond endurance, or at any rate she thought that it was: but it is not at all the same thing when she can hope to get a divorce which will leave her free to marry somebody else, and perhaps she already has in view the man whom she would like to have as her next husband. In such cases there may often be an element similar to what in personal injury cases is known as "compensationitis". In England, in cases of cruelty, the Petitioner has to show injury or apprehended injury to his or her health from the Respondent's conduct; but where, as is usually the case, the injury takes the form only of a nervous condition which obviously must be making the Petitioner very difficult to live with, there may often be a doubt as to whether the Petitioner's nervous condition is due to the Respondent's conduct or the Respondent's conduct is due to the Petitioner's nervous condition. In some cases, and particularly in defended cases where each party is asking for a divorce against the other, they are apt to drag out a long series of old unhappy memories which they hope will have a cumulative effect, beginning with the time the husband forgot the wife's birthday or the time she put him to shame by having one drink too many at his boss' cocktail party, and continuing with many other items of no greater importance, until at the end of the day even an experienced Judge may find it hard to decide whether this is a case of cruelty, which is a ground for divorce, or merely a case of incompatibility of temperament, which is not a ground for any relief at all. Until recent years it had been regarded as settled that cruelty must be shown to have been "aimed at", or intended to hurt, the other spouse or the children of the marriage; but in the cases of *Gollins v. Gollins* L.R. 1964 A.C. 644 and *Williams v. Williams* L.R. 1964 A.C. 698 the House of Lords held that if the conduct complained of was grave and weighty, and if the injury or apprehended injury to the Petitioner's health was shown, there was no need to show an intention to injure or a guilty mind. This is a different approach to the question from that of Canadian law relating to cruelty as a ground for judicial separation. In Quebec, Articles 189 and 190 of the Civil Code do not require injury or apprehended injury to health as an element of cruelty, nor do the relevant statutes of Saskatchewan and Alberta.

9. Incurable unsoundness of mind was made a ground for divorce in England by the Act of 1937, if the patient had been continuously under care and treatment for a period of at least five years immediately preceding the presenta-

tion of the divorce petition. The period of five years is not considered to be broken if the patient is lawfully on leave of absence from the hospital on trial. By an amendment made by the Divorce (Insanity and Desertion) Act, 1958 (now superseded by section 1 (3) of the Act of 1965) any interruption of the period of care and treatment for 28 days or less is to be disregarded for the purpose of determining whether or not such period has been continuous.

10. Presumption of death of the other spouse was made a ground for dissolving the marriage under the Act of 1937 (now superseded by Section 14 of the Act of 1965). A petition has to be presented to the Court to have it presumed that the other spouse is dead and to have the marriage dissolved. If no other evidence of the death can be found, the fact that for a period of seven years or upwards the other party to the marriage has been continually absent from the Petitioner, and the Petitioner has no reason to believe that the other party has been living within that time is evidence that he or she is dead until the contrary is proved. Absence under a separation agreement does not bar the Petition, though continued absence from the Petitioner where the parties have bound themselves to live apart proves very little. There are Rules of Court which prescribe the steps which the Petitioner must take to try to trace the missing spouse. The decree is in the first instance only a decree nisi, as in a divorce case; and if, after the decree nisi but before it has been made absolute the other party is found to be alive an intervention can be made and the decree will be rescinded.

11. An essential element in the 1937 reforms was the provision that no divorce proceedings could be taken within the first three years of the marriage without special leave. The ground for this was that it was felt that the possibility of getting a divorce for a single act of adultery on the part of the husband was in many cases resulting in young people making insufficient effort to overcome the difficulties of adjustment which are to be expected at the beginning of married life, and in some cases was even leading them to enter on marriage without due consideration, in reliance on being able to get out of it again if they found that they were unsuited to each other. There was a relaxation of this rule during the 1939-45 War, but it was only temporary. The special leave required for presenting a petition in cases of exceptional hardship to the Petitioner or exceptional depravity on the part of the Respondent has to be obtained from a Judge. Applications for such leave are heard in Chambers, i.e. in private, and not in open Court, so that there is no body of reported cases to show exactly what qualifies as exceptional hardship or exceptional depravity: but such applications are not very numerous, and it is believed that many of them are rejected.

12. The law as to condonation in England was amended by the Matrimonial Causes Act, 1963, (now superseded by Section 42 (2) and (3) of the Act of 1965), which provided that adultery or cruelty should not be deemed to have been condoned by reason only of a continuation or resumption of cohabitation between the parties for one period not exceeding three months with a view to a reconciliation. This Act provided also that adultery which has been condoned should not be capable of being revived. Under the law as it was before 1963, a spouse's forgiveness of the other spouse's adultery was conditional on his not committing any further matrimonial offences; and, if he did commit any, (which might be cruelty or desertion as well as renewed adultery) the old cause of complaint was revived.

13. The law as to collusion in England was amended by the Act of 1963 (now superseded by Section 5 (2) of the Act of 1965) by a provision that on application made either before or after the presentation of a petition for divorce the Court might take into consideration any agreement or arrangement made or proposed to be made between the parties, and might give such directions in the matter as the Court thought fit. The object of this change was to relieve the

lawyers for the parties of the difficulty which was continually arising in knowing where to draw the line between a bona fide agreement for the care of the children of the marriage, or for financial provision for the family pending divorce proceedings, on the one hand and collusion on the other hand. Now if the Court approves the proposed agreement or arrangement it is freed from any taint of collusion. If the Court does not approve it, the parties can amend it, or abandon it and work out a new one. This change has apparently proved very beneficial in England; and in *Nash v. Nash* L.R. 1965 p. 266 a Judge who had heard in Chambers a number of applications for approval of such agreements adjourned them into Court for judgment (i.e. he gave judgment in public, so that his words could be reported) and said, in part

"A Collusive bargain is one which by its terms, express or implied, provides for the conduct of the suit in one respect or another. A survey of the cases which have developed and shaped the law as to collusion reveals that it is a concept of great range: within it will be found not only such morally offensive bargains as buying false evidence, buying off a defence believed to be good, bribing a reluctant wife to petition by the offer of generous provision after decree absolute, but also such morally inoffensive bargains as the making of reasonable arrangements for maintenance which include a term touching upon the conduct of the suit. Collusion is no longer an absolute bar to relief. Collusion which contains no genuine offence will no longer debar the Court from proceeding to decree: but collusion which is a genuine offence remains objectionable, and, so long as it taints a suit, will be treated by the Court as an effective bar to relief."

Then, after describing at some length the criteria by which the Court is guided in approving or disapproving such agreements, and dealing separately with each of the ten applications, the Judge concluded as follows:

"It will be apparent from the foregoing that since the enactment of the Matrimonial Causes Act, 1963, it is no longer appropriate to treat all collusion as mischievous or all who negotiate collusive bargains as mischief makers. A collusive bargain, which in the ordinary meaning of the word is corrupt, remains an offence legally and morally, e.g. the procurement of a decree upon a false case or improper pressure by financial bribes or threats upon a spouse to bring a suit or abandon a defence: but a collusive bargain, which represents an honest negotiation between the parties, which is not intended to deceive the Court either by putting forward false evidence or suppressing or withdrawing a good defence and which takes its place in an agreement which is intended to make a reasonable provision for the parties according to its subject-matter, is a perfectly reputable transaction. There is no objection to solicitors and counsel negotiating such a bargain; their duty, in this context as in every other, is to apply their honest skill to the task in hand. If they do so and then place the results of their labour before the Court in a spirit of unreserved candour, they will have lived up to the honourable tradition of their profession in a changing world, and will have discharged their duty to their clients, the Court and the public—the public whose overriding interest is that the institution of marriage should not be undermined by an unworthy and disreputable market in its dissolution."

14. One further change in the divorce law in England has been made since 1937, viz. that now the evidence of a husband or wife is admissible in any proceedings to prove that marital intercourse did or did not take place between them during any period: but a husband or wife is not compellable in any proceedings to give evidence of the matters aforesaid. This rule is now embodied in Section 43 (1) of the Act of 1965. For many years such evidence by either spouse had been excluded by a ruling of the House of Lords in *Russell v. Russell* L.R. 1924 A.C. 687.

15. This memorandum is submitted in the hope that a comparison of the law of England before and after 1937 with the present law in Canada may be of assistance to your Committee. The only suggestion which I venture to submit is

that your Committee might feel able to recommend some relaxation of the rule about collusion in divorce cases, perhaps on lines similar to those of the English legislation of 1963 (now superseded by Section 5 (2) of the Act of 1965) as described in paragraph 13 above. This might present constitutional difficulties in Quebec and Newfoundland, but in the Provinces which have divorce courts it probably would be of considerable assistance to lawyers and their clients who have to deal with the incidental arrangements rendered necessary by divorce proceedings.

Montreal, October 1966.

APPENDIX "12"

BRIEF

to

THE SPECIAL JOINT COMMITTEE OF THE SENATE
AND HOUSE OF COMMONS ON
DIVORCE

by

Canadian Federation of University Women
29 Edgedale Rd., St. Catharines, Ont.

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

1. Law should reflect the collective sense of justice of the society to which it pertains. In this case the divorce law of Canada, being established in most provinces in 1857 (see *Proceedings* of session one of Joint Committee page 11) is obviously out of date since religious thought and sexual mores are very different today from those of Victorian England.

2. Changes including as grounds for divorce the grounds adopted in England in 1937 would appear to be generally acceptable to many organizations and many sections of society.

3. These changes constitute a minimum. Other grounds for divorce are now being suggested and would seem to warrant study by the Joint Committee.

4. The reform of laws connected with divorce, such as domicile, should also be considered, especially with a view to establishing before the law complete equality of men and women.

1. The Canadian Federation of University Women has a membership of more than 11,000, all of whom are graduates of accredited universities throughout the world now residing in Canada. The Head Office of the Federation is at 29 Edgedale Road, St. Catharines, Ontario. The President is Mrs. M. J. Sabia, and the Executive Secretary Mrs. R.T. Shannon. The Federation is organized on a local, provincial and national basis, with clubs and executive members in all the provinces.

2. The objectives and nature of the Canadian Federation of University Women are outlined in article 2, *Purpose*, of our constitution. This constitution is currently being revised, but the objectives and nature of the group will not be changed. Our purpose is to assist in developing a sound concept of educational values; to arouse and sustain an intelligent interest in public affairs; to encourage an active participation in such affairs by qualified women; to provide an opportunity for effective action; to guard and improve the economic, legal, and professional status of Canadian women; and to facilitate understanding and cooperation among university women, nationally and internationally, irrespective of race, religion or political opinions. The Canadian Federation of University Women actively participates in the work of the International Federation of University Women.

3. The Canadian Federation of University Women is organized in such a way that subjects which come up for discussion at our meetings, particularly at the regional, provincial or national level, have already been thoroughly discussed at the local level by the general membership. At the national level, we have nine standing committees and nine special committees. One of our standing committees studies the status of women and one of our special committees studies legislation affecting women. Our general meeting for all members is held every three years in various parts of Canada. The last one was held in Winnipeg in

August 1964, and our next will be held in Vancouver in 1967. Each year between general meetings (called Triennial Conferences) meetings of the Council, consisting of the executive and delegates from all member clubs, are held. The organizational structure ensures that resolutions presented to a general meeting have been studied by many people for some length of time in order that a sound discussion and an informed vote may result.

4. The proceedings of the first two sessions of the Joint Committee of the Senate and House of Commons on divorce refer to many of the facts and reasons which have made members of the Canadian Federation of University Women study the question of change in the divorce laws. On page 119 of the *Proceedings* of the second session of the Joint Committee Dr. P. M. Ollivier refers to a new approach to the question of divorce which is discussed in an article by Mr. Douglas F. Fitch of Calgary in the *Canadian Bar Journal* for April 1966. This article called "As grounds for divorce, let's abolish matrimonial offences" introduces the idea of the "breakdown of marriage" in terms which seem valid in today's society. A similar idea is referred to very briefly in an article on the Catholic Church by June Callwood in *Maclean's* for August 20th 1966 page 34. The reference is to the "sixth century device for dissolving marriages by declaring them spiritually dead". It is not suggested that this concept is accepted by many people but that it is mentioned at all in a "popular" article is significant.

5. The Catholic position on divorce remains unaltered, but this does not necessarily mean that the Catholic church would oppose changes in the divorce law, if such were deemed necessary by the pluralistic society in which we all live. Traditionally all the churches have opposed changes in the divorce laws but there are now signs that they are reconsidering. The recent changes in the divorce laws in New York State were apparently not opposed by the churches. The General Council of the United Church this year passed a recommendation for reform of the divorce law which we believe will be presented directly to this Joint Committee. The report of the committee of the Archbishop of Canterbury reveals a similar tolerant attitude. (Schedule A).

6. During the last few years many organizations and societies have concerned themselves with the social and ethical problems which arise from the present divorce laws. The Canadian Bar Association, so closely linked professionally with these problems, at its last annual meeting passed recommendation advocating changes similar to the ones we advocate below.

7. At the Triennial conference in Winnipeg in 1964, the following resolution was passed:

Laws pertaining to the Dissolution of Marriage

WHEREAS the present sole grounds for divorce in Canada (except in Nova Scotia) is adultery or gross sexual offence;

AND WHEREAS this exclusive emphasis on the sexual relationship is degrading to the marital status;

AND WHEREAS the law of the common-law provinces of Canada relating to divorce is either, with minor amendments, the English Divorce and Matrimonial Causes Act of 1857 or legislation similar thereto, and whereas no extension of the grounds for divorce in the common-law provinces has taken place since 1927, when the courts were empowered to grant a decree of divorce to a wife on the grounds of her husband's adultery only, and whereas the law of England relating to divorce has been amended since 1937 to extend grounds for divorce;

AND WHEREAS the laws of Canada dealing with the dissolution of marriage, being outdated and inadequate to our present society, lead to their abuse and to the commission of fraud and perjury in our courts;

AND WHEREAS it is now possible to obtain a decree of dissolution of marriage at any time after marriage is solemnized and whether or not the parties have made any effort to prevent their marriage breaking down;

THEREFORE BE IT RESOLVED that the Canadian Federation of University Women request the Government of Canada:

1. to grant to the courts in such provinces and territories as desire it, power to dissolve marriages upon the following grounds (in addition to the present grounds), these being the grounds adopted in England in 1937 and upheld by the British Commission on Marriage and Divorce 1951-1955:

- (a) desertion without cause for at least three years
- (b) insanity, not cured after specific treatment for five years
- (c) cruelty

2. to restrict the bringing of actions for divorce during the first three years after solemnization of a marriage to cases where the plaintiff has suffered exceptional hardship as a result of the actions of the intended defendant spouse.

This resolution in its final form was presented by the University Women's Club of Victoria, B.C., which first brought the matter up for discussion at the Council meeting in Toronto in 1963. Several other local clubs, including the University Women's Club of Ottawa, presented similar data or resolutions, but agreement was finally reached on the one presented by Victoria. Some of the material supplied by the Victoria Club to the Federation can be produced if necessary.

8. This resolution is very similar to Senator Arthur Roebuck's bill. It is not radical. It is not our intention that a live marriage be dissolved but it is our intention that "we rationalize, not liberalize, our divorce law" (see page 120 *Proceedings* of second session of Joint Committee). Moreover it is urged that these reforms be accompanied by a real effort by all parties in society to ensure that the interests of any children be regarded as primary at the dissolution of a marriage. (Present laws tend to protect the interests of the so-called "innocent party" rather than the interests of children.) These interests include not only economic and physical needs of children but their emotional well-being, including the right of the child to a parent relatively free from unnecessary emotional stress.

9. In the *Proceedings* of session one of the Joint Committee page 12, Mr. E. Russell Hopkins says "the divorce law of Canada, like Canada itself, is in the nature of a mosaic". This is fascinating historically but frustrating in many ways to a society which daily becomes more heterogeneous and mobile. The jurisdiction for divorce is based on the provincial domicile of the husband, which because of present mobility may be in legal doubt. Therefore it is urged that a review of the law of domicile also be undertaken. The right of a married woman to her own domicile, and the granting to the courts of the jurisdiction to hear divorce cases based on the domicile of the wife, would relieve many present inconsistencies in the law of divorce. The question of domicile is still being studied by our Standing Committee on the Status of Women, and no firm or detailed recommendation has yet been made.

10. "The morality of a by-gone age still rules our people today". (Canadian Bar Journal Vol. 9, No. 4, August 1966 page 272). A society disturbed by an apparent increase in the social problems retains a law which contributes to many of those problems. Let us extend our area of human concern to eliminate the anachronism of our divorce law.

October, 1966.

JOINT COMMITTEE

Schedule (A)

Canadian Catholic Conference
Conférence Catholique Canadienne

90 Parent Avenue,
Ottawa 2, Canada,
Telephone: 236-9461

Gordon George, S.J.,
General Secretary.

OTTAWA, August 26, 1966.

Mrs. H.A. Elliott,
Canadian Federation of University Women,
44 Strathcona Crescent,
Kingston, Ontario.

Dear Mrs. Elliott:

Thank you for your enquiry of August 23 about submissions to the Joint Committee on Divorce.

The C.C.C. has not at this time made any decision about presenting a brief and so there is not very much I can tell you.

The Catholic position on divorce (With a right to re-marry) remains unaltered. There seems to be no possibility of a change.

This is not, of course, the same question as that relating to the divorce laws themselves. It does not necessarily follow from the Catholic Church's opposition to divorce as such that a brief from the Bishops of Canada would oppose changes in the divorce law.

I am sorry that I cannot be more helpful, but to say more would be to give you the benefit of a hazardous guess.

Sincerely yours,

Gordon George, s.j.
General Secretary.

The C.C.C. is the Association of the Roman Catholic Cardinals, Archbishops and Bishops of Canada.

Schedule (B)

(Editorial from *The Globe and Mail*, Toronto, of August 2nd 1966.

A MORE TOLERANT ATMOSPHERE
FOR DIVORCE REFORM

A report from London that the Church of England may alter its attitude toward the reform of secular law on divorce is regarded as a favorable sign by those who hope for an early change in Canada's divorce laws.

The shift in Anglican thinking, as expressed in a study prepared by a group of clergy and laymen for the Archbishop of Canterbury, follows by three months the U.S. Roman Catholic Church's apparent decision not to deplore a law drastically widening the grounds for divorce in New York State. Neither church altered its stand that marriage as a sacrament is indissoluble; but their willingness to allow secular divorce on reasonable grounds reflects a new and laudable tolerance.

Will these churches now display the same tolerance in Canada? Senator Arthur Roebuck, who is chairman of the joint Senate-Commons Committee on Divorce, believes at least one of them will. Senator Roebuck's own bill on divorce reform, one of many private bills before his committee, proposes three grounds for divorce: desertion of at least three years, adultery and cruelty. Last April, he confided that his bill had met no opposition from the larger of the two traditionally hostile denominations, the Roman Catholics. This in itself gives hope that many politicians will now feel free to approach this question in its only proper political context: as a social problem of a pluralistic society.

The Church of England study group suggests far more liberal grounds for divorce than does Senator Roebuck. In effect, it accepts almost any grounds for divorce by recognizing only one comprehensive cause: the "breakdown" of marriage. Rather than proceeding from some narrow legalistic infraction such as adultery, divorce would be granted on a court's conclusion that, for any reason at all, a marriage had irreparably failed. Quibbling over partners' relative guilt or innocence would become irrelevant; the only pertinent fact in granting divorce would be the observation that happiness together for two particular people was impossible.

This is a bold and generous concept. Nevertheless, it may entail practical drawbacks.

One immediate problem which the proposal presents is the possibility that divorce litigation will become more complex. The court applying the standard of a "breakdown" in marriage would resemble, say its advocates, a "coroner's inquest—a judicial inquiry—pleadings would need to be considerably expanded." Many divorces are already held up because the courts are clogged and proceedings are cumbersome.

Whatever its difficulties, the Church of England proposal gives Senator Roebuck and his committee one more reason to press the Government to allow divorce a fair and full debate directed to radical reform. The churches seem either to demand reform or decline to oppose it. It is time for Canadian politicians, who often like to lead public opinion by following it, to prove they are no less enlightened.

Schedule (C)

Background Material: Status of Women Committee Study Paper on the Domicile of Married Women.

1. *Domicile and the Individual*

Domicile is the true and permanent home of a person from which he has no present intention of removing and to which he intends to return whenever he is away. The place of domicile determines the civil status of the individual and thus many of his personal rights and obligations. Every child is born with a domicile of origin that is dependent on the domicile of the person upon whom it was then legally dependent. Any person may change his or her domicile simply by choosing another—that is, by deciding that another place will be “home”.

2. *Domicile of the Married Woman in Canada*

There is no such thing as domicile at large in Canada. One is domiciled in a particular province. The same is true of other countries where there are separate political jurisdictions as for example in the United States, Australia and the United Kingdom.

In Canada, as elsewhere, single men and women and married men and widows all have the right to establish an independent domicile at will. However, in Canada, on marriage a woman loses her domicile and acquires that of her husband. This fact is a serious impediment in the rights of the married woman since in our legal system the place of domicile determines the jurisdiction of the courts in matrimonial matters and the law of the place of domicile governs the personal status of the individual.

Except in the provinces of Alberta and Quebec, in Canada, the domicile of the wife follows that of the husband as long as a legal marriage subsists. This means that a wife retains her husband's domicile even in the case of a judicial separation or desertion until the dissolution of the marriage. The effect of this rule is to deprive the separated or deserted woman of a domicile if her husband leaves the province in which she resides. In Alberta and Quebec the domicile of the wife follows that of the husband except in the case of a judicial separation, at which time the wife may again establish her independent domicile.

The woman deserted by her husband cannot acquire a separate domicile from his to begin divorce proceedings, even though she was judicially separated from him. (except Alberta and Quebec) However, under the Divorce Jurisdiction Act, RSC 1952, Chapter 84, where a married woman has been deserted by her husband and has been living apart from him for a period of two years and more, she may start divorce proceedings in the province in which they were domiciled before her desertion. This Act doesn't give that wife the right to choose her own domicile—a right enjoyed by all other adult persons. Again, where a husband and wife are separated by mutual consent and the husband may be perfectly willing for his wife to have an independent domicile under the Common Law rules governing domicile she may not have one. The origin of this rule lies in the years when a woman on marriage ceased to be a person in law.

3. *Domicile of the Married Woman in Other Countries*

Domicile of the married woman is the subject matter of a chapter in the United Nations' publication *Legal Status of Married Women* (1958). Three general categories of domicile for married women have been established.

- (a) The domicile of the wife follows that of the husband. This is the rule in Canada except in Alberta and Quebec. Other countries using this rule include Bolivia, China, Egypt, India, Lebanon, New Zealand, Saudi Arabia and the United Kingdom.
- (b) The domicile of the wife follows that of the husband except in certain specified cases. This is the rule in Alberta and Quebec. Other coun-

tries using this rule include Argentina, Belgium, Brazil, Chile, Cuba, Ecuador, France, Greece, Haiti, India (legislation covering Christians), Iran, Italy, Pakistan, Peru, Philippines, Switzerland, Italy, Thailand, Turkey, U.S.A., Uruguay and Venezuela.

- (c) The domicile of the wife is independent of that of the husband. Marriage does not affect the wife's domicile and therefore on marriage the wife neither loses her own domicile nor acquires that of her husband. Where the wife has the same domicile as her husband, as is the case in the great majority of marriages, the wife is not considered as having taken her husband's domicile but as having the same domicile as he. Examples of countries using this rule are Bulgaria, Czechoslovakia, East Germany, West Germany, Hungary, Japan, Netherlands, Norway, Poland, Sweden and Yugoslavia.

After completing a survey on the rules governing the domicile of married women throughout the world and their effect on women, the Economic and Social Council of the United Nations passed a resolution urging governments to take all necessary measures to ensure the right of a married woman to an independent domicile. The full text of the resolution is included in Appendix A.

4. Domicile of the Married Woman in the United States

There is a great variation in the rules governing the domicile of the married woman in the United States. Four states recognize a woman's right to acquire her own domicile for all purposes without limitation, although 42 states and the District of Columbia permit a married woman to acquire an independent domicile for all purposes if she is living apart from her husband for cause; of these only 18 permit a married woman to acquire an independent domicile if she is separated from her husband by mutual consent or if her husband acquiesces to the separation. All states permit a married woman to establish a separate domicile for purposes of instituting divorce proceedings.

In a report issued in October 1963, the Committee on Civil and Political Rights of the President's Commission on the Status of Women reported that the differing rules governing the domicile of married women in the various states created confusion and hardship. It declared the dependent domicile of the married woman to be inconsistent with the concept of equality of men and women and to the idea of a marriage partnership. It recommended that the question of the domicile of married women be studied with a view to liberalizing the existing rules governing it. Since that Report was received, many State Commissions on the Status of Women have made recommendations concerning an independent domicile for married women. (*Report of the Committee on Civil and Political Rights, The President's Commission on the Status of Women, October 1963, pp. 19-21 and 27.*)

5. Recent Developments in Canada

In Canada in 1961 the Conference of Commissioners on Uniformity of Legislation in Canada (43rd Annual Meeting) approved a model statute on the law of domicile. This draft statute is intended to supersede the common law rules for determining domicile and does provide for the independent domicile of the married woman.

6. Recommendation of the Status of Women Committee

The Committee on the Status of Women recommends that member clubs acquaint themselves with the rules governing domicile in Canada with a view to requesting their provincial governments to pass legislation giving to married women the same rights as to domicile as now are enjoyed by other adult persons.

APPENDIX A

Resolution adopted by the 890th plenary meeting, 3 August, 1955, of the Economic and Social Council, *Concerning the Domicile of Married Women*.
The Economic and Social Council,

Nothing that in the legal systems of many countries the domicile of the wife follows that of her husband; that in these countries the wife, upon marriage, loses her original domicile and acquires that of her husband which she retains until the dissolution of the marriage, even if residing separately,

Believing that such legal systems are incompatible with the principle of equality of spouses during marriage proclaimed in the Universal Declaration of Human Rights, and noting that their application results in particular hardships for married women in countries where domicile determines the jurisdiction of courts in matrimonial matters and where the law of the place of domicile governs the personal status of the individual,

Recommends that Governments take all necessary measures to ensure the right of a married woman to an independent domicile.

APPENDIX B

Draft Model Act to Reform and Codify the Law of Domicile

(Proceedings of the 43rd Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada, Appendix M, p. 139)

1. This Act may be cited as the Domicile Act.
2. This Act replaces the rules of the common law for determining the domicile of a person.
3. In this Act, unless the context otherwise requires, "mentally incompetent person" means...
4. (1) Every person has a domicile.
- (2) No person has more than one domicile at the same time.
- (3) The domicile of a person shall be determined under the law of the province.
- (4) The domicile of a person continues until he acquires another domicile.
5. (1) Subject to section 6, a person acquires and has a domicile in the state and in the subdivision thereof in which he has his principal home and in which he intends to reside indefinitely.
- (2) Unless a contrary intention appears,
 - (a) a person shall be presumed to intend to reside indefinitely in the state and subdivision where his principal home is situate; and
 - (b) a person shall be presumed to have his principal home in the state and subdivision where the principal home of his spouse and children (if any) is situate.
- (3) Subsection (2) does not apply to a person entitled to diplomatic immunity or in the military, naval or air force of any country or in the service of any international organization.
6. The person or authority in charge of a mentally incompetent person may change the domicile of the mentally incompetent person with the approval of a court of competent jurisdiction in the state and subdivision thereof in which the mentally incompetent person is resident.
7. This Act comes into force on a day to be fixed by the Lieutenant-Governor by his proclamation.

APPENDIX "13"

BRIEF

To the Special Joint Committee of the Senate and
House of Commons on Divorce

by

Alfred J. Wickens, Q.C.

Barrister, Solicitor, Notary Public (retired), Qualicum Beach, B.C.

BRIEF RE: MARRIAGE AND DIVORCE

The honourable Joint Chairmen and members of the Joint Committee of the Senate and House of Commons:

I wish to express my appreciation of the Joint Chairman Senator Roebuck furnishing me with the requisite information as to the Committee and giving me the opportunity to file this brief.

The memorandum asks me what organization or group I represent. I speak for no organization. The group on whose behalf I speak is that very large group of unfortunate people who while their marriages are a total failure have at present no remedy at law. I have no private fish to fry in presenting this brief as I am no longer practicing, having retired almost 9 years ago.

I am indebted to my long time friend and one time tennis partner Mr. Russell Hopkins and to Dr. P. M. Ollivier, who in their appearance before the Committee covered all the historic ground, the contemplation of which was occasioning me a great deal of concern.

The situation in Canada is as follows:—the Province determines who may marry, who may perform marriage ceremonies, and what constitutes a valid ceremony. After the ceremony the authority to deal with the relationship belongs to the Dominion.

The only court having jurisdiction to deal with a marriage in Canada is that of the husband's domicile or the domicile of the husband in which he deserted the wife. The only exception to this is an action to declare the marriage null and void, which may be brought (a) where the marriage was performed (b) in the domicile.

There are three forms of judgments disposing of a marriage:

1. Decree of divorce
2. Decree of nullity
3. Decree of annulment

The only grounds upon which marriages may be disposed of under those headings are as follows:

<i>Divorce</i>	<i>Nullity</i>	<i>Annulment</i>
Adultery, including rape and incest	Insanity	Lack of parental or other consent where required
Sodomy	Bigamy	Incapacity due to drunken- ness or drugs
Bestiality		Duress Impotence

N.B. Where annulment of a marriage is considered, proceedings must be brought promptly by the one whose consent was required as soon as the marriage is known of, by the one who temporarily lacked the capacity or was under duress as soon as lack of capacity is remedied or the duress removed.

Where a marriage is void because of the insanity of either party at the time of the performance of the ceremony a return to sanity after the ceremony does not validate the marriage no matter what the conduct of the party.

One of the members of your committee suggested that a marriage should be dissolved when it has become a complete failure, indicating that in his view this is even more important than adultery. With this view I agree; but unfortunately such a bland ground would lead to a multiplicity of variations in the decisions of the Courts because it would be a matter of individual opinion of the presiding judge as to whether or not a marriage had failed, and unless one specifies in endless detail facts upon which a marriage may legally be assumed to have failed little would be accomplished. In all seriousness I suggest under the three headings above given the following additional grounds for legal remedy:

DIVORCE:

1. Attempted
 - (a) Sodomy
 - (b) Bestiality
 - (c) Adultery
 - (d) Rape
 - (e) Incest

While a divorce can be obtained on the grounds of (a) (b) (c) (d) and (e), if achieved, should a wife find her husband attempting any one of the offences set out and interfere before the actual commencement of the implementation of the act, she has no remedy at law because the offence was never actually committed. Should she wait until the actual commencement of the implementation of the offence and then interfere, although the offence has been committed she still has no remedy because having had the opportunity to prevent it and failing to take advantage of that opportunity she is held by such failure to have connived at it and where there is connivance there is no remedy. This situation I am sure will shock the consciences of your Committee, but it still is the law.

2. Cruelty, mental or physical (which would include cruelty to the children, and humiliating spouse by conduct in company)
3. Neglect, including
 - (a) denial of companionship, and
 - (b) denial of intercourse
4. Deadly hostility (could be called incompatibility, although that is a bit wide) (See Cranmer Commission report page 8)
5. Refusal to beget or to bear children
6. Frigidness
7. Sterility
8. Conviction of felony
9. Moral degeneracy (including indecent exposure, indecent assault and contributing to juvenile delinquency)
10. Perversion
11. Desertion (which would include refusal or failure to support wife)
12. Homosexual practices
13. Lesbian practices
14. Self abuse inducing impotence
15. Impotence developed after the marriage
16. Post marital insanity

N.B.—In all seriousness I ask you gentlemen of the Committee which of you would desire a continuation of the marriage bonds affecting one of your children involved in any of the listed situations.

In some forty odd years of practice in the matrimonial courts of Canada I have found most or all of the items so listed, as having been the initial cause which induced the indulging in the conduct upon which the divorce action was founded, that conduct being a consequence of the situation which actually wrecked the marriage instead of itself being the wrecker of the marriage.

NULLITY

No change

ANNULMENT

Misrepresentation either by false statements or withholding facts, inducing entering into marriage. I list some items a disclosure of which normally would prevent a marriage:

- heredity
- insanity in the family
- alcoholism
- drug addiction
- a career of crime
- sexual perversion
- outright bad character
- poor health (such as consumption or cancer or a haemophiliac)
- racial origin
- religious belief or lack of it
- political convictions such as communism
- misrepresenting age
- misrepresenting financial status, or prospects
- previous infection with venereal disease
- present infection with venereal disease
- present pregnancy not by husband

As to the suggested additional grounds for annulment it has always been a matter of astonishment to me that while misrepresentation, either by concealment or disclosure, of any pertinent fact is ground for cancelling contracts, there is only one contract to which this rule does not apply, and amazingly it is the most important and solemn contract in human existence, namely, the marriage contract. If you are induced to buy anything, living or dead, by fraudulent concealment or misrepresentation you may have your choice, either to repudiate the contract or claim damages for compensation. Not so, however, in connection with a marriage, which ties you hand and foot for life. No matter by what trickery or fraud you are induced to enter into a marriage contract, the moment that contract is entered into you have "had it" and have no recourse at law. It is my firm belief and to me it makes complete sense that the law which compels persons to be honest and frank in their dealings leading to an ordinary contract should much more so require them to be honest and frank in entering into the most solemn, binding and important contract of one's life. Therefore, I urge that your Committee recommend that the law be amended so that a marriage may be annulled at the option of the offended party for any misrepresentation either by false statement, or concealment of any pertinent fact the disclosure of which could have prevented the marriage.

In England today pregnancy by other than the husband, and present venereal disease are a ground for annulment. In Canada, unfortunately, not so, and we had one tragic case of this kind some years ago, when a young Winnipeg lawyer, whose name we won't mention, married a girl and found out right after the ceremony that she was three months pregnant to another man. He brought action to have the marriage annulled and the Judge very reluctantly, as he said, had to dismiss the action, and oddly enough no steps were taken by Parliament to remedy that situation.

Originally in Canada a wife had to follow the husband's domicile, no matter where he went, to get a divorce. It was a result of an action, in which I was Counsel, where a man deserted his wife in Saskatchewan, and went to Chicago to live and there committed acts of adultery, the wife could not sue in Chicago because the law of Illinois required both plaintiff and defendant in a divorce action to be resident in the State when the action was brought. Action was then brought in Saskatchewan and an old English case quoted wherein an English woman, married to a scion of the Greek Royal family in Italy, and whose husband had never lived in England was granted relief by the English courts, the court holding that since the Greek courts had refused to entertain the action and there was no other court which had jurisdiction the English courts would assume jurisdiction and held that the husband was estopped from denying an English domicile.

The presiding Judge, the late Mr. Justice Bigelow, reserved judgment, three months later he granted the decree without reasons or comment and at the next session of Parliament a deserted wife was granted the right to bring an action in the jurisdiction in which the husband was domiciled at the time of desertion.

At first the Act was subject to the interpretation that the wife had to remain continuously in that domicile for two years, but in a revision of the Act that inference was removed; but the wife was still limited and still is limited to the jurisdiction in which she was deserted. In this connection it is suggested that a wife deserted in a Canadian domicile should have the right for the purpose of legal action to acquire a separate Canadian domicile. It could often create a hardship to require a wife to bring action in the domicile of desertion. A normal thing for a deserted wife to do is to return to her parents and very often they are in a separate domicile; or she might even find it necessary to move far away from the domicile of the desertion in order to find lucrative employment; and there appears to be no point gained in making her return to sue in a domicile far removed from the present whereabouts of both herself and her husband.

I notice Dr. Ollivier suggested that any recommendations as to amendments in the grounds for divorce should apply to all Canada, including both Newfoundland and Quebec. With the greatest of respect for the unquestioned standing of Dr. Ollivier I beg to disagree there. I don't think we have any right to force grounds for divorce upon any province (not only Newfoundland and Quebec, which have no divorce courts, but any other Province) that the people of that province don't wish. Therefore, in all seriousness, I would suggest that any recommendation which your committee makes and any legislation which may be founded upon it, should contain a provision that the legislation should apply to such provinces of Canada who by their own legislation so provide. This I might point out would give assurance to Quebec and Newfoundland that no one was attempting to assail any convictions they might have in this field.

While a form of marriage is not within the terms of reference to this committee I suggest to the Committee that they give some attention to this aspect of the question. When a marriage is performed in Canada by a Priest or Minister that ceremony has two facets (1) the religious side which prompts many to contend that marriages are made in Heaven because they are performed in a religious form of ceremony, and (2) the legal or civil contract. It is worth noting that in Roman Catholic France and Roman Catholic Belgium the only

legally recognized marriage is one performed in the office of the Burgomaster. The Church ceremony, no matter how solemn, how binding upon the consciences of the participants, is not recognized by the law of the land at all, so that when a marriage comes before the courts in Belgium and France, there is no involvement with those who hold religious convictions about the indissolubility of a marriage, because the only thing the court is considering is the legal civil ceremony.

Now actually in Canada the legal situation is identically the same. The only authority which the civil courts of Canada have in the field of marriage is over the civil side of the ceremony. If to the contracting parties the ceremony has a religious and sacramental side that is beyond the jurisdiction of the civil courts, and no matter what the judgment of the civil court, the consciences of the parties, if bound at all by the religious aspect of the marriage, remain still bound and not released. To the lay mind this situation is not so clear in Canada, as it is in France and Belgium because there the two ceremonies are separate at the time of performance, not waiting as they do in Canada, to be separated by the decision of a Court of law.

Under the list of causes for divorce I have listed deadly hostility (it is item No. 4). This item is copied from a report made in the year 1552 by a commission of Judges of the Ecclesiastical Courts, presided over by Archbishop Cranmer, Archbishop of Canterbury, appointed by King Henry 8th to investigate the whole body of Ecclesiastic law including marriage. This commission made its report in the reign of Edward 6th under the title "*Reformatio Legum Ecclesiasticarum*". In the year 1552 it recommended that divorce should be granted to either party, amongst other things, on the grounds of adultery, desertion, protracted absence without tidings, and "deadly hostility". This term "deadly hostility" fits in particularly with the suggestion of your committee member who proposed that complete failure of the marriage should be a ground for dissolving it. "Deadly hostility" is a term which would include practically all the grounds which I have set out, as additional grounds for divorce, because quite obviously if the offended party under any of the situations I have outlined was so upset about it that he or she wanted absolutely nothing more whatever to do with the guilty party, the atmosphere would be one of "deadly hostility".

King Edward 6th approved of the report of the Cranmer Commission. It was read twice in the House of Lords, but the Commons would have no part of it, so nothing was done about it, and it was the canny Scot, seeing the sense of this report, who in the year 1555 made the substance of it the law of Scotland and it remains so to this day, still much in advance of the reforms instigated by Sir A. P. Herbert in the British House of Commons. The record of this Cranmer Commission and its report may be found in a book by Fay "*Discoveries in the Statute Book*" pages 198 to 200.

Incidentally the poet Milton in 1643 published a tract in which he expressed similar views to that of your Committee member, stating that it was wrong to make adultery the only or even the leading ground for divorce. He contended that incompatibility was a more important reason for divorce; "The forced yoke of loveless marriage" was a crime against the dignity of the adults involved, as well as a perversion of the true purpose of the marital state—the mutual love between spouses.

There are those who make a great to-do about urging that a marriage be kept together for the sake of the children. I have had a great deal of experience in my 40 odd years practising law especially in the field of family relations, and in deepest sincerity I urge that it is an unkindness and the worst possible thing for children, to keep together a home in the atmosphere of dissension, quarrelling and bickering. To subject children at the most sensitive and formative period of their lives to this strained and unhealthy atmosphere is a crime against human nature for which I can find in my heart no hope of forgiveness. In my 40 odd

years of legal practice I have been shocked by the number of times that it has become apparent that juvenile delinquents and young felons, involved in a life of crime or moral degeneracy, have spent the early formative years of their conscious lives in the very kind of home atmosphere that these well meaning but misguided people seek to perpetuate for the "benefit of the children" of unsuited parents.

Any two responsible people whose marriage has gone sour, if their children mean anything to them, will adjust themselves to protect the children from the results of their parents' incompatibility, and will postpone their inevitable separation until the children are on their own. Parents who would not react in this way would do nothing but harm to the children by staying together. Amending our divorce laws so that this second type of parent could be separated and other provision made for the children will not induce the first type of parent who take the welfare of the children into consideration to seek divorce; and may I remark that you would be astonished at the percentage of incompatible parents who don't care tuppence for their children, except as a means of getting back at the other spouse. It is to protect children from this sort of thing amongst other reasons that the law should be amended.

I believe that more attention should be paid to assuring that an unsuitable marriage does not take place than that such a marriage having taken place should be continued.

What could be done about this is a wide field and is particularly difficult because it is a Provincial field but with respect I don't think that should prevent your Committee making some reference to it, should it so wish.

Your co-chairman Senator Roebuck was kind enough to suggest I should not attempt to abbreviate my representation, but I do feel one should keep a presentation of this kind as brief as possible, and if one were to try to anticipate all the questions which could be asked if one were presenting this brief in person and give all the explanations and answers that such questions might require, there would not be paper enough upon which to type it.

Please understand I am not a faddist riding a pet hobby. This is a field of law of which I made an intensive study and in which I had quite uniform success. In fact, I was not only generally regarded as a dependable authority by the Bench and Bar of my own Province, which was Saskatchewan, but my attitude to marriage and the family life was so well known that notwithstanding my well known practice in the divorce courts, it was the custom of the Roman Catholic Priests in Moose Jaw to send their families to me when they had exhausted all their efforts towards reconciliation, knowing that I would do everything possible to bring that family together if there was any hope of keeping it together.

And so that my attitude generally to a person's religious convictions may be known I want to make this unequivocal statement that I consistently and persistently refused to accept instructions to bring action for divorce of a Roman Catholic family unless I was first convinced that a complete break with the Church and their conscientious objections to divorce had occurred; and by this I mean that that was the voluntary position of the client, to which I had not contributed. This observation is not made with any attempt to achieve anything as far as my personal standing is concerned. I have been retired from the practice of law for 9 years, all but, and am living in peaceful retirement so am quite indifferent to popular acclaim or opinion. I simply mention these things in order to convince the Joint Chairmen and Members of this Committee of my complete conviction and sincerity in the presentation of the views contained in this memorandum.

I wish this Committee every success in the arduous task they have undertaken and I fervently hope that they have the courage and breadth of conviction which will enable them to deal with this question sanely and adequately and not

as so many think who seem to be obsessed with the idea that there is an ipso facto merit in keeping two unsuited people tied together on the theory it is good for public morals. What is good for public morals is a healthy and where possible a happy home life. The good Lord is reputed to have said that no man hitches an ox and an ass together. I am very much afraid that that is too often what is attempted in modern day marriage.

It is a completely mistaken view held by many well meaning people that, instead of dealing realistically with the marriage and divorce situation in Canada, one should very jealously resist any attempt to put this on a sound basis—they seem to feel that there is merit in restricting any proposed reform to the most meagre possible form; whereas, Gentlemen, to all thinking people, no matter how pronounced their religious convictions are, it is infinitely more desirable to clean this situation up so that married people may live together in the mutual helpfulness and comfort that the marriage relationship was designed to create and not compel two people, mutually unsuitable, mutually antagonistic, or two people one of whom is thoroughly disgusted, ashamed and disgraced through contact with the other, to continue to be bound together as man and wife.

I believe that by a comprehensive broadening on sensible grounds of the reasons for divorce, and keeping in mind the very sound observation of your Committee member as to “marriage having completely failed” a marked contribution can be made to the moral standard of Canadian people; and it will make quite unnecessary, what now is not infrequently the case, people who are not married to each other living together in what is commonly called “The common law” matrimonial state.

I thank you for your careful perusal and consideration of this brief and do hope you realize that it is filed from a deep personal conviction of the beneficial effect it will have on Canadian home and public life, if the recommendations contained herein are put into effect. And as a parting word may I urge again upon you that these proposals for divorce are not as startling as they appear because of their number. They could all come under the blank observation of “marriages that are wrecked beyond saving”.

Dated at Qualicum Beach, British Columbia, this 14th day of October A. D. 1966

Schedule "A"

I read in the *Vancouver Province* a day or two ago, that there had been introduced into the British House of Commons, a Bill to extend the grounds for divorce to include "marriage that had completely broken down"; but, with the usual grudging concession to common sense in such proceedings, providing that the parties to the marriage must have been separated for 5 years before the action could be brought.

Mr. Wahn must get considerable satisfaction about this move since he suggested that the most important ground for dissolving marriages should be "a broken down marriage" to make it brief.

Since this information comes too late to include in the brief, may I use this letter as a forum to which to make a point or two relative to this English move:

Question WHY WAIT 5 YEARS?—Just what is accomplished by this requirement? I set out here a few things so accomplished. Two people finding it completely impossible to associate together any longer, separate. They have been accustomed to the regular and proper satisfaction of those natural urges and desires between sexes. They are supposed to cut off this natural urge for a period of five years. Now it is all right to take a purist stand on this aspect of the situation, and say that a decent person would just take this in his stride. But, we are dealing with ordinary human feelings, desires and urges, and what's the use of trying to deal with them on the lofty plane that "human beings are god-like individuals with none but the highest and purest motives, desires etc." Human beings are human beings, and even the nicest and finest men and women have to deal with the sex urge, which is a noble thing as well as a necessary one if the human race is to reproduce and survive. These people who must live separated and apart for 5 years are supposed to live lives of celibacy and virtue for that period of time. Should the one who becomes the plaintiff in the action for dissolution of the marriage have yielded to this natural urge during the 5 years, with someone other than the spouse, then that must be disclosed to the court, and it is in the discretion of the Judge whether or not to overlook it and grant the divorce. This discretion all too often depends upon many unrelated things, such as the state of the jurist's digestion, or the treatment he received at the hands of his wife the night before; or the court of appeal, the last week. Should the plaintiff fail to disclose this fact, and it should come to the court's attention during the trial or even before decree absolute is granted, either by cross examination at trial, by some nosey busybody writing in about it, or through the activities of the "Queen's Proctor", the practice is then invariably to reject the claim for divorce.

The reason advanced for these delays, not only in the case presently before the British Parliament; but in cases of "desertion, and insanity" can only be that one shouldn't be able to get out from an intolerable marriage even on the ground of "hostility" if one is only using that as an excuse.

Let us compare this with the criminal law. The general principle there followed is "that it is better that 99 guilty should escape than that one innocent should be found guilty". With that rule, no sane person will quarrel. But in the matrimonial law, how different the situation. Exactly the reverse. Briefly stated it obviously is "it is better that a thousand people should be made to suffer inconvenience, and hardship, than that one schemer should be relieved of his marriage contract". With this law, no sensible person will agree for one minute; but, nevertheless it is completely inescapable, that is the situation.

If both parties agree that the marriage is a complete failure, where is the necessity to make them live separate from each other for 5 years to demonstrate that that is the fact?

Also, what of the "welfare of the children". What good is being done to children of such a marriage to have them live without normal family life for 5

years, and be subject to the stresses and strains of a family in fact separated, and yet in law "one"?

What of the case where to one party the marriage has completely failed, and the other for whatever reasons refuses to agree? The disagreeing party refuses to permit separation, and pursues and annoys the other, pursuing his own vengeful intentions? The only recourse is to bring an action for Judicial separation, which would provide the means to make the dissenting party behave. But what an astonishing situation, you would have a decision of a competent court that the marriage was a failure, and yet that same court couldn't dissolve this "failed" marriage, until a five years demonstration had convinced it of a fact of which they already were convinced, namely the failure of the marriage.

How absurd can we become when approaching this, the most human, and the most important of relationships?

In all other spheres of human existence we spend millions, and go to untold trouble to eliminate troubles and smooth the way so that everything should be pleasant and nice, and we penalize anything or person introducing discord or strife; but in the family relationship we go to even more trouble and expense to prevent the establishment therein of the very situations we spend so much time, money and trouble to bring about in all other spheres. If it weren't so tragic, it would be vastly amusing.

(ALFRED J. WICKENS)

APPENDIX "14"

Brief to the

Special Joint Committee of the Senate and House of Commons on Divorce

By

The Board of Directors and Staff of
The Family Service Association of Edmonton,
400 Tower Building, Edmonton, Alta.

RECOMMENDATIONS FOR CHANGES IN ALBERTA FAMILY COURT STRUCTURE PRESENTED IN THIS BRIEF WERE PREPARED ON THE BASIS OF A STUDY OF EXISTING LAWS AND FACILITIES, COURT RECORDS, AND CONFERENCES WITH MEMBERS OF THE LEGAL, MEDICAL AND SOCIAL PROFESSIONS IN ALBERTA AND OTHER PARTS OF CANADA AND THE UNITED STATES.

FOREWORD

The Family Service Association of Edmonton was established in 1942 for the primary purpose of strengthening family life in the community through programs of prevention and treatment. Because the Board of Directors of the Association believe that an interest in family law is imbedded in the basic purpose and function of a family service agency, a special continuing committee was set in 1957 to look at existing Alberta court structure and jurisdiction in the light of present-day family needs.

We recognize that social change and reform of laws is never accomplished without public clamor for that change. Within the past year the federal department of justice has reflected public interest in bringing our laws up to date by announcing plans for revision of the Criminal Code.

The need to revise family laws was emphasized in the report of the Vanier Conference on the Canadian Family, June, 1964, which recommended the establishment of proper legal facilities to assist, protect, provide control, and safeguard the wellbeing of Canadian families.

In Alberta, during the past year, public attention to questions of morality, family breakdown, respect for law and authority, has been conspicuous in newspapers, radio, television, the church pulpit and public speaking platform.

It would seem that the time is ripe to consider a full revision to our family laws as a courageous step into the present and the future. Justification for laws cannot be simply that our forefathers shaped them.

We respectfully submit this brief as yet another indication of public concern for the strength and wellbeing of our families.

THESE ARE THE PROBLEMS WE SEE

Our present approach to family law emphasized punishment rather than prevention or solution of problem. Most cases of families in trouble with the law are principally matters of maladjustment—social matters rather than criminal or legal matters.

Parent, youth and child problems are in reality all one.

Juvenile delinquency and youthful criminality cannot be separated from general family disorders because they are most often related—bound together by cause and effect.

The present family law pattern of dealing separately with each individual—and each specific incident that constitutes a broken law, does more to increase family problems than solve them.

Jurisdictions over family matters and children in trouble are today so scattered that people are shunted from court to court with their problems. As a result it is impossible for the most well-meaning judge to make decisions based on the welfare of the whole family.

In Alberta divorce is dealt with in one court, family maintenance and separation in another. Child custody, adoption, delinquency, neglect, are passed into assorted court levels and judgments are passed with minimum social investigation.

Auxiliary services for case study and counselling for people brought to court attention on domestic issues are at present inadequate and do little to help families find social solutions to their problems that will result in maximum welfare for the family and minimum expense to the public.

Existing federal and provincial legislation lumped as "domestic laws" was designed for the social order of the nineteenth century. This is the twentieth century and the social order has changed in kind and complexity.

Our family laws are ineffective because they are not in focus with the times.

Lawyers, judges, magistrates, receive no special training for handling social problems beyond direct interpretation of the laws. This results in merely processing the law rather than helping those involved.

We are not solving our social problems by filling up our jails.

Members of the legal profession show reluctance to work in the area of "domestic relations" because they are neither trained for, nor inclined to the intensive social investigation required for understanding and dealing with the very complex family problems.

The cumbersome framework of existing family laws makes their work most difficult. This is reflected in results.

We are spending vast sums of public money picking up the pieces of broken families...jailing errant fathers, supporting deserted wives and children, jailing or attempting to rehabilitate youthful criminals without considering the court and legal procedures as one more way to cure the basic sickness *before* rather than *after* members of a family have been separated.

Members of various professions, involved government and private agencies tend to work against rather than with each other in common attempt to find workable solutions to increased divorce, delinquency, desertion, failure to meet family responsibility, illegitimacy and anti-social behaviour.

THESE ARE RECOMMENDATIONS

1. Focus sharply on the need to simplify and unify all family and children matters of law involvement, if possible, under one roof. To be workable it would need a "social arm" and a "legal arm"...working together. This will involve a restructuring of existing family laws into *one* Family Court Act.

2. Revise the concept of law and procedure to emphasize *prevention* of family break-up rather than punishment for individual members.

3. Develop family court auxiliary social services to attempt solutions to social and family problems at a non-court level. This would be workable in our communities by drawing on private agency counsellors and psychiatrists as well as those immediately responsible to a unified Family Court structure.

4. Aim at complete reciprocal agreements with other provinces and countries for payment and enforcement of legal maintenance orders.

5. Increase pre-court investigation in matters of child custody arising out of divorce, separation or neglect.

6. A study should be made, preferably under control of the Law Society of Alberta, to suggest a specific framework for new or updated concepts of unified family law and/or court structure and that such a study through a committee or commission should seek opinions from judges, lawyers, sociologists, psychia-

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trists, social workers, businessmen, labour leaders, and other concerned community groups, and should enlist the support of private and government agencies and individuals who have dedicated time, effort, research and financial support to meeting and solving family problems.

SUGGESTED FRAMEWORK FOR A UNIFIED FAMILY COURT

Policies of the court would be set by "specialist" judges chosen carefully for their capacities of understanding and patience, as well as their legal talent and experience in the field of family welfare.

The approach would differ from regular court procedures in that every attempt would be made at a pre-court level to find out the basic causes of trouble no matter what specific incident lands parent or child in the arms of the law.

Key to this objective would be an intake centre...a screening or diagnostic department. Here, skilled social workers would have exploratory talks with the parties to a family dispute or the individual initially brought to court attention.

Housed within the court building (ideally) would be auxiliary social services to be used as indicated in the preliminary talks...these would include facilities for psychological testing and psychiatric treatment, an alcoholism clinic, marriage counselling, child therapy workers for children showing anti-social behaviour because of the conflict of their parents.

In addition to any immediate help, this investigation would add to as complete a picture as possible if the problem persists to formal court level. Decisions of the court could then be based on thorough investigation and recognition of the needs of the total family involved.

Probation officers would work before, as well as after, official court sentencing...with prevention and treatment the principal considerations.

Representatives of private family and religious agencies would be in direct liaison with the unified court to continue and follow through with the family in the community setting.



First Session—Twenty-seventh Parliament
1966

PROCEEDINGS OF
THE SPECIAL JOINT COMMITTEE OF THE SENATE
AND HOUSE OF COMMONS ON

DIVORCE

No. 7

TUESDAY, NOVEMBER 15, 1966

Joint Chairmen

The Honourable A. W. Roebuck
and

Ms. A. J. P. Cameron, M.P.

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UNIVERSITY OF TORONTO

WITNESSES:

John H. McDonald, Q.C., Barrister & Solicitor. *The Congress of Canadian Women*: Mrs. Nora Rodd, Brief Chairman; Mrs. Hilda Murray, National Secretary.

APPENDICES:

- 15.—Brief by John H. McDonald, Q.C., Barrister & Solicitor, Ottawa, Ont.
- 16.—Brief by The Congress of Canadian Women, Toronto, Ont.
- 17.—Private brief by Mr. H. M. Salter, Florida, U.S.A.
- 18.—Statement by the Young Women's Christian Association of Canada, Toronto, Ont.

ROGER DUHAMEL, F.R.S.C.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1966

MEMBERS OF THE
SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS
ON DIVORCE
FOR THE SENATE

Hon. A. W. Roebuck, Joint Chairman

The Honourable Senators

Aseltine	Connolly (<i>Halifax North</i>)	Flynn
Baird	Croll	Gershaw
Belisle	Denis	Haig
Burchill	Fergusson	Roebuck—(12).

FOR THE HOUSE OF COMMONS

Mr. A. J. P. Cameron (*High Park*), Joint Chairman

Members of the House of Commons

Aiken	Forest	McQuaid
Baldwin	Goyer	Otto
Brewin	Honey	Peters
Cameron (<i>High Park</i>)	Laflamme	Ryan
Cantin	Langlois (<i>Mégantic</i>)	Stanbury
Choquette	MacEwan	Trudeau
Chrétien	Mandziuk	Wahn
Fairweather	McCleave	Woolliams—(24).

(Quorum 7)

ORDERS OF REFERENCE

Extracts from the Votes and Proceedings of the House of Commons: March 15, 1966:

"On motion of Mr. McIlraith, seconded by Mr. Hellyer, it was resolved—that a Special Joint Committee of the Senate and the House of Commons be appointed to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either House;

That 24 Members of the House of Commons, to be designated by the House at a later date, be members of the Special Joint Committee, and that Standing Order 67(1) of the House of Commons be suspended in relation thereto;

That the Committee have power to engage the services of such technical, clerical and other personnel as may be necessary for the purpose of the inquiry;

That the Committee have the power to send for persons, papers and records, to examine witnesses, to report from time to time, and to print such papers and evidence from day to day as may be ordered by the Committee, and that Standing Order 66 be suspended in relation thereto; and

That a Message be sent to the Senate requesting Their Honours to unite with this House for the above purpose, and to select, if the Senate deems it so advisable, some of its Members to act on the proposed Special Joint Committee."

"By unanimous consent, on motion of Mr. McIlraith, seconded by Mr. Hellyer, it was ordered—That the order of the House of Monday, February 21, 1966 referring the subject-matter of the following bills to the Standing Committee on Justice and Legal Affairs, namely:—

Bill C-16, An Act to provide in Canada for the Dissolution of Marriage (Additional Grounds for Divorce).

Bill C-19, An Act to provide in Canada for the Dissolution and the Annulment of Marriage.

Bill C-41, An Act to amend the British North America Acts, 1867 to 1965, (Provincial Marriage and Divorce Laws).

Bill C-44, An Act to provide in Canada for the Dissolution of Marriage.

Bill C-55, An Act to provide in Canada for the Dissolution of Marriage.

Bill C-58, An Act respecting Marriage and Divorce.

Bill C-79, An Act to amend the Dissolution and Annulment of Marriages Act (Additional Grounds for Divorce).

be discharged, and that the subject-matter of the same bills be referred to the Joint Committee of the Senate and the House of Commons on Divorce."

March 16, 1966:

"By unanimous consent, on motion of Mr. Stewart, seconded by Mr. Byrne, it was ordered—That the subject-matter of Bill C-133, An Act to extend the grounds upon which courts now have jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief, be referred to the Special Joint Committee on Divorce."

"By unanimous consent, on motion of Mr. Stewart, seconded by Mr. Byrne, it was ordered—That the subject-matter of Notice of Motion No. 11 be referred to the Special Joint Committee on Divorce."

March 22, 1966:

"On motion of Mr. Pilon, seconded by Mr. McNulty, it was ordered—That a Message be sent to the Senate to acquaint Their Honours that this House will unite with them in the formation of a Joint Committee of both Houses to inquire into and report upon divorce in Canada, and that the Members to serve on the said Committee, on the part of this House, will be as follows: Messrs. Aiken, Baldwin, Brewin, Cameron (*High Park*), Cantin, Choquette, Chrétien, Fairweather, Forest, Goyer, Honey, Laflamme, Langlois (*Mégantic*), MacEwan, Mandziuk, McCleave, McQuaid, Otto, Peters, Ryan, Stanbury, Trudeau, Wahn and Woolliams."

LÉON-J. RAYMOND,
Clerk of the House of Commons.

Extracts from the Minutes of the Proceedings of the Senate:

March 23, 1966:

"Pursuant to the Order of the Day, the Senate proceeded to the consideration of the Message from the House of Commons requesting the appointment of a Special Joint Committee of the Senate and House of Commons on Divorce.

The Honourable Senator Connolly, P.C., moved, seconded by the Honourable Senator Roebuck:

That the Senate do unite with the House of Commons in the appointment of a Special Joint Committee of both Houses of Parliament to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either House;

That twelve Members of the Senate, to be designated at a later date, act on behalf of the Senate as members of the said Special Joint Committee;

That the Committee have power to engage the services of such technical, clerical and other personnel as may be necessary for the purpose of the inquiry;

That the Committee have the power to send for persons, papers and records, to examine witnesses, to report from time to time, and to print such papers and evidence from day to day as may be ordered by the Committee, and to sit during sittings and adjournments of the Senate; and

That a Message be sent to the House of Commons to inform that House accordingly.

After debate, and—

The question being put on the motion, it was—

Resolved in the affirmative."

March 29, 1966:

"With leave of the Senate,

The Honourable Senator Beaubien (*Provencher*) moved, seconded by the

Honourable Senator Inman:

That the following Senators be appointed to act on behalf of the Senate on the Special Joint Committee of the Senate and House of Commons to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, namely, the Honourable Senators Aseltine, Baird, Belisle, Bourget, Burchill, Connolly (*Halifax North*), Croll, Fergusson, Flynn, Gershaw, Haig, and Roebuck; and

That a Message be sent to the House of Commons to inform that House accordingly.

The question being put on the motion, it was—

Resolved in the affirmative.”

May 10, 1966:

“Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Roebuck, seconded by the Honourable Senator Croll, for the second reading of the Bill S-19, intituled: “An Act to extend the grounds upon which courts now having jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief”.

The question being put on the motion—

In amendment, the Honourable Senator Connolly, C.P., moved, seconded by the Honourable Senator Hugessen, that the Bill be not now read the second time, but that the subject-matter be referred to the Special Joint Committee on Divorce.

After debate, and—

The question being put on the motion, it was—

Resolved in the affirmative.”

J. F. MacNEILL,
Clerk of the Senate.

MINUTES OF PROCEEDINGS

TUESDAY, November 15, 1966.

Pursuant to adjournment and notice the Special Joint Committee of the Senate and the House of Commons on Divorce met this day at 3:30 p.m.

Present: For the Senate: The Honourable Senators Roebuck (*Joint Chairman*), Baird, Belisle, Denis, Fergusson, Flynn and Gershaw—7.

For the House of Commons: Messrs. Cameron (*High Park*) (*Joint Chairman*), Brewin, Honey, McCleave, Peters andl Wahn—6.

In attendance: Dr. Peter J. King, Assistant.

The following witnesses were heard:

John H. McDonald, Q.C., *Barrister and Solicitor*;

The Congress of Canadian Women:

Mrs. Nora Rodd, Brief Chairman;

Mrs. Hilda Murray, National Secretary.

Briefs and Statements submitted by the following are printed herewith as Appendices:

15. John H. McDonald, Q.C., Barrister and Solicitor, Ottawa, Ont.

16. The Congress of Canadian Women, Toronto, Ont.

17. Mr. H. M. Salter, Florida, U.S.A.

18. Young Women's Christian Association of Canada, Toronto, Ont.

At 5:10 p.m. the Committee adjourned until Tuesday next, November 22, at 3:30 p.m.

Attest.

Patrick J. Savoie,
Clerk of the Committee.

THE SENATE

SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS ON DIVORCE

EVIDENCE

OTTAWA, Tuesday, November 15, 1966.

The Special Joint Committee of the Senate and the House of Commons on Divorce met this day at 3.30 p.m.

Senator Arthur A. Roebuck and Mr. A. J. P. Cameron (*High Park*) Co-Chairmen.

The CO-CHAIRMAN (*Senator Roebuck*): Ladies and gentlemen, honourable senators, we have a quorum, and notwithstanding the conditions, which were not very favourable for it, here we are.

May I read a letter that came to me from the gentleman who addressed us on the last occasion, Mr. G. B. R. Whitehead. You remember he gave us a most interesting and very learned dissertation on the English law, and he wrote to me: "This is only to tell you how much I appreciated all your kind hospitality yesterday and the attentive hearing which your committee gave me. It was a new and most interesting experience for me and I shall always remember it."

I thought you would be interested in this acknowledgment of the fact that we did give him a most courteous hearing, as we always do.

We have two distinguished delegations today, and by arrangement between the parties Mr. John Haskell McDonald is the first to address us. Will you come forward, Mr. McDonald.

Mr. McDonald was born in Montreal on July 7, 1913. He was educated in Westmount public and high schools, and McGill, in international law. He has the degrees of B.A. and B.C.L. He was called to the Bar of the Province of Quebec in 1939, and to the Bar of Ontario in 1947. He was appointed Queen's Counsel in 1962.

Mr. McDonald had a long war service, more than I can tell you of, but he was finally discharged with the rank of Commander, having served from 1945 to 1949 on the Active Reserve of the Royal Canadian Navy as Deputy Director of Intelligence.

In 1945, on demobilization, he joined the staff of the late Honourable Brooke Claxton, then Minister of National Health and Welfare, as executive assistant and acted temporarily as chief legal adviser and as Director of Information for the Department of National Health and Welfare and later as legal adviser to the Canadian delegation to the World Health Organization's initial meeting at the United Nations in New York City, and drafted the World Health Organization Charter.

In 1946 Mr. McDonald transferred, with the Honourable Brooke Claxton, to the Department of National Defence and served as executive assistant to the minister and acted temporarily as secretary to the then Defence Council. In 1947 he retired from the Civil Service and returned to the practice of law and was called to the Bar of Ontario.

Mr. McDonald has had considerable experience in the literary world. He was editor of *McGill Daily* during the period 1936, 1937 and 1938 and was the

founding president of the Canadian University Press, and was for some time editor of *The Varsity*, University of Toronto. He was also a contributor to *The Harvard News*, and a number of other journals.

Ladies and gentlemen, I have pleasure in introducing Mr. McDonald.

Mr. John Haskell McDonald Q.C.: May I thank you, sir, for your kind remarks.

Messrs. Chairmen and honourable members: I believe that my brief has been distributed and I understand that some of you have already read it.

Before saying anything I would draw your attention to one error in wording on page 7, paragraph 5; at the bottom of the page, there appears the following:

"5. *Suggestions and Summary*—(i) 'Mutual Consent' should be recognized as a cause for divorce..." That should be "ground," not cause. That is the only correction I would suggest in the text.

I noticed, in the invitation to appear here, that the ground rules were very concisely laid down, and brevity I believe is the important consideration. Accordingly I have attempted to summarize the full brief in one sentence, which appears at the top of the first page: "This submission advocates divorce by mutual consent."

That in essence is what I suggest, and I have made considerable reference in the first part of the brief to prior proceedings.

When the committee was announced, I had many ideas which I thought might be brought before it. However, in reading through the reports which you were good enough to send me, from June 28 to July 5, prior to writing my own humble brief, I realized that a good many of the suggestions I had intended to make were already in contemplation and I felt there was no point in going over territory that had been so adequately covered by others more experienced than I.

I was very pleased to see, in the minutes of proceedings of October 18, which I read after my own brief had been put together, that the Deputy Minister gave an excellent summary of the situation as it obtained in Canada. I therefore confined myself to one specific point.

I advocate the possibility of divorce being by mutual consent. No sooner had this brief been filed with the committee than this whole question was aired in the United Kingdom. I have several press clippings, some of which cry horror at the idea, while others are friendly; and perhaps the most interesting article is one I took from the *Ottawa Journal* of November 9 in which the High Court Chief Justice stated, in connection with the question of divorce by mutual consent, that safeguards such as waiting periods, to leave the way open for reconciliation, should be enforced.

In his view the objectives of a good divorce law should include (a) the support of marriages which have a chance of survival and (b) decent burial, with the minimum of embarrassment and bitterness, of those marriages that are undeniably dead. He has expressed my sentiments on this point.

Looking over this field of the committee's investigation, I had occasion in the summer to take cognizance of the divorce laws in Mexico, in Japan, and in New York State, and in this regard I did quite a lot of reading; and through the kindness of various people in Scandinavian Embassies I managed to get hold of the basic divorce laws, or summaries thereto, for Finland, Norway, Sweden and Denmark.

I have tried in my brief to extract the relevant points on the question of divorce by mutual consent and I will not burden you now with a recital of details. My recommendations are summed up briefly in these words: Divorce by mutual consent after a ten-month waiting period.

The reason I hit upon ten months was that it might be wise to provide for children who might appear in the interim.

This divorce would be granted by the appropriate official on the application of the parties themselves. A decree *nisi* would be granted at the time of the application and the decree final at the end of the ten-month period.

In the case of children, I suggest that the same official who would grant the divorce would have regard for the economic status of the parties and would come up with a financial settlement and provisions to ensure that the children would be adequately raised and properly brought up, in so far as children can be brought up in the circumstances ensuing from divorce.

There is a third category involved. Where children appear in the interval between the granting of the first decree and the granting of the final decree, I should think that the same rules would obtain for the custody of such child or children; and this arrangement would be finalized in the period between the decree *nisi* and the decree final.

In my brief I set forth the concept that, for some people, marriage is simply a contract; and under basic laws a contract between two parties can be adjusted or resolved if the parties agree.

I fully appreciate that there are in this country other people who have very strong and deep-seated feelings about marriage—religious backgrounds and so on—which preclude any contemplation of the breaking-up of; and in my brief I say, with all due respect to these people: Let us consider putting into the revised law of divorce of this country a provision whereby divorce can be obtained by mutual consent. This would not offend those who have contrary views, and it would allow those who would like to be divorced by mutual consent to obtain divorce.

In reviewing the laws of the Scandinavian countries I find permutations and combinations of the time element involved. I picked ten months out of the air for the reason that I have stated, and I suggest it as a starting point from which we can consider the subject.

That summarizes my brief.

The CO-CHAIRMAN (*Senator Roebuck*): I understand your idea of divorce by consent is not exclusive.

Mr. McDONALD: Oh, no.

The CO-CHAIRMAN (*Senator Roebuck*): It is in addition to other grounds?

Mr. McDONALD: Yes; and I have set that forth in the early part of my brief where I explain that such persons as your good self, Dr. Ollivier, Mr. Hopkins and others having absorbed a great deal of history on the subject, I have not tried to reiterate either what has been said or what has been anticipated. What I advocate would be merely one other reason for divorce and would in no way change any suggestions that have been made or any that may be put forward hereafter.

The CO-CHAIRMAN (*Senator Roebuck*): I believe Mr. McCleave has something he wishes to say.

Mr. MCCLEAVE: Yes. On behalf of certain people not here today, for a reason that everyone knows, I would like to apologize to yourself, Senator Roebuck, and your Co-Chairman and the witnesses, and put on the record publicly what I expressed privately. These meetings were drawn up and the agenda arranged some time ago, and we thought it would not be proper to ask for a postponement of the hearing because of the fact that the National Convention of the Conservative Party Association was being held. However, we can promise Mr. McDonald, and the ladies who will follow, that we will read their statements with a great deal of care.

Senator FERGUSON: If Mr. McDonald is not going to read the brief in detail, I suggest that it be printed as part of the committee's record. I would have spoken to some of the things he has in the brief. So that we shall understand it

thoroughly, I think it ought to be printed as part of the record, and I so recommend.

The CO-CHAIRMAN (*Senator Roebuck*): The submission of the brief to the committee, even if it is not read, takes care of that recommendation *ipso facto*. It will be printed in full. I thought of suggesting to Mr. McDonald that he read the final paragraphs, the recapitulation, that is to say paragraphs 4 and 5, and the conclusion as well.

Mr. McDONALD: After summarizing as best I could the notes I had on the laws of the four Scandinavian countries, I recapitulate this by saying:

4. Recapitulation

The foregoing recapitulation, in a most general way, of the laws of the four Scandinavian Countries referred to herein would lead the way to a broad suggestion that consideration should be given by this Honourable Joint Committee to the possibility of extending in Canada, insofar as Federal jurisdiction obtains, the concept of divorce by mutual consent. To this end, the following suggestions are put forward for consideration by the Committee, namely:—

5. Suggestions and Summary

- (i) "Mutual Consent" should be recognized as a ground for Divorce in cases where there are no children, such divorce by mutual consent to be granted by virtue of a decree nisi upon application by both parties and without formal hearing provided the officer (Judge) concerned is satisfied that the proceedings are in good order and that the decree final should be granted only after a period of ten months if there are no children of the marriage.
- (ii) In the case of a divorce by mutual consent in which there are children, then such divorce should be granted only upon the satisfaction of the official concerned that adequate arrangements have been made concerning the welfare of the children—
- (iii) In the case of a divorce being granted pursuant to sub-section (i) hereinabove and further in the case of children being born to the parties concerned in the interim between the granting of a decree nisi and a decree final then the terms and conditions governing such children should conform to the general pattern set forth in sub-section (ii) hereinabove.

6. Conclusion

Honourable members, it has been a privilege to appear before the committee and I can only hope that the thoughts I have advanced today may be of some assistance to your deliberations. I firmly believe that there is room in this country for the acceptance of the concept of "Divorce by Consent". I well know that there may be many people in Canada who have very definite views on the so-called "sanctity of marriage," however, there is in my opinion a great segment of the population which regards marriage as a civil contract. This concept is substantiated by The Marriage Act of Ontario (RSO 1960, c. 228, s. 26) which provides for marriage by a Civil Officer. Thus marriage becomes a contract. Furthermore, in my opinion, there is no contract which cannot be resolved by the mutual consent of the contracting parties. I believe that this concept should now be extended and made available in the laws of marriage and divorce in Canada in so far as it is acceptable to those citizens of this country who are prepared to utilize this general thesis.

The CO-CHAIRMAN (*Senator Roebuck*): What happens if a baby appears after ten months?

Senator BAIRD: A late arrival.

The Co-CHAIRMAN (*Senator Roebuck*): It is possible, is it not?

Mr. McDONALD: I am not a medical man, sir. May I say I have been before the senator in another capacity in other places and I have had some experience with divorce and I appreciate the opportunity that has been afforded me of appearing here today to express my views on the subject I have discussed.

The Co-CHAIRMAN (*Senator Roebuck*): Ladies and gentlemen, have you any questions to ask Mr. McDonald, or any comments to offer?

Mr. WAHN: This presentation by Mr. McDonald has been most helpful. Would he agree that when this committee is considering the question of divorce our first object should be to preserve those marriages that are capable of being preserved?

Mr. McDONALD: I agree with that, sir, and I have cited the brief report of the findings of the Royal Commissioners in England. Their first concern is that the marriage be reclaimed if at all possible, and in any event the children should be protected. Your approach is a very reasonable one.

Mr. WAHN: Following that line of thought, would you agree, from the consideration you have given the question, that before there should be any divorce it should be mandatory that reconciliation procedures be attempted?

Mr. McDONALD: I have thought about that very seriously. In Sweden there is a proviso that there must be either legal separation for one year or *de facto* separation for a period of three years before the divorce-by-consent concept comes into play. Perhaps my suggestion might be qualified by saying, there should be legal separation for a period of two years prior to the functioning of the concept. I have an open mind.

Mr. WAHN: Do you feel that professional marriage counsellors or psychiatrists skilled in consultation with people bent on divorce have any useful function? Do you think their services are helpful where marriages appear to have broken down?

Mr. McDONALD: It depends on the families concerned. I have known some psychiatrists in this field who have been more harmful than helpful. It depends upon the circumstances of the parties. However, there is room for inclusion of the concept, though how you are going to put it into the law I do not know.

Mr. WAHN: Suppose the law provided that before a divorce by mutual consent could be obtained the parties would have to appear before a judge or some responsible person to determine whether it was necessary for them to have marriage counsel: would you see anything objectionable in that?

Mr. McDONALD: I do not see anything objectionable in it but it would be hard to define the process. One would have to get a certificate to show that he or she had attended before a marriage counsellor; and while there are those who are receptive to suggestions from the clergy and from professional marriage counsellors, there are others whose minds are closed to that sort of thing and say, "Let us get rid of all that".

Mr. WAHN: On the principle that when your car breaks down you take it to a trained mechanic at the garage before deciding to throw it into the dump yard, I was wondering whether the same sort of consideration should be given to marriage contracts—whether the parties should not obtain the benefit of skilled counselling before permitting the divorce to take place.

Mr. McDONALD: In my experience, sir, and I have handled a great number of divorces from various strata of society, I have found that the more intelligent people are the more tenaciously they hold to the view that they themselves know better than anyone else what they want to do and that it would be wasting their time and money in consulting high-priced psychiatrists. When you are consider-

ing people with minimal means it would be a burden on them, unless there were facilities, as perhaps there are. The church has done much. But very often you think something is patched up because some priest or minister has talked people into going back, and the whole thing starts off again in a year. People are unhappy and live under duress.

Mr. WAHN: Perhaps medicare legislation will deal with the financial problem. I understand that in England, in order to preserve marriages and to avoid hasty divorces, no divorce is permitted save in exceptional circumstances, within the first three years after the marriage.

Mr. McDONALD: Yes.

Mr. WAHN: It is felt that in the first three years after marriage people experience the greatest difficulty in learning to live with each other and mutually adjust themselves, and that during that period divorce should not be permitted except in obvious cases. What do you think of that as a provision of the law?

Mr. McDONALD: I would have been sad to see such a provision in effect after the war. That is where I got my feet wet in this divorce work. Many people married in haste and had to repent at leisure. If people had had to wait three years it would have occasioned hardship and brought illegitimate children into existence. I am not unqualifiedly in favour of the suggestion.

Mr. WAHN: Your point leads to the next question. One way of preserving marriage would be to avoid hasty marriage in the first place, of the type you have mentioned. Do you agree with that?

Mr. McDONALD: Yes.

Mr. WAHN: We know that many such marriages break up. Would you be in favour of some legal provision which would curb hasty marriage and ensure what has been described as a cooling-off period between the securing of the marriage licence and the actual marriage?

Mr. McDONALD: We have that in effect now in Ontario. The parties have to wait three days; it is practical from the legalistic point of view; but my own experience has been such that, in my opinion, when people are put in such a situation they would go ahead and live together anyway.

Mr. WAHN: In that event they have no problem with divorce.

Mr. McDONALD: No; but the birth of children would lead to other problems. I acted the other day for people who wanted to get a Mexican divorce, which they did. The State of New York recognizes Mexican divorces and they took a week off and went to Syracuse to get married. The papers did not arrive from Mexico in time and they had the honeymoon and married the second week.

The Co-CHAIRMAN (*Senator Roebuck*): The result preceded the cause.

Mr. WAHN: I assume you practise in the Province of Quebec?

Mr. McDONALD: Yes, before the Senate Divorce Committee.

Mr. WAHN: Do you feel that the people would accept the principle of divorce by consent?

Mr. McDONALD: Some of them definitely would not. That is why I phrased the last paragraph of my brief with great care. I have no illusions as to the effect of this proposal in my native province. There are, however, in Quebec many people who are not particularly tied to any church and who would avail themselves of civil marriage if that were possible, and I think those people should be given the option of getting out by mutual consent if they want to.

Mr. WAHN: Thank you, Mr. McDonald.

Mr. BREWIN: Mr. McDonald, you referred to some royal commission. Were you referring to the commission that reported to the Archbishop of Canterbury?

Mr. McDONALD: No. This is a report that was carried in the *Ottawa Journal* on November 9. It was a Canadian Press despatch. I quote a passage:

"A government-assigned panel of legal experts say the obvious breakdown of marriage should be a ground for divorce. Divorce should be granted after two years of separation if both parties consent, or after five to seven years of separation even if one party objects", says a report of the British Law Commission published today. Safeguards such as waiting periods to leave the way open for reconciliation, and measures to protect children—should be enforced, the Commission says. The objectives of a good divorce law should include (a) the support of marriages which have a chance of survival and (b) the decent burial, with the minimum of embarrassment, humiliation and bitterness, of those that are indubitably dead, the report says."

The commission consisted of five prominent specialists led by High Court Justice Sir Leslie Scarman.

Mr. BREWIN: What I had reference to was a report submitted recently to the Archbishop of Canterbury by a number of distinguished persons, wherein it was suggested that there should be a rephrasing of the whole concept of matrimonial offences in consequence of the breakdown of marriage, into which perhaps both the concept of the Scandinavian countries and your own might fit. I was wondering whether you had had an opportunity to see that report.

Mr. McDONALD: No, I am sorry to say, I have not. I know it exists but I have not seen it.

Senator GERSHAW: This suggestion is a long way from the grounds we have been working on in this committee, and it occurs to me that a question I was about to ask has perhaps been answered, at least in part. Two people might feel they would like to get married but not forever; and in fact people do remain married for a year or so and then have a divorce. If there were divorce by consent, do you think that some people, having that means of dissolution in mind, would get married more readily than they otherwise would?

Mr. McDONALD: They might, yes. Many people know that they can have their marriage dissolved by following the rules laid down, namely, by committing adultery, and many observations could be made on that point; but I am not inclined to dwell on that today. I suggest there would be a great deal less contrived adultery if there were an honest way of getting out of hopeless marriage. There is no question divorce is on the increase. According to the latest published figures from the Dominion Bureau of Statistics, there were 8,941 divorces granted in 1965, so that divorce is here to stay; and if there were a little more flexibility it would be easier on some people who might not wish to avail themselves of the present grounds of divorce.

Senator GERSHAW: Would you include hopeless insanity as a ground of divorce?

Mr. McDONALD: Yes. My proposal does not in any way delimit the other grounds, but I felt it was important to make this particular point.

Senator GERSHAW: It is in addition.

Mr. McDONALD: Yes, it is an additional ground.

Senator FERGUSSON: Can the witness tell us whether this legislation which, I understand, he says is in effect in the Scandinavian countries, is something recent, or has it been the law there for some time?

Mr. McDONALD: Some of it is quite old. I may say that some of my notes are rather sketchy, but I was faced with a translation problem and the Canadian Embassy in Copenhagen was very helpful. The Act in Denmark is Act 276 of the

General Statutes and it goes back many, many years. It has been amended a number of times but I cannot tell you the dates of origin of these Acts.

Senator FERGUSON: They are not recent ones?

Mr. McDONALD: No. I started on this course of investigation two years ago, even before this committee was announced, and I found no difficulty getting these laws, and any supplemental questions I asked were readily answered. This information could be obtained from the people I have referred to in my brief, and I am sure that if the secretary of the committee were to write to the gentlemen named who were helpful to me he would get any details that might be required.

The Co-CHAIRMAN (*Senator Roebuck*): Any more questions?

Mr. WAHN: Could Mr. McDonald give the committee some idea of what, on the average, the cost to a person would be of getting either a parliamentary divorce or, in the alternative, a legal divorce in the Province of Ontario.

Mr. McDONALD: It depends to some extent, as Senator Roebuck knows, on the extent of the investigation that must go on into the adultery; but, assuming that that presents no difficulty, I would say offhand, in round figures, about \$1,500.

Mr. WAHN: For both?

Mr. McDONALD: Yes.

Mr. WAHN: Thank you.

Mr. McDONALD: Excuse; that must be qualified. People in the Province of Quebec are handicapped by virtue of the fact that they have to travel to Ottawa and spend a night here, and this is an added burden on people from a part of the Province of Quebec that is not adjacent to Ottawa.

Senator BAIRD: Does the amount stated include Senate fees?

Mr. McDONALD: Yes.

The Co-CHAIRMAN (*Senator Roebuck*): And legal fees?

Mr. McDONALD: Yes.

The Co-CHAIRMAN (*Senator Roebuck*): And expenditures involved in gathering information?

Mr. McDONALD: Yes. I am quoting the fees that are current in Ottawa. There may be much higher fees in other parts of the country. I do not know what fees are charged in places like Toronto, but this is a sort of tariff for Montreal divorces being handled here.

Mr. WAHN: Would the same amount, \$1,500, be the cost in Ontario in the Ottawa area?

Mr. McDONALD: I do not do much work in the courts here but that is about the range.

The Co-CHAIRMAN (*Senator Roebuck*): Higher in the ordinary courts than it is in the Parliamentary Court?

Mr. McDONALD: Yes.

The Co-CHAIRMAN (*Mr. Cameron*): On behalf of the committee I extend our thanks to you, Mr. McDonald, for your most interesting and comprehensive brief. You have introduced a novel thought—not entirely a new thought because some states have put it into practice—and in this connection Mr. Brewin has mentioned the report submitted to the Archbishop of Canterbury which resulted from the study of conditions conducting to the failure of modern marriage. The thought will no doubt spread throughout Canada and will be one more item added to the inventory of the committee when they make up their minds on the subject of enlarging the grounds of divorce. We thank you for coming, Mr. McDonald.

Mr. McDONALD: Thank you, sir, and thank you all, ladies and gentlemen.

The Co-CHAIRMAN (*Senator Roebuck*): Will the next delegation please come forward—Mrs. Nora K. Rodd and Mrs. Hilda Murray. Ladies and gentlemen, I wish to introduce the delegation from The Congress of Canadian Women.

The main work of the Congress of Canadian Women is among women and children, for peace and security of the family and home. It has international ties with various women's organizations and corresponds with many countries in regard to family economics, children's educational opportunities, equality of women, and other matters relating to the family and the political status of women.

May I say that Mrs. Rodd's late husband and I went through law school together. I knew him very well and admired him greatly.

As a young woman Mrs. Rodd taught school in the Province of Ontario where she was born. Later she completed her work for Bachelor of Arts degree at the University of Queens at Kingston, and after that received her Master of Arts in Economics from Wayne University at Detroit.

Along with her husband, the late Roscoe Rodd, Q.C., she was active for many years in church work, and in the Y.M. and Y.W.C.A. and the work for world understanding and peace.

Mrs. Rodd has long been active in work for women and children and the home, and in world movements for peace. In 1951 she was the Canadian member of the Women's Committee of Investigation in Korea, and at the invitation of the women of Korea. Since its founding in 1950, Mrs. Rodd has been a member of the Congress of Canadian Women, and from 1960 to 1962 the National Secretary.

Mrs. Nora K. Rodd, The Congress of Canadian Women: Comrades, Mr. Chairman, Honourable Senators and Members I presume those of you who have seen our brief have probably read it and so I shall begin by reading the summary. It is not a long brief. I understand that time is precious here.

The Co-CHAIRMAN (*Senator Roebuck*): Take your time, Mrs. Rodd, and give us what you think would be of interest to us.

Mrs. RODD: I hope there will be time for Mrs. Murray to speak. She has been active in the work of the organization, having been president for some years. With your permission, I should like to read the summary at the end of the brief.

The Co-CHAIRMAN (*Senator Roebuck*): At what page are you reading?

Mrs. RODD: At page 12.

Summary of Brief

Broken marriages are a social evil, and making divorce more difficult will not remove the cause or causes. The objective is to create such a political atmosphere that men and women can count on building a stable family life. The 1961 census shows 81,000 wives deserted by or separated from their husbands, and more than 15,600 divorced couples in Canada, with many more thousands of homes "prisons of intolerable wretchedness" and with untold suffering and harm to the children. Society must accept responsibility for these broken homes, sometimes for the poor man the care of two wives and two families—until we have found the way to prevent them.

As with Roman Civil law, divorce should be as simple as marriage. Since founded on mutual affection, when that ceases to exist marriage should be dissolved by mutual consent, or if sought by one party only, then grounds shown. It is degrading to base marriage law on the adversary system—to show fault. We must do away forever with the pretence that marriage is but a physical union, and that the main cause of unhap-

pininess is adultery. In ceasing to maintain this attitude the government will give leadership in developing a higher sex and marriage morality, neither prudish nor irresponsible, but upholding the finest traditions of our people.

Divorce is of particular concern to women. The United Nations Charter proclaims woman's right to equality, and when society makes this a reality there will be many more happy marriages. Modern society needs both woman's mind and hand—one third of our workers are women, many of them married. Society must remove discrimination in education and training and surround the home with networks of nursery schools and after-school centres so that the modern woman may play this triple role of worker, wife and mother.

No higher duty is laid upon men and women in our society than that of founding a home and rearing healthy and happy children to be high-minded and responsible citizens.

To this end the Congress of Canadian Women recommends:

- (a) That one Canadian statute by act of Parliament unify the law on marriage and divorce; that this apply to every province.
- (b) That this law instruct that courses of family life be given in high schools, colleges and universities, and in adult study classes throughout the country.
- (c) That there be a just marriage contract. That any property owned by either party before marriage, and any received later in the form of gifts, be controlled by that party. All property or wealth earned during the marriage be held by both equally, and subject to equal division in the event of subsequent separation.
- (d) That all Canadian citizens have Canada-wide domicile, that of the wife no longer considered of necessity that of her husband.
- (e) That at the time of marriage a government statement be issued with the marriage certificate setting forth the rights and duties of each party, and along with this—information on services available to the family, such as legal aid, family court, marriage counselling, children's aid, etc.
- (f) Once, however, marriage has broken down, that divorce be available "without blame or recrimination" through the local courts and at a cost within the reach of all, and when provision for the children is assured. That orders for maintenance be placed in the children rather than the wife.
- (g) That divorce be available after two years of separation as well as for any one of the following reasons: Incurable mental disease; life imprisonment; desertion; brutality; incompatibility; alcoholism; infidelity or immorality.
- (h) That a period of six months before a second marriage be the rule excepting in such special circumstances as the court might find.

And now may I say a few words on the emphasis we place on the social conditions of our times as a consequence of there being so many divorces.

Divorces were very few in Canada before the first world war and after that they increased rapidly, and one thing that has made some women feel they could not tolerate marriages of the sort they had once put up with was the fact that women were earning their own living and so feeling independent. They did not all have to marry in order to live, nor did they all have to stay married in order to be fed.

I submit, ladies and gentlemen, we should consider some of the things our young people are faced with now. They see such dreadful things going on around

them everywhere that they are inclined to say, "So what? To hell with such a civilization! If they don't care any more for us, what do we care? Just live it up!"

We see so much of that sort of thing; and, after all, the young ones are not the ones to blame. I have a few clippings and a little book that many of you know.

Here is a clipping—a few notes by an Anglican minister, by name the Rev. Bernard Reynolds of Vancouver. This was published in 1953. He began by deploring the number of common law marriages that existed; not that these marriages, so-called common law marriages, were not quite often good, but that they were uncertain: the wife has no rights nor have the children. We all know that.

It may be different in some provinces, but a week ago I was talking to the lawyer in charge of this work in the Welfare Department at Toronto, Mr. Rutherford, and he said the position of the wife in that situation is very shaky.

The Co-CHAIRMAN (*Senator Roebuck*): Have you any suggestions to make along that line? We are much impressed with what you say, because frequently these common law marriages are quite successful in a sense: children are born of the marriage and they are brought up well, but they are illegitimate children.

Mrs. RODD: They are considered as having no rights unless the father recognizes them. Unless there is a will they have no rights. It is hard to get relief and help for children and mothers under such circumstances.

Of course, if people could get divorce more readily there would not be so many common law marriages. Some years ago Rabbi Abraham L. Feinberg wrote a fine article in *Maclean's* Magazine. It was published in the June 4, 1960, issue. In this article he tells how from ancient times the Jewish people viewed divorce. They looked upon divorce as something that people had as much right to as marriage. If the marriage did not work, divorce was available to them.

First of all, it was much more easily available for the man and he could put away his wife without much difficulty; but gradually it was recognized that it should work both ways. In the September issue of *Chatelaine* there was a very thoughtful article by one of our women, Nancy Tayler White. I do not know whether this was a pen name; at any rate she is an educated woman who writes on the degrading experience of going through divorce in Canada, and she has gone through it herself.

Nancy White tells how she had to swear to things she did not feel were right; how she had to blame her husband, when she did not feel she should do so, in order to get a divorce. She was subjected to this degrading experience. The article is worth reading. The title is: "How our Divorce Law Degrades Us".

The little book to which I have referred is called *Ultimate Belief*, written by Arthur Clutton-Brock. Shortly after the first world war he saw how Germany had "beehived" us and brought us to a state of war. The Germans, he says, had been taught to believe that their main business was to make their country great, and as he goes along he feels there is something in England that is almost akin to that—the belief, as a philosophy of life, that money making is one of the main things.

He says our people must cultivate a society that will foster a spirit of goodwill, the search for truth and for beauty. He blames the English and our western civilization for neglecting the philosophy of beauty. His view is that we do not get the truth and do not have morality if we fail to honour beauty in life. At the end—and this has much to do with divorce—he says, "an unhappy society makes for unhappy marriages, and a society that young people cannot respect makes for unhappy marriages."

The other day I cut out of the *Toronto Star* an article telling us how cheap they are making prostitution for the soldiers in Viet Nam. This article states that the Army-People Council of South Viet Nam had approved a woman lawyer's

proposal to legalize prostitution and that prostitutes be put in recreation centres. Some soldiers, when they are off duty, get free passes to these places. One of the places mentioned is a 20-room brothel accommodating an average of 100 to 300 soldiers daily. Young women are treated in special hospitals for disease, and a good many of them are diseased, and so on.

Think of our young boys reading that sort of thing in a Canadian newspaper. Think of the feelings of mothers as they contemplate their sons' departure to fight in a foreign country where young women are made prostitutes in that manner. How can young people respect our society when we make money out of war, when Canada makes money out of sending materials to the United States to kill Vietnamese.

I will tell you of an incident that occurred in the experience of one of our women not long ago. A brilliant boy in an Ontario university got a summer job working in a plant in Toronto and he came to one of our women interested in peace and handed her a \$10 bill and said: "Please take this. I find that our company is making parts for a plane that will be used in Viet Nam and I want you to use this money to further your work." She replied: "I want you to think about this carefully. You are only a student and you can't afford to give \$10. I will take it and we will talk about it later. In the meantime I want you to tell your mother about this."

She saw him the next day and said, "Did you tell your mother and father?" He replied: "I told my mother and she said she thought it was too much." They compromised but this boy would not settle for less than \$5.

When I heard about that I wrote to our Prime Minister, because we have no right to put our young people in such a position. That is why we have people in Toronto saying: Don't trust anybody over thirty; we don't like your civilization.

This is what Mr. Clutton-Brock says in effect: The aim of civilization is not to give the few the leisure to exercise their intellectual and aesthetic activities while the many are drudges. We do not believe that only the rich ought to be good while the many do not have the opportunity to want to be good. If we have learned to exercise our own spiritual and aesthetic qualities, and value the exercise of them above all things, the drudgeries of others will become intolerable to us.

That is what we want to leave with you. We want a society in which drudgery, poverty and war will be intolerable to all. Then we shall know how to keep happy marriages happy and help those that are not happy to keep from breaking up.

The CO-CHAIRMAN (*Senator Roebuck*): Shall we have questions now or wait till we have heard Mrs. Murray? Let me introduce Mrs. Murray. For the record, may I say something about her, because we have a very distinguished witness before us at the moment.

As a young woman Mrs. Murray left England in 1920 and was married three weeks after landing in Canada, and she has lived with her husband, John, in the same house in Scarborough Township for 46 years. They were both born in Birmingham, England.

Mrs. Murray has served at one time as an elected director on a Rochdale co-operative store in Toronto, as secretary to the local Red Cross and various township organizations. She was elected the first woman councillor in Scarborough in 1948. She ran for deputy reeve and was elected twice in that capacity—the first and only woman to sit in that office.

As representative for her ward, she headed various committees, both in the township and in York County Council, that is, Welfare, Mothers' Allowance Board, and Chairman of the Property Committee, where she assisted in selling several millions of dollars of tax-sale land.

She has been active in work for peace, for women and children, for years. She has served in the capacity as President of the Congress of Canadian Women for about ten years and recently as national secretary *pro tem*.

At several international women's conferences in various parts of the world, she has represented this organization. Mrs. Murray is deeply interested in good government and politics, and studied economics at the University of Toronto extension courses for four years.

Mrs. Murray, we shall be pleased to hear from you.

Mrs. Hilda Murray, The Canadian Congress of Women: Thank you, honourable senator. Ladies and gentlemen, I would like to speak briefly on two points, and the first is that marriage is a contract. Now, a contract is an agreement between two people and the state, and it would seem to me that in ordinary affairs one is not required to go to court and ask for the dissolution of a partnership on the basis that the other partner was a crook or had committed a crime; yet we do ask a married person seeking a divorce to prove that the other party has broken the law, notwithstanding that, as has been said, marriage is a civil contract.

Marriages are not made in heaven but on earth by the mutual wish of two people, and if we view marriage in that light it is degrading to a man or a woman to require proof of adultery or some other social crime.

I believe in and support the principle that divorce should be by mutual consent. I am not very familiar with divorce, though we have had divorces in the family, and I know it gives rise to a feeling of shock and a sense of guilt, of something criminal: people do not like to have it known that a son or a daughter has been divorced. This should not be, and I am sure that this esteemed committee will recommend appropriate regulations.

In England we used to have bans and we waited three weeks, and there is some suggestion that we should wait three weeks before marriage.

I wish to make a strong point about the education of youth. Our young people are living in a world entirely different from the world that we lived in as boys and girls. We knew nothing about sex; we had to wait until we got married. I do not know about men, but women had to await that experience after marriage. But on C.B.C. they explained all the details of the act and of childbirth. This in my view is beside the question, teaching children sex. We are living in a scientific age and young people cannot fail to acquire knowledge of the sort that the youth of my day did not have. I do not think I could read character in a man at the age of 20, nor do I believe that many boys were mature in the sense that young people are today.

I have only one child, a daughter, and two grandsons, and I do not want my grandsons to go around the world, as many young men do today, siring unknown children. I believe our young people are living in a more protected society than we lived in. I was very young when, during the first world war, I used to see Canadian soldiers in street cars in England, Australian soldiers, soldiers from all parts of the Commonwealth, besides English, so many uniforms, and I wondered whether I should ever see a young man in a civilian suit.

That was a harsh world for young women and a harsher one for young men, and a harsh discipline they underwent. Today, with television and radio, particularly television, and the various news media, magazines and so on, the emphasis is all on sex, and no part of it on the responsibility of marriage and parenthood.

I am a very practical person. I do not think I am an idealist—maybe I am; I do not know. But when I was in the Welfare Department and some young girl would come and say, "My husband slammed the door in my face; I'm not going

to live with him; what can I do—can I have welfare?”—in such circumstances I felt like saying, to quote the famous words of the cartoonist Bruce Bairnsfather, “If you can find a better ’ole, go to it.” At any rate, when I think of such young women I say to myself, if you can find a better job than your marriage, go to it.

Marriage is a business. I have to be a business woman, I have to pay taxes, and this is a business too; it is something acquired by experience, it is not taught; and I am sure you ladies and gentlemen, and others who are concerned with the problems you are considering, realize that our young people need direction in marriage.

You have to have a licence to drive a car; you have to know the rules and regulations; you learn at your cost that you dare not disobey those rules, and apart from the cost to you, you know that they exist for everybody’s good including your own, and if you disregard them and endanger life and property you are dealt with severely and your licence is suspended.

It is different with marriage. No young person is ever asked: Do you think the man you are marrying is suitable for you? Have you some hopes for a happy married life? Is it simply because you feel it is romantic to get married that you are getting married? Ill-considered marriages are the cause of a great deal of misery besides being a tremendous expense to the country.

There are thousands of children in Canada who are thrown upon the rates, without any parents, without any hope of a home, for the most part because of ignorance and a lack of feeling.

I would like to see the committee recommend some course of instruction in character and in the responsibilities that go with marriage, because it is a responsibility. Happy marriages make for the welfare of society, because, for one thing, our taxes go up if we are saddled with a lot of these problems, especially where children are concerned.

We talk about the rights of men and women but never about the rights of unborn children, and this to me is a very serious thing, and I do not believe our college graduates have the faintest idea of what they are doing in fathering or mothering children without careful thought.

After all, people do pay governments to enforce the regulations so that cars shall be driven safely for everyone’s sake and order be brought out of chaos and preserved. But we are not getting order out of chaos in family life and I would like to see the Government take a forward step in instructing people in the responsibility of marriage and what it entails. Marriage is not a romance made in heaven; it is a contract.

We see to it that we know what we are doing when we buy a piece of property, but we are doing nothing where young people are concerned. I would like to see this committee make some recommendation. I do not care how brilliant young people are, they need instruction in the responsibilities of marriage. If they were properly instructed I do not think we would have the divorce problems we are faced with now. Thank you.

The Co-CHAIRMAN (*Senator Roebuck*): Thank you, Mrs. Murray. Are there some questions?

Mr. WAHN: I am particularly interested in the recommendation that the minimum age for marriage be 18 years. Was the reason for this recommendation your feeling that marriage is so serious and important a matter that it should not be entered into impetuously and without proper consideration?

Mrs. RODD: Yes, Mr. Wahn. Our committee felt that hasty marriage was not good for the family; it is a contract that should be entered into only after mature thought.

Mr. WAHN: Would The Congress of Canadian Women be in favour of compulsory marriage counselling or advice before marriage?

Mrs. RODD: "Compulsory" is a strong word. We would like to see it taken for granted. We would like to see on the marriage certificate places and names of people whom they could consult at the first hint of difficulty. We would like to see in high schools and colleges some attention paid to the thought that since people are likely to get married sometime they should have some counselling.

Mr. WAHN: At the present time in Ontario it is possible to obtain a marriage licence and marry three days later. Do you think this period of time between the issuance of the licence and the performance of the marriage should be extended to make sure that people do not rush into marriage without due thought?

Mrs. RODD: Either that, or before people apply for the licence they should show that they have taken the course or that they are thoroughly aware of the gravity of what they are doing.

Mr. WAHN: I notice you believe there are some exceptional circumstances in which marriage should be permitted under eighteen, and you mention pregnancy as one such consideration.

Mrs. RODD: I don't believe in forced marriages. My husband used to tell me about things like that happening. Our people do not favour forced marriages for the reason that such marriages are not likely to be happy; but if a court feels that it would make for greater happiness to have a young person under eighteen married because she is expecting a baby we think the court should have the right to endorse it.

Mr. WAHN: That is a little inconsistent with the thought you expressed that marriage should not be entered into without due consideration of the implications of the marriage contract.

Mrs. RODD: I do not think there is inconsistency. The objective is happy marriage, and if a young man and a girl are expecting to be parents I think that is a situation in which the court might waive the 18-year age rule.

Mr. WAHN: I have only one other question. I would ask the witness whether The Congress of Canadian Women would be in favour of a requirement that, barring exceptional circumstances, before divorce is granted there be an interval during which the parties may have an opportunity to get together with a view to reconciliation.

Mr. RODD: Yes. Everything should be done to hold the marriage together if there is any possibility of that being done. We mention in our brief that there should be a period before divorce is granted and they part definitely, and we also discuss marriage counselling and so on.

Mr. WAHN: And in ordinary circumstances remarrying should not be permitted for a period of six months. That is a recommendation?

Mrs. RODD: That gave rise to some controversial discussion because some of us felt it might not be necessary. But one of our young lawyers, who does quite a bit of divorce work, was of the opinion that such a provision was advisable since second marriages could be hasty as well as first.

Mr. HONEY: Am I right in my understanding that The Congress of Canadian Women is a federation of similar organizations having the same objectives, or is this an entity in itself?

Mrs. MURRAY: We have chapters in various cities across the country, and we have affiliations with women's auxiliaries.

Mr. HONEY: In what provinces have you affiliated bodies?

Mrs. MURRAY: We have them in Alberta, Saskatchewan, Manitoba, Quebec and Ontario.

Mr. HONEY: How many members have you?

Mrs. MURRAY: We issue a News Letter to nearly seven hundred people.

Mr. HONEY: Do these members pay a membership fee, Mrs. Murray?

Mrs. MURRAY: Yes, not to us but to the local chapter.

Mr. HONEY: One more question following Mr. Wahn's last line of questioning about marriage counselling. I took it he was referring to marriage counselling after the parties had decided upon a divorce and before steps were actually taken in that direction.

Mrs. MURRAY: I do not think we said that it should be after the divorce was granted.

Mr. HONEY: No; I did not suggest that. But when the couple feel that their only alternative is divorce, at that point when they apply for a divorce to the authority that has jurisdiction, then you would agree that a counselling system should interpose that decision and the granting of the divorce?

Mrs. RODD: We were talking with marriage counsellors as well as lawyers and the thought was that before people reach the decision that they want a divorce they should discuss the position with some close friend, whether minister or lawyer. We feel there is room for a counsellor, before they have officially asked for a divorce, and even perhaps after that and before the divorce is granted.

Mr. HONEY: Did you give thought to a system of counselling which might be under the jurisdiction of the court, or the divorce authority, which would lay it down as a condition precedent to an application for divorce that the parties submit to counselling?

Mrs. RODD: We did not put it that way, but that is not a bad suggestion. The idea is that counselling should be available and should be available to all.

Senator FERGUSSON: I would like to commend the witnesses for their brief. I would suggest that along with the marriage certificate there be issued a statement setting out the rights of the parties, and it is important that they be advised of the services that may be available.

At the end of Recommendation "F", on page 13 of the brief, there appears the following: "That orders for maintenance be placed in the children rather than the wife."

Mrs. RODD: Yes.

Senator FERGUSSON: How do you work that out practically? The children live with the mother, and anyone who has taken care of them and used the money for them will have acted in behalf of the mother?

Mrs. RODD: We got that suggestion from a study of some of the English writers and from the Royal Commission on Divorce in England. There it was brought out that quite often it makes for bitterness on the part of the husband if he feels that the wife is suing for her own benefit and there were some misgivings as to whether in the circumstances the court would be able to decide fairly as between the parties. The lawyer who made the suggestion was a woman. It was felt that bitterness could be avoided if the order were given in the names of the children.

Senator GERSHAW: There is one matter I would mention. A couple come to the doctor for a blood test. He takes the blood, gives a certificate that there has been a test, forwards it to the lab and gets the results back in a week. Does that apply in all the provinces? It does with us.

Mrs. RODD: In connection with marriage?

Senator GERSHAW: Yes.

Mrs. RODD: The question is whether that practice prevails in all provinces. I do not know but I am inclined to doubt it.

Senator GERSHAW: One disease to watch for is syphilis, which is not very common nowadays, though there is always a possibility. It has always seemed to me to be hardly complete to take the blood and give a certificate, because you have to get the result of the examination.

Mrs. RODD: We have not looked into that; it is something we have not discussed.

The Co-CHAIRMAN (*Senator Roebuck*): Have you anything to say, Senator Baird?

Senator BAIRD: I have nothing to say. It was a perfect brief.

The Co-CHAIRMAN (*Mr. Cameron*): Following up what Mr. Honey was saying about counselling services under the jurisdiction of a court and reporting back to the judge, this I should think would apply in the case of a marriage that can be redeemed. Suppose the parties make up their minds that they want a divorce: is the judge to have the authority to refuse the divorce, or is this to be regarded as only one step in obtaining a divorce? Is it to be mandatory or just a trial to see whether a reconciliation can be effected? Is it mandatory that they must make an attempt at reconciliation?

Mrs. RODD: The idea is that they should try everything rather than go on with the divorce.

The Co-CHAIRMAN (*Mr. Cameron*): I suppose that is the answer one would give. It might be difficult to enforce; the judge might say, "I will not give you a divorce".

Mrs. RODD: I would like to think our courts are so reasonable that they would urge that everything possible be done to keep the family together, but not going beyond what is possible.

The Co-CHAIRMAN (*Mr. Cameron*): May I thank Mrs. Rodd and Mrs. Murray for the brief they have presented to us and for the information we have been given. I thank you, ladies, for your excellent presentation.

The committee adjourned.

APPENDIX "15"

Submission to
THE SPECIAL JOINT COMMITTEE
OF THE
SENATE AND HOUSE OF COMMONS
ON
DIVORCE
by

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P.O. Box 942
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1 November, 1966.

PREFACE

This submission advocates divorce by Mutual Consent.

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1. Preamble

(a) *Status of appearant*

Messrs. Chairman, Honourable Members of the Joint Committee:

Before I make any observations with respect to the question of "Divorce" I would like to state that I appear here in my own capacity as a Member of the Bar of the Province of Quebec and as a Member of the Law Society of Upper Canada and that I do so on my own behalf and that I am representing no organization, association or any party or parties.

(b) *Qualifications*

Having had a number of years experience before the Divorce Committee of the Senate and subsequently, further and perhaps more limited experience, before the Senate Commissioner on Divorce, I felt when your august committee was formed that I might be able to make some contribution towards the consideration of the possible reformation of the laws of divorce in Canada.

(c) *Prior Proceedings*

Having had the opportunity of studying the proceedings of this Special Joint Committee bearing date of 28 June, 1966, and 5 July, 1966, I realized that much of what I had planned to say had already been covered by such eminent Counsel as The Hon. A. W. Roebuck, who for many years has been so helpful to those of us who have appeared as Barristers or Solicitors in divorce proceedings before the Committee of the Senate on Divorce, Mr. E. Russel Hopkins, Senate Law Clerk and Parliamentary Counsel who, in the proceedings of 28 June, 1966, so aptly set forth the constitutional background concerning divorce in Canada, Mr. Justice A. A. M. Walsh, Senate Commissioner, who in the first Hearing of the Special Joint Committee of the Senate so ably outlined his own views on the position played in the newly re-organized Senate divorce procedures from the point of view of the Senate Commissioner. Particularly I would refer to the observations made by Dr. P. M. Ollivier, Law Clerk and Parliamentary Counsel of the House of Commons who before the second meeting of the Special Joint Committee of the Senate and the House of Commons on Divorce on 5 July, 1966, so concisely summed up many of the ideas that I would have presumed to have mentioned.

(d) *Scope of observations*

In view of the statements made by the foregoing distinguished lawyers who have had far more experience than I in these matters, I believe it wise to confine myself to one or two points which I have had the opportunity of studying in some detail and which I believe may add to the deliberations of this Special Joint Committee. Basically my submission is that some consideration should be given by the Committee to the possibility of following the example set by various Scandinavian Countries, whose legislation I have had the opportunity of reviewing, and which I will attempt to summarize briefly in this presentation. In this connection I am particularly indebted to Ake Waddstein, Esq., Chancellor of the Royal Swedish Embassy in Ottawa, Dr. Sakari Nurmi, Charge d'affaire of the Embassy of Finland in Ottawa, the Royal Norwegian Embassy in Ottawa, and Mr. Juhl of the Royal Danish Embassy in Ottawa, all of whom have been most helpful in providing summaries of the laws concerning divorce generally which obtain in their several countries.

2. Basic Thesis

There is a great similarity between the Laws governing divorce and the protection of women and children in each of these four Scandinavian Countries. I

believe I can best summarize my views on the way in which divorce in Canada can be simplified and made more practical to the people of Canada by referring to this legislation. These observations would be in addition to the valuable suggestions already offered by the distinguished lawyers who have appeared before this Special Joint Committee and I would propose to add to the inventory of suggestions to be considered by this Committee the concept of "Divorce by Mutual Consent".

3. *Parallel Legislation*

A review of the Laws of the Countries referred to above indicates that they are such as to encompass and illustrate this concept, viz:—

(a) NORWAY

- (i) In addition to the grounds of adultery the laws of Norway provide for divorce being available to a spouse whose partner is guilty of certain criminal offences; however, to pinpoint the basic concept that I wish to dwell upon, I would state that divorce is possible in certain circumstances in cases where there has been a one year separation and where there is consent by both parties. However, if only *one* party desires the separation, a "special reason" must be pleaded. This "special reason" may be that the "difficulties" between the parties concerned are so deep that to insist that the marriage continue would be "unreasonable".

Under the Norwegian system either party can seek a divorce if "legal separation" has been in effect for at least two years. However, either party can seek a divorce even if there has been no legal separation if the husband or wife have *lived apart for three years*.

- (ii) The procedure in Norway is quite simple, i.e. consultation and negotiation must be tried between the husband and the wife before an officer of the Court responsible for Marriage. In the case of children provision must be made for such children and the responsibility rests on both parties and it is usual that one party or both parties will agree to pay for the maintenance of the said children. It would appear from my study of the procedures involved that this is a matter for mutual agreement between the parties to the divorce and is precedent to their seeking divorce proceedings on the basis of mutual consent.

(b) FINLAND

In addition to the usual grounds for divorce, namely, adultery, venereal disease, attempt on a spouse's life, etc., the basic ground for divorce is that after one year of separated living, and after a decision by the Court that the parties separate, a divorce may be granted by mutual consent or after two years of separated living without a Court's decision. The procedure generally is that separation can be granted by a Court on certain conditions at the request of both spouses together or in certain cases when one spouse has seriously neglected his or her duties as a spouse, i.e. neglect, incompatibility, etc.

(c) DENMARK

- (i) Inter alia the Divorce Laws of Denmark provide that when marriage partners "owing to deep and permanent disagreement" consider they cannot continue married life agree to separation a divorce will be granted. The basic grounds for separation and eventual divorce are that if *one* marriage partner claims of the other that the other is guilty of gross neglect "in respect of (his) (her) duty to keep the

partner or children or otherwise gross infringement of (his) (her) duties to them, or if owing to deep disagreement, relations between the married partners must be considered as ruined, then judgment can favour separation for each, which ultimately leads to divorce.

(ii) The procedures are much the same as in the case of Norway.

(d) SWEDEN

(i) Swedish Law on divorce is perhaps the broadest of the laws of all the Scandinavian Countries and the grounds for "immediate final divorce" are as follows:—

Three year separation because of incompatibility where there has been no decree for legal separation. In this case the procedure is a request *made by mutual application* or by service of a summons by one party which is acknowledged by the other party stating that separation has been due to incompatibility.

After two years of desertion, divorce may be granted by request of the deserted party.

When a spouse has been absent for three years under circumstances which may presume death, a divorce may be granted.

(ii) With respect to the Laws of Sweden, it is observed that the children are given considerable protection under the law wherein there must be:—

Agreement concerning alimony, support and custody of the children which must be entered into before a legal separation and divorce are granted.

The spouse adjudged responsible for the divorce is never entitled to alimony and may be required to pay damages if the act which caused the divorce was grossly offensive to the other party.

4. Recapitulation

The foregoing recapitulation, in a most general way, of the laws of the four Scandinavian Countries referred to herein would lead the way to a broad suggestion that consideration should be given by this Honourable Joint Committee to the possibility of extending in Canada, insofar as Federal jurisdiction obtains, the concept of divorce by mutual consent. To this end, the following suggestions are put forward for consideration by the Committee, namely:—

5. Suggestions and Summary

- (i) "Mutual Consent" should be recognized as a cause for Divorce in cases where there are no children, such divorce by mutual consent to be granted by virtue of a decree nisi upon application by both parties and without formal hearing provided the officer (Judge) concerned is satisfied that the proceedings are in good order and that the decree final should be granted only after a period of ten months if there are no children of the marriage.
- (ii) In the case of a divorce by mutual consent in which there are children, then such divorce should be granted only upon the satisfaction of the official concerned that adequate arrangements have been made concerning the welfare of the children.
- (iii) In the case of a divorce being granted pursuant to sub-section (i) hereinabove and further in the case of children being born to the parties concerned in the interim between the granting of a decree nisi and a decree final then the terms and conditions governing such children should conform to the general pattern set forth in sub-section (ii) hereinabove.

6. Conclusion

Honourable Members, it has been a privilege to appear before the Committee and I can only hope that the thoughts I have advanced today may be of some assistance to your deliberations. I firmly believe that there is room in this country for the acceptance of the concept of "Divorce by Consent". I well know that there may be many people in Canada who have very definite views on the so-called "sanctity of marriage", however, there is in my opinion a great segment of the population which regards marriage as a civil contract. This concept is substantiated by The Marriage Act of Ontario (RSO 1960, c. 228, s. 26) which provides for marriage by a Civil Officer. Thus marriage becomes a contract. Furthermore in my opinion there is no contract which cannot be resolved by the mutual consent of the contracting parties. I believe that this concept should now be extended and made available in the laws of marriage and divorce in Canada insofar as it is acceptable to those citizens of this country who are prepared to utilize this general thesis.

Respectfully submitted.

John H. McDonald.

APPENDIX "16"

Submission to
THE SPECIAL JOINT COMMITTEE OF THE SENATE AND
HOUSE OF COMMONS ON DIVORCE

by

THE CONGRESS OF CANADIAN WOMEN

Box 188,
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June 27, 1966

DIVORCE REFORM FOR CANADA

In order to make the people easy under the meanest circumstances it is requisite that great numbers of them should be ignorant as well as poor.

—Sir John Mandeville, 14th Century, England

1. Before World War 1 there were few divorces in Canada, not one in a thousand marriages, but since then they have rapidly increased with the preliminary figure for 1963, at 7681, the highest on record.¹

2. Divorce is a social evil, a disease symptom of a society that is ill. The remedy does not lie in making divorce more difficult but in seeking out the causes and as much as possible in removing them. Dr. Wilder Penfield, neurosurgeon and author, president of the Vanier Family Institute, contends that young people of today have not changed in recent generations; are not different fundamentally, "At heart they all want a successful family life of their own . . . but a better way of communication must be found so they will understand that the way to a happy partnership is still the path of patience and self respect, reserve, studies, athletics and good fun during the time of preparation for their own self-support and independance. . ." However he continues, "Victorian rules of family living are not good enough for today. We must welcome change to bring strength to family relations based on new knowledge of a modern world."² He criticizes the mass media that "advertise wrong sex relationships and the desirability of strong drink while spending very little time on the important virtues . . ." "We must draw some conclusions about control of the mass media."³ In other words, while the family is expected to remain a strong pillar of society that society must recognize its obligations to the home. The old Greeks had a saying—a man owes his parents much, whether for good or ill, but he owes society more.

3. The greatest of all changes in the modern home is the working mother. Modern society needs the work of women's hands and brain power. Women have the same need as men to improve the family financial position, and the same need for satisfying work.

4. In the biography of Marie Curie, her daughter Eve tells how her mother grieved over the lack of education, particularly among women; and used to say that she wanted for all women a happy home life, and work they could enjoy; for love was too stormy a rock to build all one's happiness upon. How many of us know of homes that are happier now because the mother is too working, using her education and training, and bringing to the home her own interesting experiences! But far too many have to work, at unskilled and dull jobs, with far too little reward, and for long hours, and then come home to carry on with another job. Department stores and industry should provide daycare centres for working mothers. "They want women workers because they are cheap labor. . . How wonderful a mother would feel if she worked in a store in the daytime and could have lunch with her child", says Dr. Benjamin Schlesinger of the School of Social Work of the University of Toronto⁴. More government established nurseries and nursery schools are needed for mothers in offices, schools and hospitals.

5. And what of housing? Toronto Housing Authority head testifies that a mother of six is prepared to give up her children for adoption because of housing shortage; nearly 4,000 families with a total of nearly 9,000 children are in need of low-cost housing; more than 7,000 homes have been demolished in the last ten years in Toronto and replaced mainly by luxury apartments.⁵ Director of the

¹ *Canada Year Book*, 1965.

² *Montreal Star*, Mar. 17, 1966.

³ *Globe and Mail*, June 5, 1965.

⁴ and ⁵ *Globe*, Nov. 23, 1965.

Children's Aid Society reports that one of the chief reasons for admission of children to institutions for the emotionally disturbed, at a cost of up to \$24 a day, is that of bad housing, and as slum housing is knocked down, low-rental units are getting fewer and fewer.⁶

6. And unemployment? An Ontario unemployed truck driver is sentenced to four months' hard labor for brutally beating his five-year-old daughter. How can a family be happy when there is financial insecurity, and such families are measured in thousands in our wealthy country. If no work, then at least a living income is a necessity.

7. There is but one cause of divorce—the culmination of the process of marriage disintegration of which specific incidents, serious or trivial, are but the indices of its regressive trend . . . The specific or spasmodic incidents—the legal grounds—symptoms at best, pretexts at worst. Does it require great psychological acumen to see that cases are rare indeed in which a single fact or event destroys a marriage?⁷

J. P. Lichtenberger in
Problems of the Family

8. In a study of the ROYAL COMMISSION ON DIVORCE, published in England in 1956, O. Kahn-Freund, Faculty of Law, University of London, considers divorce as a social evil, outcome of many factors in the social, economic and cultural environment.⁷ Not so long ago, he recalls, masses of people never bothered to get married at all, and dissolution did not appear in the divorce courts. He agrees with Lord Walker, Judge of the Court of Session and member of the Commission, who recommended dissolution on breakdown the sole mode of ending the marriage state, and this at the option of either party. This he believes would heighten respect for true marriage, and places emphasis on marriage as a real union for life. And further, that the spirit in which the laws are applied by the courts is more important than any form of words.

9. In THE LAW AND PRACTICE OF DIVORCE IN CANADA, by H. L. Cartwright and E. R. Lovekin, the authors outline the history of marriage and divorce,⁸ as it has come down from three sources; the civil law of Rome, the canon law of the medieval church, and the common law of England, the greatest of these, the civil law. The wife in the beginning was merely a chattel bought by the husband, over whom he had the power of life and death—one of his possessions. Under civil law mere living together was sufficient, though it became the custom to acknowledge this in the presence of seven witnesses. This continued in Scotland until recent times. Under Emperor Justinian divorce was as simple as marriage; since founded on mutual affection, when that affection ceased to exist marriage should be dissolved by mutual consent. If only one wanted divorce, grounds had to be shown and the guilty party was punished, even to banishment.

10. This law of the Christian Rome Digest carried on until 534 in England—through the Institutes of Constantine who declared Christianity the state religion in 313 A.D. During the Dark Ages, until 1025, this humane law was almost forgotten. Then the study of civil laws was resumed, and today it has been adopted in almost every nation of the Western World. Even in England, stronghold of common law with its barbarous lists of offences and penalties.⁸

11. The Church, with many of its members judges, was the main channel through which the study of civil law returned. The idea of equity became very strong—"a system of supplemental law founded upon defined rules, recorded

⁶ *Ibid.*, Sept. 30, 1965.

⁷ *Modern Law Review*, Vol. 19, 1956, pp. 575-590.

⁸ *Chapter on History*, pp. 1-7.

precedents and established principles, the judges however, liberally expounding and developing these to meet new exigencies."⁸ By the end of the 19th Century the fusion of civil law and equity together prevailed over the common law. Divorce was freely allowed in Saxon times; after the fall of Rome the bishops had great power, and by decretals or canons—some supposed to come from Saint Peter—passed from one bishop to another, legislated for their parishes. This did much to establish the superhuman origin of ecclesiastical power and sanctity of the person and property of bishops. Through canon law the Church asserted power over every phase of man's activity, and this has come down in ceremonies surrounding marriage, baptism and funerals.⁷ (At the time of Henry VIII the Church owned one third of England). The Church granted annulments and divorces readily—for adultery or cruelty by either—Henry had a commission set up to reform the divorce law, hoping to liberate it from clerical influence, but he died before this had been accomplished. Divorce flourished until 1601, when the Court of the Star Chamber declared marriage indissoluble.

12. From then until 1857 judicial separation was in the hands of the Ecclesiastical courts, when it became a matter of a bill for divorce before Parliament—practically impossible for women and for the poor.⁷ In 1857 under the English Matrimonial Causes Act, the petition was to be heard by three judges, later by the House of Lords, then by single judges. The Law of England was adopted in Canada at different dates. The Ontario Divorce Act of 1930 introduced the English Act of 1857, and amendments of '58, '59, 1860 and 1868, as part of the Ontario Act of 1925 which permits marriage with sister of deceased wife. The jurisdiction in Divorce is restricted to the Federal Government. There is no statute unifying the law of the whole country.⁷

13. In the marriage contract it is generally expected that the husband will provide for wife and children while the wife takes care of the children and the home—the law has not changed despite the changed status of the working wife. In separation and divorce young children are usually left with the mother, and maintenance is as a rule ordered for children under the age of sixteen.⁹

14. "After thirty years of practice, and many thousands of hours spent listening to marital troubles," H. L. Cartwright gives this as his conclusion: "The manner in which our culture tries to channel the sexual urge is productive of untold misery, most of which is both stupid and unnecessary... Why do we keep the lid on so tight that the repression sometimes explodes in murder? Is there a legitimate reason behind this?... How can we apply 'sacrament' to a civil marriage? Law is made for all, not just for a religious group... Happiness is an individual thing... There is a basic need of every human being for affection. Our whole legal practice is based on the adversary system of need to show fault on the part of the other. No system could be better designed to push people apart. Always we come back to the individual, and for that reason I have advocated divorce be available to either after two years' separation..."

15. He quotes a judge from New Zealand, where the period of separation is three years, as he gave his opinion to the English Royal Commission on Divorce—that people living apart are married in name only and it is cruel and anti-social, and against the public interest to perpetuate these marriages—and adds, "I respectfully agree."¹⁰

16. In *A CENTURY OF FAMILY LAW*, R. H. Graveson discusses the future of family law in which divorce is no longer a disgrace, but is still a tragedy, "and for the children of the marriage, a capital tragedy—ten percent is a high mortality rate for marriage." The lawyer, he believes, cannot ignore

⁷ *Modern Law Review*, Vol. 19, 1956, pp. 575-590.

⁸ *Concise English Dictionary*, 1913 Edition.

⁹ Cartwright, above, p. 19.

¹⁰ *Ibid.*, Preface, V-VIII.

considerations of sociology, psychology or economics. "Sexual morality, once the monopoly of middle class respectability, which the rich ignored and the poor cannot afford, has changed . . . A political atmosphere is required . . . in which a planned, personal future is practical and possible." Family life is changing, yet it is, he says, fundamentally an individual matter—what one man and one woman are likely to do in a particular situation.¹¹

III

17. A fair and humane divorce law presupposes a just marriage contract. Speaking before the 1960 Commonwealth and Empire Law Conference in Ottawa, Vera Parsons, Q.C., brought out what seemed to her "the basic error in the theory that the contribution of the wife to the undertaking of marriage, by the care she gives her husband, children and the running of the household, has no monetary value."¹² Since marriage does not require that the husband give up his career for several years, is there any answer to this problem, she asked. Yes—the marriage contract. She proposed a contract in which each continues to control any separate property owned before marriage, as well as any that might come to either as a gift . . . and that property acquired by either in any way during the partnership, be considered common property, subject to equal division in the event of subsequent separation.

18. To operate properly, said Professor Ian F. G. Baxter of Osgoode Law School, Toronto, a family needs both income and services, and each is as valuable as the other.¹² The effect on children from broken homes would be far less severe if the parent in whose custody they remained—usually that of the mother—would have some assurance and freedom from worry about such basic matters as rent and food and clothing. The lack of this assurance is the cause of much lasting bitterness as well as a heavy burden on society. The 1961 census records over 81,000 wives deserted or separated from their husbands, and more than 15,600 divorced couples. Many more partners are still trapped in what Dr. Kaspar Naegele, Dean of Arts at the University of British Columbia, calls "prisons of intolerable wretchedness."¹²

19. O. R. McGregor, Department of Sociology of Bedford College, University of London, points to the obligations society must assume when the divorced man on low income cannot maintain two wives, and possibly two families.¹³ Such casualties, he maintains, "must be accepted at best as the temporary responsibility of social policy . . . In tackling social problems consciousness of ignorance may be the beginning of wisdom."

IV

20. The churches welcome reform in the laws of marriage and divorce. They too are asking that no longer must adultery be the only reason for divorce, with its "stooping to collusion and fabrication of evidence and to legal perjury", in the words of the Rt. Rev. George Luxton, Bishop of Huron Diocese.¹⁴ He advised that a period before divorce proceedings be given to counselling in an attempt at reconciliation, "Can we not look at the situation realistically . . . Are there not marriages which may be free from adultery yet are no longer viable on other equally serious grounds? When living together in peace is no longer possible . . . then allow a divorce in our courts."

21. In a "Plea to Rationalise Canada's Divorce Law"¹⁵ the Rev Douglas Fitch of Calgary, speaks as a minister of the United Church, "I am concerned to

¹¹ *A Century of Family Law*, pp. 411-417.

¹² *Chatelaine Magazine*, Should you have a Marriage Contract, by Molly Gillen.

¹³ *Divorce in England*, pp. 199-200.

¹⁴ *Globe and Mail*, Jan. 11, 1966.

¹⁵ *Dead or Alive*, pp. 168-177.

make this point, . . . that the moral and spiritual sides of marriage are incomparably more important than the physical side. . . . In 'marriage breakdown' the state in effect says "no divorce until we are quite certain the marriage has permanently broken down. . . ." He advocates a Parliamentary Committee or Royal Commission to enquire into the whole of our marriage and divorce laws, and concludes: "In the battles that lie ahead, the Church must be a fieldpost for reformers, not a citadel of reactionaries."

22. At the recent convention of the Eastern Canada Synod of the Lutheran Church in America, held in Waterloo, Ontario, the Rev. Arthur Horst, commenting on the growing trend toward common law arrangements because of the high cost of divorce, spoke for a reversal of the cost of the marriage licence and divorce proceedings.¹⁶ A resolution that the Church undertake a study of all aspects of marriage and divorce was approved.

23. The Unitarian Church has put before its congregations the main proposals of the eight bills for divorce reform introduced in the House of Commons this year. Discussions were held and resolutions were voted on. The first Unitarian Congregation of Toronto voted 83 per cent in favour of granting a divorce at the request of both parties, and 40 percent at the request of one party (no grounds required).¹⁷ One of the eight bills before the House is that of Senator Arthur Roebuck, patterned on the British system, and neither to that nor the recent law of the New York State, has the Catholic Church raised objections.¹⁸

24. Both as wives and mothers, divorce is of particular concern to women. Betty Friedan, clinical psychologist and author, says that divorce in America, according to the sociologists, is in almost every instance sought by the husband, even if the wife ostensibly gets it, and that the chief reason seems to be the growing aversion and hostility men have for the feminine millstones hanging around their necks.¹⁹ She blames the narrow life that many home women lead. Speaking in Toronto recently she put it this way:

25. "It takes courage for a woman to leave this hiding place and choose to make her own way—to move on in human evolution . . . As soon as women take the first step in choosing for themselves the kind of life they wish to lead, the nature of this society will change . . . Children will learn earlier to take the responsibility for their own development; will learn to be independent. The husband may have more power in his home—husband and wife free one another from the straitjacket of home life . . . women share the human brain."^{19A}

26. This need of a wider life for women was brought out in the DECLARATION of the International Assembly of Women, in Copenhagen in 1960:

27. Women are taking an ever greater part in the creation of material and spiritual values in all countries. They constitute a third of the workers, and their work has become indispensable in the economy of every country. . . . women today have their political rights in many countries. . . . But all recognized rights are not yet applied. Discrimination still exists in a majority of countries—the real responsibility to reconcile their work outside and their social activities with their family responsibilities. . . . Family rights (must be) adapted to the evolution of society . . . knowing their responsibilities, today more than ever, women are aware of the important role which is theirs as citizens, workers and mothers. A new woman is claiming her place in society.²⁰

28. The United Nations Charter proclaims her right to equality in all fields of life. When men and women together make this equality a reality there will be

¹⁶ *Globe and Mail*, June 2, 1966.

¹⁷ *Unitarian Horizons*, June 7, 1966.

¹⁸ *Globe and Mail*, May 2, 1966.

¹⁹ *The Feminine Mystique*, p. 261.

^{19A} *Globe and Mail*, Jan. 11, 1966.

²⁰ *The International Mtg. of Women*, pp. 14-15.

many more happy marriages in Canada. Dr. T. R. Clarke of the University of Alberta, addressing the 99th annual meeting of the Canadian Medical Association in Edmonton June 1966, gives the divorce rate in Alberta as one in every four marriages.²¹ Dr. Otta A. Schmidt of the University of Manitoba, read a paper in approval of *The New Woman*—"New woman has a new look and biological newness." He called on women to establish the code of sexual ethics for our society—"to give the necessary direction for its identification." And as Mme. Therese Casgrain expressed it in discussing Quebec's Civil Code, "Women must decide what they want. If they want protection, let them keep their antiquated law and way of life. If they really want equality then they must stop being little girls and live up to the responsibility."²²

VI

29. No higher duty is laid upon men and women in our society than that of founding a home together and rearing healthy and happy children to be responsible citizens. To that end the Congress of Canadian Women submits that society should surround the family with every possible safeguard. Among these an established minimum age for marriage, and courses on the family not only in our college and universities, and for adult education classes, but in high schools as well. Could not the marriage certificate be part of a government document including such information as the contract, services available to the family—counselling, Family Courts, Children's Aid Society, and Legal Aid Break-downs do not come all at once. Counselling can show the strength as well as the weaknesses in a family set-up, says Ethel Ostry of Toronto, experienced social worker and marriage counsellor. "A marriage threatened by divorce may be saved if it has the strength of love."²³

30. Once the marriage has broken down, however, divorce should be available, after a reasonable time, without blame or recrimination, and at a minimum cost—within the reach of all—and when the custody and care of the children is taken care of. The enforcement of maintenance order is a most important problem. If orders for maintenance of children were made separately, and the right placed not in the wife but in the children, Professor O. M. Stone of the Law School of London School of Economics, maintains, much opposition would be overcome.⁷

31. Would not a period of six months of separation be sufficient before granting a divorce, and three months before marrying again? What is to be gained by prolonging a state of tension and anxiety? By either party, or by the children? The divorce law should be Canada-wide, and likewise domicile. "Since the law of marriage and divorce is within federal jurisdiction, and national in character, there is good reason for holding that domicile should be Canadian," counsels W. Kent Power in *THE LAW OF DIVORCE IN CANADA*. This is as important for the wife as for the husband. A form of civil marriage should be available to all, and the religious ceremony to all who wish and respect it.

32. The laws of society should meet the needs of the people. When large numbers of citizens are circumventing the laws in order to live in accordance with their best judgement, these laws must be changed.

²¹ *Ottawa Citizen*, June 6, 1966.

²² *Montreal Star*, Aug. 20, 1965.

TO THE JOINT COMMITTEE OF THE SENATE AND THE HOUSE
OF COMMONS ON DIVORCE

Summary of Brief: DIVORCE REFORM FOR CANADA submitted by

The Congress of Canadian Women

Broken marriages are a social evil, and making divorce more difficult will not remove the cause or causes. The objective is to create such a political atmosphere that men and women can count on building a stable family life. The 1961 census shows 81,000 wives deserted by or separated from their husbands, and more than 15,600 divorced couples in Canada, with many more thousands of homes "prisons of intolerable wretchedness" and with untold suffering and harm to the children. Society must accept responsibility for these broken homes, sometimes for the poor man the care of two wives and two families—until we have found the way to prevent them.

As with Roman Civil law, divorce should be as simple as marriage. Since founded on mutual affection, when that ceases to exist marriage should be dissolved by mutual consent, or if sought by one party only, then grounds shown. It is degrading to base marriage law on the adversary system—to show fault. We must do away forever with the pretence that marriage is but a physical union, and that the main cause of unhappiness is adultery. In ceasing to maintain this attitude the government will give leadership in developing a higher sex and marriage morality, neither prudish nor irresponsible, but upholding the finest traditions of our people.

Divorce is of particular concern to women. The United Nations Charter proclaims woman's right to equality, and when society makes this a reality there will be many more happy marriages. Modern society needs both woman's mind and hand—one third of our workers are women, many of them married. Society must remove discrimination in education and training and surround the home with networks of nursery schools and after-school centres so that the modern woman may play this triple role.

No higher duty is laid upon men and women in our society than that of founding a home and rearing healthy and happy children to be high-minded and responsible citizens.

To this end the Congress of Canadian Women recommends:

- (a) That one Canadian statute by act of Parliament unify the law on marriage and divorce; that this apply to every province.
- (b) That this law instruct that courses on Family Life be given in high schools, colleges and universities, and in adult study classes throughout the country.
- (c) That there be a just marriage contract. That any property owned by either party before marriage, and any received later in the form of gifts, be controlled by that party. All property or wealth earned during the marriage be held by both equally, and subject to equal division in the event of subsequent separation.
- (d) That all Canadian citizens have Canada-wide domicile, that of the wife no longer considered of necessity that of her husband.
- (e) That at the time of marriage, a government statement be issued with the marriage certificate setting forth the rights and duties of each party, and along with this—information on services available to the family, such as Legal Aid, Family Court, Marriage Counselling, Children's Aid, etc.

- (f) Once however; when marriage has broken down, that divorce be available "without blame or recrimination" through the local courts and at a cost within the reach of all, and when provision for the children is assured. That orders for maintenance be placed in the children rather than the wife.
- (g) That divorce be available after two years of separation as well as for any one of the following reasons: Incurable mental disease; life imprisonment; desertion; brutality; incompatibility; alcoholism; infidelity or immorality.
- (h) That a period of six months before a second marriage be the rule excepting in such special circumstances as the Court might find.
- (i) Marriage and divorce to be available in every province. Marriage ceremony to be either civil or religious at the parties choice. That the minimum age for marriage, excepting in special circumstances, pregnancy among them, be 18 years.

The Congress of Canadian Women, Box 188, Station E., Toronto 4.

The Congress of Canadian Women began to take shape about 1948. Its constitution was adopted in 1950.

The purpose of this organization is to co-ordinate the activities which are of common interest to all Canadian women, to defend their liberty, and the future of their children, the security of their homes and to co-operate with all organizations striving for similar objectives.

To advance the stability and well-being of family life and to secure a high standard of living for all Canadians. In short to protect and promote family health, full development of children, to ensure for them the benefits of modern science and to guarantee all children have the same educational opportunities, and all Canadians shall have security during their working life and old age. To organize Women to play their full part in advancing peace, social progress, democracy.

To prepare and present briefs to the Federal Government of Canada on behalf of Canadian women, dealing with the needs as agreed to in conference or convention.

National Officers: The President, Mrs. Helen Weir, The Secretary, Mrs. Hilda Murray, The Treasurer, Mrs. Mary Dennis.

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The Congress of Canadian Women,
 June 27, 1966.

APPENDIX "17"

Private brief

to The

SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS

ON DIVORCE

by

H. M. Salter, Esq.,

Rt. 4, Box 922,

Brooksville,

Florida, U.S.A.

To the Joint committee on the subject of Divorce.

I have read with interest the proceedings of the committee Bulletin No. 1 and 2.

I would like to add a few comments and suggestions that may be useful information to the committee.

I am at present a permanent resident of the United States but was born in Saskatchewan and lived there for 61 years of my life. I have no axe to grind but perhaps my personal experiences and ideas derived therefrom may be useful to you in alleviating suffering of other Canadians.

I have experienced the death of a wife through the ravages of cancer, and have also had the heart rending experience of losing a wife through divorce proceedings, which was partially contested only for the purpose of obtaining alimony.

This part of my life brings about this brief.

The experience of going through a divorce action regardless of being a defendant, or a plaintiff, is I can assure you one of life's most bitter experiences. It therefore behooves lawmakers to try, if possible, to alleviate this human distress as much as possible, especially is this true in respect to children who are often innocent pawns.

I agree with the general principle that divorce should be granted for a general break-down of the marriage relationship rather than on specific grounds. It is impossible in most cases to assess who is really the party at fault, as one partner may pursue such a course of conduct that drives the other partner into providing the so-called grounds for divorce. This partner is then labelled, be it man or woman, as the *bad* partner.

The conventions of our society then attaches a stigma of shame, to that partner to the marriage, who has been labelled by the court as legally guilty.

The shame and guilt is then passed on to children of this marriage. These children cannot escape from this stigma because one of the parties to the divorce action must be either a father or a mother and must carry a lifetime of stigma.

The court should simply rule that marriage has broken down and the marriage is dissolved. I believe this would alleviate this cruel burden on innocent children.

There is great misconception by Canadians about so-called easy divorce laws and multiplicity of grounds in the United States. I have given considerable study to this subject here.

This could be compared to the many Americans who have a great misconception about Canada in general. There are many here, who think Canada is a land of RCMP officers and snow and ice.

There is no such a thing as an easy divorce—It is a bitter heart rending experience for anyone who is so unfortunate, to be subjugated to it. Except perhaps the racketeer who seeks only large alimony and gets it.

There are not really 40 different grounds for Divorce in United States, really only about eight; namely they are—Adultery, Insanity, Drunkenness, Drug Addiction, Non Support, Imprisonment, Cruelty, Impotence, Desertion. The other grounds are really only subheadings of these general grounds. The press greatly exaggerates how easy it is to get a divorce in the United States.

These so called and publicized easy divorces are rare, and only apply to uncontested cases, usually publishing only part of the story. The marriage has broken down generally in every case I am sure. When a divorce is seriously contested anywhere in the United States, it can be before the courts for long periods ranging up to ten years; this can hardly be called easy.

The uncontested divorces are really *all* by consent of both parties, whether they be in *Canada* or in *United States*.

It is therefore correct to say that nearly all divorces are granted after the parties concerned have reached a prior agreement. It has to be so, I hope nobody is under the delusion we do not already have divorce by consent *in Canada* as they have elsewhere. Please take note of this point—

The marriage relationship has of course been seriously broken prior to divorce action for various causes.

The present system of delineating certain *specific offences* in *Canada*, and the *United States*, satisfies the law, but forgets in so doing it is stigmatizing many *innocent children*.

I do not think the committee should neglect to gather all information possible from *United States* courts on the grounds that *American divorces* are so-called easy divorces; this is wrong.

I do not uphold the *American divorce laws* as a model, quite the contrary I think they are outdated as much as our *Canadian laws*, in terms of *Freedom of the individual and christian human relationship*.

Canada now has a chance to lead, as they have so often done before in the realm of *Freedom to the individual and alleviation of human distress*. Dont Muff it.

The subject of alimony should also be included. This has become a racket in both *Canada*, *Britain*, and the *United States*. Ruthless people marry for no other reason than to obtain alimony. It should be abolished as it is in the *State of Pennsylvania* and *Texas*, once the divorce is final, regardless of fault. The spectre of thousands of dollars being granted for alimony in *Canada*, *United States*, and *Britain*, is surely making a mockery of the institution of marriage—This should be abolished.

The welfare of children in case of a divorce is most important. I believe that the courts in most provinces have done a reasonably good job, where they take as a guiding principle, the first consideration is, the welfare of the children concerned.

The exception to this is, that *each party* to a divorce action should be held equally and wholly responsible for the maintenance of the children according to ability to pay.

The division of property or other assets of the parties concerned in a divorce action should be based on the accumulation and contribution during the term of the marriage *only*:

The Woman being given equal credit for time spent in the home.

I again want to emphasize the present system of alimony is and punitive against innocent children of a second allowable marriage.

The criminal who commits an offence is probably given one severe fine or a term in jail.

The husband who commits adultery, which is *not* a crime is assessed a fine *every month* of his life for the rest of his life, which could be 40 or 50 years and amounts to thousands of dollars. This is harsh and surely out of all proportion to the offence committed.

Where is our principle of equality of sexes gone here??

The law should also be changed that compels the husband to always pay the costs of the divorce action, regardless of who brings the action. Some equality of the sexes should be arrived at in this field also.

The present divorce laws in *Canada* are certainly causing undue hardships in *Canada*, to many innocent people. I believe they contribute to Murder, suicide,

common law living, and untold Canadians leaving Canada to obtain relief from unjust divorce laws.

There is no doubt the last two causes can be completely eliminated by rational divorce laws. The others at least lessened.

It is my opinion that rational divorce laws will not in the long haul increase divorce in Canada. It is possible at first there will be a backlog of Canadians already in serious matrimonial trouble, when this is cleared up, rational laws will decrease the divorce rate in Canada.

I am sure the *majority of married* Canadians are *not* interested in divorce no matter what kind of divorce laws are passed. It is also correct to say that marriage based on compulsion is foreign to the Canadian way of life, and tends to weaken the institution of marriage. It is also correct to say that Canadians have always responded better to volunteer discipline than to compulsion.

In conclusion I am for rational divorce laws based on the principle of the break down of the marriage relationship and the abolishing of alimony as we now have it, once a final decree of divorce is issued.

Respectfully submitted

H. M. Salter,
Rt. 4, Box 922,
Brooksville, Florida,

APPENDIX "18"

Statement to the
SPECIAL JOINT COMMITTEE
OF THE
SENATE AND HOUSE OF COMMONS
ON
DIVORCE
by

Young Women's Christian Association of Canada
571 Jarvis Street
Toronto 5
Canada

September 8, 1966.

On behalf of the YWCA of Canada, I wish to present to your Committee the following resolution which was passed at the quadrennial Convention of the YWCA of Canada, held in Saskatoon in June 1965:

WHEREAS, there are recognized injustices arising from the restricted grounds for divorce in Canada, and

WHEREAS, it is recognized that any extension in the grounds for divorce still leaves the matter to individual choice, and

WHEREAS, the YWCA of Canada is concerned about the family in all its facets;

THEREFORE, BE IT RESOLVED: That the YWCA of Canada make representation to the responsible governments requesting that their efforts to reform present divorce legislation be intensified.

We recommend the above resolution for consideration by your Committee and would be glad to present it in an appearance before your Committee if this is your procedure.

Sincerely,

Mrs. E. J. Aplin
Consultant for Public Affairs.



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First Session—Twenty-seventh Parliament
1966

UNIVERSITY OF TORONTO

PROCEEDINGS OF
THE SPECIAL JOINT COMMITTEE OF THE SENATE
AND HOUSE OF COMMONS ON

DIVORCE

No. 8

TUESDAY, NOVEMBER 22, 1966

Joint Chairmen

The Honourable A. W. Roebuck

and

Mr. A. J. P. Cameron, M.P.

WITNESSES:

The United Church of Canada: Rev. J. R. Hord, Secretary of the Board of Evangelism and Social Service; Rev. Frank P. Fidler, Secretary of the Commission on Christian Marriage and Divorce, and of the National Marriage Guidance Council, Associate Secretary of the Board of Christian Education; Rev. R. S. Hosking, Chairman of the Commission on Christian Marriage and Divorce, and Member of the National Marriage Guidance Council; Rev. W. E. Mullen, Director, Pastoral Institute; Mr. Douglas F. Fitch, Barrister, Solicitor and Notary, Member of the Pastoral Institute; Mr. Roy C. Amaron, Advocate, Barrister and Solicitor, Member of the Marriage Guidance Council, Convenor of the Law and Legislation Committee of the Montreal Presbytery and Representative of the Quebec Sherbrooke Presbytery.

APPENDICES:

19.—Brief submitted by the United Church of Canada.

20.—Brief submitted by the Pastoral Institute of the United Church of Canada.

ROGER DUHAMEL, F.R.S.C.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1966

MEMBERS OF THE
SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS
ON DIVORCE

FOR THE SENATE

Hon. A. W. Roebuck, Joint Chairman

The Honourable Senators

Aseltine	Connolly (<i>Halifax North</i>)	Flynn
Baird	Croll	Gershaw
Belisle	Denis	Haig
Burchill	Fergusson	Roebuck—(12).

FOR THE HOUSE OF COMMONS

Mr. A. J. P. Cameron (*High Park*), Joint Chairman

Members of the House of Commons

Aiken	Forest	McQuaid
Baldwin	Goyer	Otto
Brewin	Honey	Peters
Cameron (<i>High Park</i>)	Laflamme	Ryan
Cantin	Langlois (<i>Mégantic</i>)	Stanbury
Choquette	MacEwan	Trudeau
Chrétien	Mandziuk	Wahn
Fairweather	McCleave	Woolliams—(24).

(Quorum 7)

ORDERS OF REFERENCE

Extracts from the Votes and Proceedings of the House of Commons: March 15, 1966:

"On motion of Mr. McIlraith, seconded by Mr. Hellyer, it was resolved—that a Special Joint Committee of the Senate and the House of Commons be appointed to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either House;

That 24 Members of the House of Commons, to be designated by the House at a later date, be members of the Special Joint Committee, and that Standing Order 67(1) of the House of Commons be suspended in relation thereto;

That the Committee have power to engage the services of such technical, clerical and other personnel as may be necessary for the purpose of the inquiry;

That the Committee have the power to send for persons, papers and records, to examine witnesses, to report from time to time, and to print such papers and evidence from day to day as may be ordered by the Committee, and that Standing Order 66 be suspended in relation thereto; and

That a Message be sent to the Senate requesting Their Honours to unite with this House for the above purpose, and to select, if the Senate deems it so advisable, some of its Members to act on the proposed Special Joint Committee."

"By unanimous consent, on motion of Mr. McIlraith, seconded by Mr. Hellyer, it was ordered—That the order of the House of Monday, February 21, 1966 referring the subject-matter of the following bills to the Standing Committee on Justice and Legal Affairs, namely:—

Bill C-16, An Act to provide in Canada for the Dissolution of Marriage (Additional Grounds for Divorce).

Bill C-19, An Act to provide in Canada for the Dissolution and the Annulment of Marriage.

Bill C-41, An Act to amend the British North America Acts, 1867 to 1965, (Provincial Marriage and Divorce Laws).

Bill C-44, An Act to provide in Canada for the Dissolution of Marriage.

Bill C-55, An Act to provide in Canada for the Dissolution of Marriage.

Bill C-58, An Act respecting Marriage and Divorce.

Bill C-79, An Act to amend the Dissolution and Annulment of Marriages Act (Additional Grounds for Divorce).

be discharged, and that the subject-matter of the same bill be referred to the Joint Committee of the Senate and the House of Commons on Divorce."

March 16, 1966:

"By unanimous consent, on motion of Mr. Stewart, seconded by Mr. Byrne, it was ordered—That the subject-matter of Bill C-133, An Act to extend the grounds upon which courts now have jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief, be referred to the Special Joint Committee on Divorce."

"By unanimous consent, on motion of Mr. Stewart, seconded by Mr. Byrne, it was ordered—That the subject-matter of Notice of Motion No. 11 be referred to the Special Joint Committee on Divorce."

March 22, 1966:

"On motion of Mr. Pilon, seconded by Mr. McNulty, it was ordered—That a Message be sent to the Senate to acquaint Their Honours that this House will unite with them in the formation of a Joint Committee of both Houses to inquire into and report upon divorce in Canada, and that the Members to serve on the said Committee, on the part of this House, will be as follows: Messrs, Aiken, Baldwin, Brewin, Cameron (*High Park*), Cantin, Choquette, Chrétien, Fairweather, Forest, Goyer, Honey, Laflamme, Langlois, (*Mégantic*), MacEwan, Mandziuk, McCleave, McQuaid, Otto, Peters, Ryan, Stanbury, Trudeau, Wahn and Woolliams."

LÉON-J. RAYMOND,
Clerk of the House of Commons.

Extracts from the Minutes of the Proceedings of the Senate:

March 23, 1966:

"Pursuant to the Order of the Day, the Senate proceeded to the consideration of the Message from the House of Commons requesting the appointment of a Special Joint Committee of the Senate and House of Commons on Divorce.

The Honourable Senator Connolly, P.C., moved, seconded by the Honourable Senator Roebuck:

That the Senate do unite with the House of Commons in the appointment of a Special Joint Committee of both Houses of Parliament to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either House;

That twelve Members of the Senate, to be designated at a later date, act on behalf of the Senate as members of the said Special Joint Committee;

That the Committee have power to engage the services of such technical, clerical and other personnel as may be necessary for the purpose of the inquiry;

That the Committee have the power to send for persons, papers and records, to examine witnesses, to report from time to time, and to print such papers and evidence from day to day as may be ordered by the Committee, and to sit during sittings and adjournments of the Senate; and

That a Message be sent to the House of Commons to inform that House accordingly.

After debate, and—

The question being put on the motion, it was—

Resolved in the affirmative."

March 29, 1966:

"With leave of the Senate,

The Honourable Senator Beaubien (*Provencher*) moved, seconded by the Honourable Senator Inman:

That the following Senators be appointed to act on behalf of the Senate on the Special Joint Committee of the Senate and House of Commons to inquire into and report upon divorce in Canada and the social and legal problems relating

thereto, namely, the Honourable Senators Aseltine, Baird, Belisle, Bourget, Burchill, Connolly (*Halifax North*), Croll, Fergusson, Flynn, Gershaw, Haig, and Roebuck; and

That a Message be sent to the House of Commons to inform that House accordingly.

The question being put on the motion, it was—

Resolved in the affirmative.”

May 10, 1966:

“Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Roebuck, seconded by the Honourable Senator Croll, for the second reading of the Bill S-19, intituled: “An Act to extend the grounds upon which courts now having jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief”.

The question being put on the motion—

In amendment, the Honourable Senator Connolly, P.C., moved, seconded by the Honourable Senator Hugessen, that the Bill be not now read the second time, but that the subject-matter be referred to the Special Joint Committee on Divorce.

After debate, and—

The question being put on the motion, it was—

Resolved in the affirmative.”

J. F. MACNEILL,
Clerk of the Senate.

MINUTES OF PROCEEDINGS

TUESDAY, November 22, 1966

Pursuant to adjournment and notice the Special Joint Committee of the Senate and the House of Commons on Divorce met this day at 3:30 p.m.

Present: For the Senate: The Honourable Senators Roebuck (*Joint Chairman*), Aseltine, Baird, Belisle, Denis and Gershaw—6

For the House of Commons: Messrs. Cameron (*High Park*) (*Joint Chairman*), Baldwin, Brewin, Forest, Honey, McCleave, Peters, Ryan and Wahn—9

In attendance: Dr. Peter J. King, Special Assistant.

The following witnesses were heard:

The United Church of Canada:

From Toronto: Rev. J. R. Hord, Secretary of the Board of Evangelism and Social Service; Rev. Frank P. Fidler, Secretary of the Commission on Christian Marriage and Divorce, and of the National Marriage Guidance Council, Associate Secretary of the Board of Christian Education; Rev. R. S. Hosking, Chairman of the Commission on Christian Marriage and Divorce, and Member of the National Marriage Guidance Council:

From Calgary: Rev. W. E. Mullen, Director, Pastoral Institute; Mr. Douglas F. Fitch, Barrister, Solicitor & Notary, Member of the Pastoral Institute.

From Montreal: Mr. Roy C. Amaron, Advocate, Barrister Solicitor, Member of the Marriage Guidance Council, Convenor of the Law and Legislation Committee of the Montreal Presbytery and Representative of the Quebec Sherbrooke Presbytery.

Briefs submitted by the following are printed as Appendices:

19. The United Church of Canada.

20. The Pastoral Institute of the United Church of Canada, Calgary, Alberta.

At 6.00 p.m. the Committee adjourned until Tuesday next, November 29, 1966 at 3:30 p.m.

Attest

Patrick J. Savoie,
Clerk of the Committee.

THE SENATE
SPECIAL JOINT COMMITTEE OF THE SENATE AND
HOUSE OF COMMONS ON DIVORCE
EVIDENCE

OTTAWA, Tuesday, November 22, 1966.

The Special Joint Committee of the Senate and the House of Commons on Divorce met this day at 3.30 p.m.

Senator Arthur W. Roebuck and Mr. A. J. P. Cameron (*High Park*) Co-Chairmen.

The JOINT CHAIRMAN (*Senator Roebuck*): Honourable members of the committee, it is time we commenced; we have a quorum. I notice some of the senators have not brought their copy of the brief with them but we have been kindly supplied at this moment with a number of others and we will have them distributed.

We have a very distinguished delegation to address us today. They are from The United Church of Canada, and the Reverend James Raymond Hord will be the first speaker.

Mr. Hord was born in 1918 at Ilderton, Ontario, in London Township, and received his Bachelor of Arts degree from the University of Western Ontario. His theological training was taken at Emmanuel College, Toronto, where he received the Bachelor of Divinity degree, and at Union Theological Seminary, New York, which granted him the degree of Master of Sacred Theology.

Following ordination in 1942 he served pastoral charges in Saskatchewan Conference and for eleven years was Minister of Lakeview United Church, Regina. Under his leadership Lakeview grew from small beginnings to become one of Western Canada's largest congregations.

While in Regina Mr. Hord was a member of the United Church's Board of Information and Stewardship. In 1959 he accepted a call to the pastorate of Royal York Road United Church, Toronto.

Mr. Hord wrote the Lenten booklet for his denomination in 1961 entitled "The Crises of Life". Mr. Hord was appointed Secretary of the Board of Evangelism and Social Service at the 20th General Council, London, Ontario, and assumed office in 1963. He is secretary of his Church's Christian Faith Committee, Church and International Affairs Committee, and also secretary of the National Religious Advisory Council.

Our first witness is a man of very large experience and erudition and I have pleasure in introducing the Rev. Mr. Hord.

The Reverend J. R. Hord, B.A., D.D., S.T.M., Secretary of the Board of Evangelism and Social Service: Mr. Chairman and members of the committee, on behalf of our committee officially appointed by the United Church, may I make it clear that the gentlemen whom I am about to name—Dr. Fidler, Dr. Hosking, Mr. Boothroyd and Mr. Amaron of Dorval, Quebec—are part of the official committee presenting this brief on behalf of The United Church of Canada which includes official statements of positions passed by the General Council of the United Church.

We have Mr. Roy Amaron and Mr. Douglas Fitch, who will be introduced in detail later, representing the Pastoral Institute of the United Church in Calgary. They have done a great deal of work and I think you will be impressed with the background information they have provided in this brief on behalf of the Pastoral Institute.

If you turn to page 3 of the United Church brief you will see the main recommendations.

First of all, we believe that the divorce laws of Canada should be reformed; and, backing that up, we do not need to reiterate the inadequacies of the present law. We believe that the present divorce law based on the concept of matrimonial offence inflicts severe hardships and quite often deny the decree to those who face marital failure. For a law which regards adultery as the only ground for divorce can be grossly unjust, and certainly does not take into account the findings of the social sciences of psychology and psychiatry, which today uncover deep-seated anxieties, fears and disturbances which make it difficult for one partner to be related to the other.

I would suggest that the act of adultery, which is so built-up in the present law, is often a symptom of an unhealthy marriage rather than the cause. Often a couple are not getting along together because of other deep-seated conditions which lead to the act of adultery, therefore adultery should not be regarded as the only cause of marital failure.

We protest the present divorce law, which really encourages adultery in order to get a divorce. I am giving the background to this argument first. Adultery as a ground of divorce really leads to the falsification of evidence. We are pleading the cause of a large number of couples in Canada who are living common law; and here, I believe, the Christian religion has to accept a great deal of blame for the way we treat couples living common law. In the past we have almost treated them like moral lepers.

The number of such persons is estimated in the Calgary brief as 400,000. Many of these unfortunate people cannot get divorce, or cannot afford one, and so we make a plea for those people living common law. Really the concern of society as well as the concern of the Church should be placed above these social contexts. If our divorce laws were reformed, many of these couples could legitimize their unions and so live happier lives, and this would be much better for the children.

We protest the present law, which tends to favour the rich and discriminate against the poor. If you have money you can likely get a divorce, but there are poor people who cannot afford it when the marriage is broken up.

We criticize the present divorce procedures with their accusatorial posture requiring one partner to charge the other with a matrimonial offense. Quoting from our brief:

Such procedures aggravate the differences, multiply the bitterness and harden the antagonism of one partner for another.

I come now to the second recommendation, and this is the main point we wish to make today both on behalf of the United Church and on behalf of the Pastoral Institute—and I believe Mr. Amaron, speaking for the Montreal Presbytery and the Quebec-Sherbrooke Presbytery as well, will endorse this. The second recommendation is that the concept of marriage breakdown be substituted for that of marital offence as the basis for granting divorce in Canada: not just one basis but the basis for granting divorce in Canada. Our Board of Evangelism accepted this concept last February 1966. Our General Council accepted it in September last.

We were delighted that the Archbishop of Canterbury's Committee on Divorce Reform endorsed this view in its report "Putting Asunder" published last summer. I hope, Mr. Chairman, your committee will give special attention to this excellent and wonderful report.

It was with some trepidation that our Board suggested this new concept to the General Council. Mr. Fitch had written a searching background article, which appeared in our Board's annual report, titled "Let's Abolish All Grounds for Divorce". This will be found in our report.

We did not expect the concept was sufficiently familiar to command a possible majority vote; but may I say that the General Council of the United Church, with representation from the whole of Canada, every province I believe, passed it almost unanimously. I do not believe there were any negative votes. In fact, there was a sense of relief expressed to us in many quarters when we had finally come through with this concept. In a moment I would like to ask Dr. Fidler to show how the report of our commission on Christian marriage and divorce really led up to this marriage-breakdown concept even though it was not represented as such. It is set forth in our commission's report which Dr. Fidler will speak to you about.

We are urging this concept very strongly. It can be tried in court; as the Archbishop of Canterbury's committee points out, it is a triable issue; but it would be tried by judges who have a particular interest and concern as well as knowledge in this field.

Court procedures can be developed to probe into the background of all marriages that are in difficulty; instead of merely looking at the obvious where adultery or cruelty is apparent, such procedures would go into the deeper history and background of the marriage. We believe that this is the coming thing, that there is, shall we say, a ground swell in Canada towards this concept, and we hope therefore that your committee will adopt this.

The JOINT CHAIRMAN (*Senator Roebuck*): Could that be done by witnesses or would it be necessary to have a special investigation of the marriage situation?

The Rev. Mr. HORD: I would like to have Mr. Fitch speak to that, if you will.

The JOINT CHAIRMAN (*Senator Roebuck*): Not just now, if you don't mind. Mr. Fitch will address us in due season. He will speak later.

The Rev. Mr. HORD: Could he address himself to that situation later?

The JOINT CHAIRMAN (*Senator Roebuck*): Certainly.

The Rev. Mr. HORD: We have listed, especially in the Calgary brief, many of the advantages of this marriage-breakdown concept. I will mention some.

First, there is a compulsory waiting period which would prevent those situations where one of the partners wants a quick divorce in order to marry another woman, or the wife wants to marry another man. In other words, it prevents the so-called quickie-divorces and quickie remarriages. Mr. Amaron and Mr. Fitch will comment on the legal implications of this.

In our official report we are advocating a compulsory attempt at conciliation. I notice the Calgary brief opposes compulsory conciliation and I think we should state that this divergence of view of our official position is not compulsory conciliation but a compulsory attempt at conciliation.

Mr. BALDWIN: Collective bargaining.

The Rev. Mr. HORD: It might preserve some of these marriages if they went to marriage counsellors, clergymen, and so on. Some of these marriages could be saved, or at any rate the proceedings could be held up, if the couple were willing to go to conciliation. That is the second recommendation we are making.

In the third place, our proposal promises relief in those situations where one partner stubbornly refuses to grant a divorce. Sometimes a woman will dig in her heels and say, "I will not divorce that blackguard, that wretch, that stinker", and he has to live common law. We believe that a marriage which has broken down is, as it were, a festering sore in society and affects all concerned.

Our fourth submission in regard to the advantages which in our opinion would result from the adoption of the marriage-breakdown concept is that court procedures such as we suggest would arrange for maintenance and costs and above all proper care and proper provision for the children of the marriage. In our reports we build this up very strongly—that special attention must be given to the custody, care and maintenance of the children, and so on.

The fifth point is that court procedures such as we request would take into account not only present matrimonial offences but all other factors involved in the marriage breakdown.

And the sixth advantage accruing from the marriage-breakdown concept is that, as we hope, the new procedures would eliminate the means test since at present those with money can get a divorce whereas poor people cannot afford it.

We recommend:

1. That the divorce laws of Canada be reformed.
2. That the concept of "marriage breakdown" be substituted for that of "marital offence", as the basis for granting divorce.
3. That new marital court procedures to deal with distressed marriages be established, the primary concern of these procedures to be the preservation of marriage and family life, for the welfare of society and that these court procedures should provide:
 - (i) means whereby either consort could require the other to participate in conciliation procedure with a view to avoiding further legal proceedings.
 - (ii) That an attempt at conciliation be compulsory as a requisite to the obtaining of a separation or divorce.

I would point out that it is a compulsory attempt at conciliation, and we should always bear in mind that the judge would have discretion in exceptional cases.

- (iii) That no divorce proceedings be initiated, except by special permission of the court, until three years of marriage have elapsed.
- (iv) That, while conciliation or separation or divorce proceedings are in progress, the court shall have the power and the means to protect the interests and welfare of the children involved.
- (v) That no decree of divorce become absolute until the court, by order, has declared that it is satisfied that proper arrangements have been made for the welfare of the children.

I hope, Mr. Chairman, that members of your committee will comment on this.

4. That courts draw upon the skills of ministers, social workers, marriage counsellors, medical doctors, and others trained in the social sciences in addition to lawyers and other court officials currently employed in attempting to effect reconciliation.

Of course, we must say that the whole problem of divorce indicates that there is crying need of more extensive preparation for marriage. There is great need of training of young people for marriage. We need to inculcate the responsibilities of family life, mental health, education, and so on, and the Calgary brief eloquently pleads this on pages 12 to 21, wherein it stresses the strengthening of family life.

There is one other point I think I should mention here: Would this new concept lead to a rash of divorces? Would it lead to a rapid increase in divorces in Canada? There would be, of course, an immediate increase because it would

give an opportunity to some couples to get a divorce which they could not obtain under present conditions. But we believe that in the long run there would not be any significant rise in the divorce rate in Canada.

In our proposal the whole emphasis is on saving the marriage if at all possible through conciliation proceedings, avoiding hasty decisions, and so on so that in the long run it would strengthen family life in Canada and clear up the festering situations that exist in various parts of the country.

We offer the marriage-breakdown concept as a positive and healthy one that should be promoted. I wish to thank you, Mr. Chairman and gentlemen of the committee, for your patient hearing.

The JOINT CHAIRMAN (*Senator Roebuck*): That is a very valuable contribution to the subject, Mr. Hord. I am sure it is appreciated by everyone who has heard your submission. We must hurry on because there are many others to be heard. Thank you, Mr. Hord.

May I now call upon the Rev. Frank P. Fidler, Associate Secretary of the Board of Christian Education of The United Church of Canada.

The Rev. Mr. Fidler is a graduate of the University of Manitoba in Engineering, B.Sc. (E.E.), of Emmanuel College (Toronto) Diploma in Theology, and Bachelor of Divinity, University of Toronto Graduate School, courses in Department of Psychiatry.

Mr. Fidler was engaged in boys' work, having been at one time Boys' Work Secretary, Religious Education Council of British Columbia. He was on the Religious Education Council of Canada in 1932 and 1933, and Assistant and Associate Minister of Bloor Street Church, Toronto, 1933-39. He was Minister of Glebe United Church, Ottawa, from 1939 to 1948.

He was Associate Secretary of the Board of Christian Education, The United Church of Canada, 1949. He has had special responsibility for a number of church activities, of which one might mention family life education and work with the Marriage Guidance Council of the United Church.

May I call on Mr. Fidler.

The Reverend Frank P. Fidler, B.Sc., B.D., D.D., Associate Secretary, Board of Christian Education: Mr. Chairman, perhaps it would be useful if I were to take a few moments to outline the way in which our Church has come to a practical and official position with respect to divorce, and the reasons for doing this, or at least some of the reasons.

As long as ten years ago the General Council of our Church, the 17th General Council, established a Commission on Marriage and Divorce. This was done as a result of pressures arising out of the experience of the Ministry of our Church, many ministers having to cope with the fact that hardship was caused by marital stress and strain, the fact being that in most cases—almost every case—the provincial law, and, in the case of divorce that had to be dealt with on a federal basis, the federal law treated adultery as the only ground for divorce, notwithstanding that very often the marriage had in fact broken down.

The marriage bond was no longer of any effect and this created a severe hardship. But the very fact that they were unwilling to produce evidence of adultery showed that adultery was not necessarily part of the breakdown. Experienced ministers were discovering the hardship this was in fact causing and in the result there was a widespread request that the General Council establish a commission to study the whole problem and to give some guidance in terms of the present situation, on the basis of our understanding of the responsibility of the Church and the authority of Scripture in this kind of situation.

The commission which was formed, and actually worked for six years, consisted of a number of persons from every walk of life. The Chairman, Dr.

Hosking, is with us and will be addressing you. He came with an experience of the ministry, having been Judge of the Toronto Family Court, and General Secretary of the National Council of the Y.M.C.A. in Canada.

We have Mr. Roy Amaron from the Province of Quebec, and we had the late Mr. E. S. Livermore, Q.C., who had been a magistrate and a judge. We also had two psychiatrists, social workers, women as well as men, and we drew upon a wide field of experience across the country representing a great variety of services, and we had the advice of members of the legal profession.

We recognized very early that we could not come to any sound judgment about the attitude of our Church towards divorce until we had restudied what its position might be about the nature of marriage and its responsibilities, and the life of the family, the understanding of the family in all of the terms of its responsibility, both towards the members of the family within the family circle and towards the family as a whole considered as a unit of society.

We tried to look at the problem not only from the point of view of social good, that is from the sociologist's point of view, but from the standpoint of the Church seeking a deep understanding of the question of sex, marriage, and so on.

We reported on three successive occasions—Three successive biennial councils—and the first report, which was entitled "Towards More Understanding of Sex and Marriage," laid down our understanding of fundamentals from that point of view in our field.

This report was adopted by the General Council of the Church as the basis of our understanding of the problem we had been studying. On the basis of this point of view the commission proceeded towards the final report, which was at length issued in the form of the book I hold in my hand. Its title is *Marriage Breakdown, Divorce, Remarriage*. I understand each of you has a copy of the book. These copies were distributed in order that you might use them in conjunction with the brief, because we do refer to this brief.

The JOINT CHAIRMAN (*Senator Roebuck*): You will be kind enough to send me a copy? I am sure other members of the committee will read this.

The Rev. Mr. FIDLER: If sufficient copies have not already been distributed we shall be glad to send you additional copies. I understand that they were sent out but they were misdirected.

It might be useful to review for a moment the background of the position which was recommended by the commission and which was accepted as the position of the General Council of our Church, because the study that was made at that time was not merely based upon current evidence supplied through the experience of our own ministry, but we drew upon studies carried out around the world in divorce procedures as they were found in a number of other countries.

At that time we tried to find a summary of the provincial practices with respect to marriage across Canada, but they were not obtainable from any source we could discover, and to our knowledge the first complete summary was that which was prepared under the direction of the late Mr. Livermore.

The JOINT CHAIRMAN (*Senator Roebuck*): I had the honour of appointing Mr. Livermore magistrate in St. Thomas thirty years ago.

The Rev. Mr. FIDLER: We also looked at points of view of other branches of the Christian Church in the United States and Britain, and the Eastern Orthodox Church, and other sources. It was on the basis of studies of this kind, and experiments going on in a number of courts where they were attempting to deal with marriage breakdown taking place in different forms, that we made our findings.

I will not go through all these studies now, but I will say that the present brief has emerged directly from the experience that let up to the action of the

General Council; and four years ago, when this became the position of the United Church of Canada, we felt that we could not well produce what might be an anticlimax. The recommendation at that time was that a royal commission might be set up to study this situation in terms of legal and legislative implications. We are happy to say that this is the way it is being done, and it will be more productive.

If you look through our brief you will notice that following the recommendations we have tried to draw attention to some questions that might be asked as to the reasons why the United Church of Canada presents this brief.

We recognize that it is the primary function of the Church to instruct its members in the Christian ethic of marriage, but we also recognize that even within the Church some ardent and faithful Christians do discover that their marriage, for one reason or another, deteriorates, breaks down; and we have to deal with these situations in the administration of our Church, as other branches of the Christian Church must do in their internal administration.

We believe that the Christian Church has a responsibility to see that compassion and justice are shown to all persons in society, and not only to those within the fold in our own parish.

Where the marriage has broken down irretrievably there ensues a state of things that can be a living hell for husband and wife alike, not to mention the children; so that it becomes necessary to ask what remedial action can be taken.

We do not believe the Church should legislate for persons outside her membership; but since the Christian Church does in fact influence all legislation in one way or another, in that it helps to form opinion, we were led to the position that we had some responsibility in relation to the public. This is the reason we present such a brief as this is.

We outline what we believe to be the serious inadequacies in the present law regarding divorce. I will not go through this. We considered, when our commission was meeting, the extension of the grounds for divorce; and if it was a widespread view then that the marriage-breakdown concept should be the sole ground, we did not feel there was readiness even in church constituencies to accept it as such.

Mr. HONEY: What year was that?

The Rev. Mr. FIDLER: That was in 1962. We do believe, however, that as a result of the use made of this report, and having regard to the position of The United Church of Canada officially, and the fact that this concept of the breakdown of marriage has become familiar to many ministers and lay people in our constituency, it was appropriate, when the 22nd General Council met in September of this year, to declare that we were in a position to give it as our view that the present law, based on the principle of matrimonial offence, was totally inadequate, and to recommend that marriage breakdown itself might be considered as the basis for divorce.

This is the background of the way in which we have come to this position. I think it underlines our conviction that there is a readiness in our constituency and, on an even wider scale, throughout the country to regard this as the basis for divorce.

The JOINT CHAIRMAN (*Senator Roebuck*): Has it been adopted in any other place? They considered it in England; but has it been put into effect?

The Rev. Mr. FIDLER: In the background material from Calgary there are references to sixteen places where this is the basis for divorce.

For example, speaking of the law which has just been promulgated, in Australia at the 1st of January 1961, we find this as one of the fourteen grounds for divorce: Separation for five years, whether the separation was by agreement, decree or otherwise, without any reasonable likelihood of cohabitation being

resumed, provided that—and the conditions are set out. This will be found at page 52 of the background material. It comes under the summary of divorce legislation in other places.

The Rev. Mr. HORD: It is only one ground for divorce in Australia.

Mr. PETERS: When you were discussing this matter in terms of *Marriage Breakdown, Divorce, Remarriage*, was any consideration given to separation from the ecclesiastical point of view?

The Rev. Mr. FIDLER: Yes, we recognized that; and in the first report we did look at marriage as a sort of contract as well as a religious covenant, and this is the way we describe it. But the basis of marriage is a social contract; it is a contract between two people, entered into in the presence of a witness or witnesses, whose status is defined by the state, whether Canada or elsewhere, in which civil marriage is performed.

Mr. PETERS: In the case of remarriage, all churches have experienced a great deal of difficulty in this field in performing what really, in effect, is a civil contract function separate and apart from the Church. The Church is involved in mixed marriages and remarriages and it is involved in original marriages in many cases. Was any consideration given to the separation of the respective roles of the pastor as religious minister and the public functionary who performs the civil marriage? Was it considered advisable that the civil function be performed elsewhere and that the Church perform its rites within the terms of its particular doctrine? Would that eliminate difficulties in respect of remarriages, mixed marriages, and some of the other problems that have been referred to?

The Rev. Mr. FIDLER: We recognize that when a minister officiates at a wedding he acts in two capacities. He has to be licensed by the state and therefore, in that respect, is a representative of the state and functions as a civil officer in that role. But, in addition, the service of the Church is a religious service, and thus offers the blessing of the Church and accepts the vows of the participants as a covenant they make with God. In our view the minister is simply a witness to this act. I think I have stated the two functions which the minister fulfills in officiating.

Mr. PETERS: But did the conference go so far as to make recommendations as to the separation of the two functions?

The Rev. Mr. FIDLER: We did not recommend that.

Mr. PETERS: Has not this been a considerable problem in recent times, and will it not be a greater problem in the future if we broaden the grounds? The fact that, as has been stated, there are 400,000 common-law partners is some indication of the magnitude of the problem. As a matter of fact, this figure is low; the Canadian Bar Association puts it considerably higher. Do you think this is creating a problem that the churches are unable to cope with?

We find that to some extent the same problem exists for the legal profession. They know that what they are doing may not be in keeping with the very high standard of ethics of their profession, but they do it because of the thousands of common-law cases we hear so much about.

The Rev. Mr. FIDLER: Our approach was to recognize that there is a difficulty here for religious as well as civil authorities. But as a Church we came to the clear conclusion that the General Council, recognizing the justification of divorce under certain circumstances, felt that adultery was not the only ground on which it should be granted.

We set up procedures by which a study of each situation would be made on its own merits, in so far as they could be sorted out, with provision for reference to other courts in the Church if there were any doubt as to the status of two people. But there is always difficulty here, and this is where individuals who may be in the position of having to decide whether or not to officiate are in difficulty.

One of the difficulties of the adversary approach to divorce is that this stigmatizes one of the parties as guilty and dismisses the other as innocent. Minister must have an understanding of human nature if they are to function effectively, we cannot approach any difficult case on the easy assumption that everything is strictly either black or white. The black or white theory is impossible.

It is often more likely that the apparently innocent party is, in the sight of God at least, a contributor to the breakdown of the marriage. So that you cannot always assume that there is a clear-cut line of demarcation between parties. No matter how well trained you are, you cannot necessarily feel that your judgment is absolute. For this reason we did attempt to set up procedures.

Mr. PETERS: There must have been raised, in the discussions that took place, the question of the contractual aspects of marriage, involving protection for the ones least able to earn their sustenance if the marriage was terminated before they could do so. The children, unless they are to be wards of society, have to be taken care of, and this can best be done in a legal contract. Do ministers and theologians, involved in the day-to-day activities of their charges, believe that, if we made the changes that are suggested by some, they would be in a position to go much further in this social field in providing the legal requirements, under the Church, that would be necessary for stabilizing what at the present time if a haphazard method of entering into a matrimonial contract without any safeguards or protection?

The Rev. Mr. FIDLER: That was a point very much on our minds and Dr. Hosking will take another point on our brief on recommendations, because this is the concern of us all, not only of the Church but of the public.

We strongly recommend that there should be special courts—and there is experience in other courts in Canada—that would lead to understanding of the kind of procedure that would provide safeguards. We believe that even when the decision is made with respect to a man and woman who have been married, there is not sufficient protection for the children or for the wife. Dr. Hosking will say something further about this. This was one of our concerns.

The Rev. Mr. HORD: I think the position of the United Church of Canada is that possibly some couples should have civil marriages; on the other hand, even though people may have made a mistake—it is very apt to happen where there are quick marriages or wartime marriages—they should have a chance to be remarried if they have learned from this experience, are sorry, and show the spirit of penitence and a desire to do better the next time.

We do not believe that the teachings of our Lord should be interpreted in a materialistic, legalistic, puritanical and narrow way. We should have love in our hearts. Our Lord had compassion on the woman of Samaria. He did not reproach her with having five husbands but helped to give her a new start in life.

We feel that with the marriage-breakdown concept where there are marital courts all aspects of marriage can be looked into, and this would be a much sounder basis for the state, for the minister, and for guidance as a whole to determine the future of a partner who has failed.

Mr. PETERS: Does the Church still maintain its position in regard to the pseudo-social-legalistic role of a dual function in marriage, officiating at a religious union and a civil contractual union, which is a different concept? Does the Church still feel that it wishes to maintain the same type of marriage ritual that it has observed in the past?

The Rev. Mr. HORD: I would say, only if a couple come to us and request our advice or ask for a Christian marriage service.

Senator BELISLE: From the biographical sketch of the Rev. Mr. Fidler I gather that he is a man of very wide experience, and perhaps he would be good

enough to answer this question for me. From his experience would he say that any considerable percentage of those who are living in common-law relations find themselves in trouble in consequence of the loss of their faith or at any rate a diminution of it?

The Rev. Mr. FIDLER: I believe, from the experience of the Church, there are many people who are in trouble because they lack the necessary faith to support them in a crisis; but it is also true, I think, that even among those whose faith is still strong there are some who for one reason or another break down under marital tensions.

In the first pages of our book there is an analysis, from the results of our own observations through our commission and from information derived from authoritative sources in different fields, of pre-marital conditions that tend to the breakdown of marriage in our society, and as well those influences within the union that lead in the same direction—the immaturity of couples, for example. We have described this not simply from the experience of individual members but on the basis of analyses that have been made by psychologists, sociologists, lawyers and others.

The JOINT CHAIRMAN (*Senator Roebuck*): The book that has been referred to is *Marriage Breakdown, Divorce, Remarriage*?

The Rev. Mr. FIDLER: Yes. Many of those who have lost faith lost it, possibly, in a society that makes it necessary for them to go through an expensive divorce procedure, or to provide evidence of adultery where there may not have been adultery until they moved into a common-law relationship; but I do not think I could say in all honesty that we have evidence or statistics to prove that these were less Christian or had less faith than others. We have no evidence of that.

The JOINT CHAIRMAN (*Senator Roebuck*): Can you tell us how you arrive at the 400,000 figure?

The Rev. Mr. FIDLER: This is an estimate, because there are no reliable statistics in this field.

Mr. FITCH: Our informant got its figures from the same source that was given in the brief presented by the Parents Association in their brief. It was an appraisal of all the correspondence of the Family Service Bureau in Toronto and the Catholic Family Service Bureau.

The Rev. Mr. HORD: Dr. Hosking would like to say a word on court procedure.

The JOINT CHAIRMAN (*Senator Roebuck*): May I ask one question before Dr. Fidler gets through. There has been a question of fundamentals. When two people agree in the first place to be married, they appear before representatives of the Crown or a minister and enter into a bond, an agreement, or whatever you call it, and after they have done so the marriage then becomes a condition, which is far more than a contract. That is my understanding of marriage: that it is not a contract, it is not an agreement, it is not a bond; it is a condition which they have brought about by agreement and by the bond they have entered into. What do you say to that theory, Dr. Fidler?

The Rev. Mr. FIDLER: I would agree, and I go so far as to agree with the opinion of an eminent theologian in Switzerland who has given much thought to this problem. The effect of marriage is to give to a man and woman a new wholeness of life, which is more than physical cohabitation but a joining together of person with person in such a way that they become different personalities. It is, as a matter of fact, an experience that makes a new state of life for those who become a part of it. I would agree with that.

The JOINT CHAIRMAN (*Senator Roebuck*): It is more than a contract.

Mr. HONEY: Speaking in a narrower sense than another member of the committee did a few minutes ago when he referred to faith, in the sense of association with the Church, am I correct in supposing that people living in a common-law relation would probably find an embarrassing social stigma attached to that condition and so would not be as closely associated with the religious life as they would if they were living in a recognized union?

The Rev. Mr. FIDLER: Yes. I think it is true that people who are living in common law can scarcely help being cognizant of the fact that this condition does not meet with the same approval that is accorded the married state both by the community and by the Church perhaps. Therefore, they are apt to feel uncomfortable, to feel that they are under the judgment of the Church especially inasmuch as it stands for that, in the community, which is normal and distinct from common-law relations.

This is true in spite of the fact that our whole concern, as Mr. Hord has pointed out, is to understand that our Christian doctrine of marriage has a strong central element of forgiveness. In fact, there is a great deal of humanity in all of us, and in the Church, which finds it difficult to be as forgiving as we should be in our judgments; and for this reason couples who are living common law are apt to feel less comfortable in the Church and perhaps in other circles of society as well.

The JOINT CHAIRMAN (*Senator Roebuck*): Thank you, Mr. Fidler, for that learned and reasonable address. Our next witness is a gentleman I have known for many years, and just the reference to Dr. Hosking recalls memories of his predecessor. He was a very able man, and in Dr. Hosking he found an equally able successor.

Dr. Hosking was born in Canada and is a veteran of World War I. He received his B.A. degree at Victoria University as long ago as 1920. You don't look it, Dr. Hosking.

The Rev. Mr. HOSKING: I feel it, sir.

The JOINT CHAIRMAN (*Senator Roebuck*): He received his B.D. degree at Emmanuel College in 1922 and the Honorary Degree of D.A. in 1942. He was Chief Probation Officer of the Toronto Juvenile Court for five years, and that is where I met him first. He was Deputy Judge of Toronto Family Court for nine years, General Secretary of the National Council of YMCA of Canada for twenty years. He retired in 1958.

Dr. Hosking was appointed Chairman of The United Church of Canada Commission on Christian Marriage and Divorce in 1956; appointed Special Assistant to the Marriage Guidance Council of The United Church of Canada in 1962; and is Assistant Minister of Lansing United Church.

Gentlemen, I present a very experienced and distinguished witness—Dr. Hosking.

The Reverend Richard S. Hosking, B.A., B.D., D.D., Chairman of the Commission on Christian Marriage and Divorce: Honourable members, before I begin to discuss my subject may I say that when I was on the Bench the Honourable Senator Roebuck was Attorney General of Ontario. I am happy, sir, to be associated with you again, even for this brief interlude.

The JOINT CHAIRMAN (*Senator Roebuck*): Thank you, Dr. Hosking. By the way, you may stand or sit, as you please. This is informal.

The Rev. Mr. HOSKING: I will sit down because I always gave my sentences sitting down.

The JOINT CHAIRMAN (*Senator Roebuck*): Were they softer that way?

The Rev. Mr. HOSKING: Yes, and the shorter I made them the more popular they were.

The **JOINT CHAIRMAN** (*Senator Roebuck*): And the less likely to be appealed.

The Rev. Mr. **HOSKING**: Yes. In fact, there were some stupid individuals who were happy when I did not give a sentence at all.

I am going to be very brief. My background is different from these other gentlemen's: it grows out of the experience of one who was Chief Probation Officer in the City of Toronto, and Deputy Judge of Toronto Family Court, having been also associated with the YMCA. Also, I am an ordained minister, though I have not worked at it professionally.

I would call your attention to the fact that at the turn of this century we had no children's courts; The Juvenile Delinquents Act was passed in 1908. The significant thing then was the introduction of study, diagnosis and treatment in the field of legal discipline.

Instead of regarding children as criminals and determining whether they were guilty, and how much punishment there should be, there was introduced into the principle of legal discipline the idea of study, diagnosis and treatment, and we worked along that line for a number of years. Then in 1929 the first Family Court in the Province of Ontario was created and I had the honour of being appointed judge of the new court.

The second step was taken and the principle of study, diagnosis and treatment was applied to family matters. I can say frankly it was not as successful as in dealing with children, because when you get into problems of husbands and wives, problems of adults, they are much more baffling. They are indeed complex and difficult to deal with. I am being quite truthful. I do not think it was as successful in its application; but I think it was more successful than the old method whereby you tried the husband or the wife, as the case might be, and then asked how much punishment there should be.

We had two trials really. The first was what I would call a strictly legal trial in which the well-proven and tested rules of evidence of British law were applied, and may I say I tried to adhere to them as closely as I could. Usually the husband was tried, occasionally the wife; and if after a properly conducted trial, listening to what the lawyers had to say, I found him guilty, then we proceeded to what I call a social trial, in which there was called in the aid of psychiatrist, psychologist, marriage counsellor, or other helpful person, so that we might begin the process of study, diagnosis and treatment where we entered into the area of the family.

Now, when we were struggling with our commission that produced these reports—and I speak literally and precisely: we struggled for six years—we were groping for this idea of study, diagnosis and treatment in the field of divorce, and we could not arrive at it, though we discussed the matter for two or three months.

We have marriage boards consisting of a lawyer as chairman, psychiatrist, marriage counsellors or what have you, and when a divorce action came up the court would refer it to the marriage board and the marriage board would investigate to ascertain whether the marriage was dead, and if the marriage was dead they simply passed it back and let the court resume its function.

If there were any sparks of life we would recommend some treatment and if we could not come up with the answer we gave it up.

I do not need to tell you gentlemen that marriage is more than a contract; it establishes certain rights and a status and we were not very happy when we failed to find the answer. We could not remove it from the court even in our thinking because of this status and the rights involved; we knew it was a legal problem and there was a place for it. When this marriage-breakdown principle came over the horizon the right way, some of us felt that that was the answer because it puts right into the court itself this study, diagnosis and treatment.

In other words, as I envisaged it, and this is only natural I am sure, you start your legal proceedings looking at the various grounds of divorce—adultery, cruelty, desertion, and so on—and when you have gone so far in this trial you begin to ask yourself: Is this marriage fatally broken, or is it just superficially broken? If it is not irretrievably gone, what can be done to mend it?

If the judge has sufficient evidence based on the grounds—he may not call them grounds but they may be introduced as evidence—he then proceeds to ask: Has there been any attempt at reconciliation? What does the psychiatrist say? Is this marriage really broken.

After hearing this type of evidence, and those who testify in that respect are, I suppose, in the nature of expert witnesses, if the judge comes to the conclusion that the marriage is hopeless he proceeds. If he comes to the conclusion that there is hope, that there is a chance of reconciliation, he can proceed along those lines. That is my conception of what this is.

You may ask: Are you ahead of public opinion? Are you asking us to recommend something that is so far in advance of the public that they do not understand it?

Let me tell you this: I have had my eyes opened as to where the public is in this kind of thinking. I happened to be carrying the ball for the General Council in 1962 at The United Church of Canada when we introduced the question of divorce being justified in certain circumstances. Our Church had never taken a stand on divorce; divorce in the past had always been regarded as sin. The United Church of Canada had never really faced up to it. Ministers were marrying these people, divorcees, some of them—those they thought worthy of marriage. They were conducting the ceremony for them.

To my amazement, in the city of London in the year 1962, approximately 400 commissioners from all across Canada reported that they had not received one vocal objection to the idea of divorce justified on certain grounds. It was staggering to me. In other words, laymen and ministers of the Church were a mile ahead of me in my personal thinking.

The JOINT CHAIRMAN (*Senator Roebuck*): You speak of commissioners? What post do they hold?

The Rev. Mr. HOSKING: We call them commissioners of the General Council, appointed by the local churches.

The JOINT CHAIRMAN (*Senator Roebuck*): They are a sort of delegation?

The Rev. Mr. HOSKING: Yes. The United Church has a fancy for titles for laymen. When it came to the business of marriage breakdown, which was presented to the General Council just in September, again to the amazement of those who were presenting it there was virtually no objection to it.

My purpose in citing this to you is to dispel any thought there may be in your mind that this is so advanced an idea that you would appear to be silly if you recommended it. I do not think it is.

There is one other objection I wish to speak to for a second and I am finished. Have we the staff to handle it? That question was asked at the turn of the century. Can we afford to introduce this idea of study, diagnosis and treatment? We did not have probation officers but we started it and built up a staff. In 1929 we faced the same problem: where were we to get marriage counsellors and other people to handle things? Again we started it and slowly built up the necessary organization.

I suggest with respect that if this step is taken it will not be difficult to find people to do the work. That is the way of progress.

Mr. BREWIN: I would ask Mr. Hosking, apropos of the last remarks he made, how startling or revolutionary he thinks the doctrine he has been discussing might be considered by some people. After so many years' experience in England

of extended grounds of divorce along the line that is sometimes advocated in Canada, and advocated here, and when we reflect that so traditionally conservative a body as a group of lawyers, judges, clergy and theologians reported to the Archbishop of Canterbury in favour of it, I suggest that what we have heard is the expression, not of a superficial or strange thought but one that represents a profound and even conservative approach to this subject.

The Rev. Mr. HOSKING: I would agree with you one hundred percent, Mr. Brewin. I was surprised when I discovered that the report in question was submitted by a committee appointed by the Archbishop of Canterbury.

Mr. BREWIN: The people who were on the committee were very experienced, not the sort of people who would go dashing off in any direction—not that I suggest for a moment that the United Church would do that.

The Rev. Mr. HOSKING: We may dash off into the Anglican Church yet, Mr. Brewin.

Mr. BREWIN: It would be helpful to the Anglican Church if you did.

The JOINT CHAIRMAN (*Senator Roebuck*): There is virtue in compromise. Is it possible to accept this concept without entirely abolishing the present system?

The Rev. Mr. HOSKING: I am sitting here as a witness, but I would hope to high heaven you would not do that, for this reason. This is something fundamental: you are lifting the struggle from the shoulders of husband and wife and looking at the institution known as marriage in a way that removes from it much of the bitterness and sense of failure and hopeless frustration. For heaven's sake, let us take our courage in our two fists and make this step. For I think it is profoundly sound; and, speaking as a religious person, I believe it is the will of God. I honestly do.

I think we should accept the concept of the breakdown of marriage; if we did, it would take a lot of the grief out of marriage.

You can hear your evidence—evidence of adultery, evidence of desertion, and evidence in respect of any of the grounds for divorce. But for heaven's sake let us keep this concept as a higher principle.

Mr. BALDWIN: There is incompatibility between the two doctrines—matrimonial offences, and marriage breakdown. Would you agree that there is incompatibility?

The Rev. Mr. HORD: Mr. Fitch would like to speak to this, Mr. Chairman.

The JOINT CHAIRMAN (*Senator Roebuck*): Thank you, Mr. Hosking, for that eloquent address. The next witness is Mr. Roy C. Amaron, learned in the law. He was born in Montreal in 1931, a graduate of McGill University in arts, 1952, and in law, 1955. He was admitted to the Quebec Bar in 1956 and practised for two years before opening an office at Dorval in 1958. He entered partnership with Mr. A. C. S. Stead and was legal advisor for the City of Dorval from 1961 to 1964.

I could go on with many details of his interesting career, but I think I have given enough to show that we have now before us somebody learned in the law and thoroughly experienced in the subject matter which is our particular interest. I have pleasure in presenting Mr. Amaron.

Mr. Roy C. Amaron, Member of the Commission on Christian Marriage and Divorce: Mr. Chairman and members of the committee, I will limit my remarks this time and bow to my confrere Mr. Fitch, who has prepared legally the extensive brief from the Calgary Institute which you have before you. Anything I say would be redundant.

It is not often that one gets an opportunity to talk after a judge, and I dare say Dr. Hosking will have the last word; at any rate I will leave to Mr. Fitch what I would have said concerning the legal aspects of this concept of marriage breakdown.

I am sure many of you recognize—what lawyers have experienced in trying to explain to their clients—the difficulties that are involved and the farce that goes on when one tries to obtain divorce where the actual act of adultery is difficult to prove for one reason or another.

The divorce system we have now is not one which lends itself to any advancement of the attempt to remedy marriage breakdown as it exists. You cannot hope to reconcile two people who are fighting by pitting them one against the other on opposite sides of the court room, each running the other down.

During the many months we spent discussing this business of marriage breakdown, this matter of marital offence, we have found how difficult it is to solve this problem. As Dr. Hosking has said, however, we believe we are coming up with the answer. To me, to the members of the commission here, and to the members of the Institute from Calgary, the answer must be in some sort of concept of marriage breakdown.

Use the grounds, if you will, as evidence, but do not simply give us a decision that will recognize marriage breakdown as a fact, but give us the machinery to deal with the situation,—conciliatory proceedings.

How often have you come up against a client who has said: "I will not go to a marriage counsellor or psychiatrist or doctor. My wife doesn't think there is anything wrong with her, I am the one that is supposed to be sick. The fact is, she is."

If we had compulsory conciliatory proceedings as part of the divorce procedure—or perhaps, in Quebec or other areas where you have judicial separation, as part of the separation machinery, at least you would have some opportunity of giving these people the chance of re-evaluating their lives and re-assessing themselves.

Where married people have failed, or where society has failed them, they should be given a chance to rebuild the marriage which they say has broken down. It might still be viable. At any rate, postpone the decision as to whether a marriage breakdown exists until such time as an effort at conciliation has been made. Speaking as a very humble suburban lawyer, I suggest that this is the way the younger generation is thinking. This is what we are asking you to consider, because if you have people coming back to you constantly saying, "This is a stupid situation, the law is an ass"—how long will they have respect for the law.

There may be other answers and I am sure you will hear many, but we as a Church submit this to you, and we speak not only for this commission but for the Montreal Presbytery and the Quebec-Sherbrooke Presbytery, which are the two local courts of the Church in Quebec primarily concerned with pressing the jurisdiction of Parliament for a proper system of divorce.

I say to you that reform is long overdue and I simply submit this as the answer.

Mr. BREWIN: One thing that Mr. Hord said earlier, on which you as a lawyer might give us some assistance, was that the present law was unfair, that it favoured the rich as against the poor, that it was expensive. The other day someone told us \$1,500 was the average figure one would have to pay, presumably lawyers and detectives in gathering the necessary evidence in proof of adultery. Have your commission looked into the question, how far you could remove that particular burden by adopting the principle you suggest? You will still have to have a court, as I understand, and an even deeper investigation.

Do you contemplate that an ancillary court qualified to carry out the necessary procedure to look into these matters would be paid for by the community?

Mr. AMARON: That is in effect what we envisage. One of the problems which practitioners in Quebec are faced with is the unrealistically high cost of divorce in that province. The figure you quote is realistic for that province. The usual

cost is probably three times what it is in other provinces, and we can only assume that it is because in other provinces there are local courts to which the parties may address themselves.

Here we are dealing in effect with a pseudo-judicial but in fact legislative process rather than a court process, which is the case in other provinces. To answer your question specifically, the system which would be developed to assist the courts in the social and psychiatric aspects of conciliation and marriage guidance would, I believe, be state-financed, as the system is now where it exists.

It could be that legal costs of divorce would go to some extent to help defray these expensive conciliatory proceedings, and perhaps fees of attorneys would be to some extent reduced to cover the less onerous proceedings and red tape with which we are now faced.

Senator BELISLE: Where does the state pay?

Mr. AMARON: At the present time I refer to the social welfare courts in Quebec where there are paid social workers.

Senator BELISLE: But it has nothing to do with any matrimonial question?

Mr. AMARON: No; but we recommend as part of the divorce system that there be compulsory conciliation and that there be called to the assistance of the court the experience and ability of social workers, ministers, and psychiatrists, and some of these would have to be state-financed.

The Rev. Mr. FIDLER: In this report there are three systems which throw a little light on the practice elsewhere—I am speaking of *Marriage Breakdown, Divorce, Remarriage*. At page 51 some information is given with respect to Australia where the state provides financial assistance to marriage guidance organizations. In Toledo, Ohio, investigations are provided by the court. That will be found at page 53. In Los Angeles, page 54, the court has for a number of years conducted a significant experiment in the field of domestic relations. One consort in a family suffering from marital discord may require the other to appear before a conciliator for marriage counselling, and so on. Provision is made for assistance along this line. There are other experiences reported but this gives the kind of provision that is made.

The JOINT CHAIRMAN (*Senator Roebuck*): There would be one applicant for divorce. Would you place the burden on the applicant to make out a case?

Mr. AMARON: I would refer you to Mr. Fitch in this respect. Unfortunately he was designated the last speaker on the program though he is the one you are most anxious to hear. I defer to him.

With reference to the question Senator Belisle raised, I would say this. I believe one of the results of the conciliation proceedings which are envisaged in this brief would be that a great deal of work now being done by social agencies in the community would have to be taken over as part of the conciliatory proceedings relating to marital problems, because many of these arise directly from marriage, or would fall into the general category they are now falling into. There might be a considerable increase in cases requiring the provision of additional social facilities, but this is something that will come anyway and will be engulfed in the social welfare activities now being carried on.

The JOINT CHAIRMAN (*Senator Roebuck*): Have you given the constitutional question any consideration? Civil rights are in the provinces.

Mr. AMARON: I have given these matters a great deal of thought, Mr. Chairman, and have discussed it with other members of the delegation. In the brief which will be discussed in a moment the constitutional question as such has been, in effect, disregarded in the recommendations for an over-all divorce picture. We recognize the problems you face as a committee in devising legislation which falls within your legislative prerogatives and we hope you will find, on a constitutional basis, the sort of answer that will encompass the main aspects

of this brief and will apply in all provinces, not only in Quebec but in all the other provinces as well, and serve perhaps as a guide and example for similar legislation by the provinces on matters of purely personal civil rights.

The **JOINT CHAIRMAN** (*Senator Roebuck*): The Reverend Mr. Hosking was a provincial, not a federal officer. I am not so sure how far we could enter into the kind of work he was doing in the juvenile and family courts. What is your opinion?

Mr. **AMARON**: The final answer is: the legislative power rests with the federal government to legislate on divorce, and if you retained to the federal judge the decision as to whether or not a divorce should be granted, and made it a condition of his decision that certain requirements should be satisfied, for example, conciliation, the care of the children, alimentary support and the various matters we have covered—if you made all this a condition of his decision you would not be legislating in a provincial area. You are saying: Unless these conditions are fulfilled there will not be divorce where we have federal jurisdiction.

Mr. **WAHN**: I have been reserving a general question until the end of the presentation by the witnesses for The United Church of Canada. Is this the end of that presentation, Mr. Chairman?

The **JOINT CHAIRMAN** (*Senator Roebuck*): I am told there are two more witnesses. There is Mr. Fitch, and the speaker next on the list after Mr. Amaron is Mr. Mullen.

The Rev. William Edgar Mullen was born in Alberta in 1920 and was on Canadian Army Active Service. In 1950 he obtained his Bachelor of Arts degree at the University of Alberta and from 1950 to 1953 he studied at St. Stephen's Theological College, Edmonton. He was ordained by the United Church of Canada. In 1953-1954 he engaged in graduate studies in theology and psychiatry at Union Theological Seminary, New York, and Rockland State Mental Hospital, Orange, New Jersey.

Mr. **MULLEN**: Please take the rest as read, Mr. Chairman.

The **JOINT CHAIRMAN** (*Senator Roebuck*): Not quite. The Rev. Mr. Mullen is a Member of the American Association of Pastoral Counsellors, being a specialist in that field. There is certainly more I could tell you about him, but perhaps I have said enough to make it perfectly clear to you who read the record that you have a witness who knows what he is talking about.

The Reverend William Edgar Mullen, Woodcliff United Church, Calgary: Thank you, Mr. Chairman. I will keep my remarks brief so that you may be able to put your questions to Mr. Fitch.

Our work at the Pastoral Institute comes out of all that these men have been telling you about, the work that this commission has been carrying on for a number of years. My first involvement with this problem was in Alberta in 1959, and for a year in the Alberta Conference of our Church we have been wrestling with it.

In 1959 we presented a resolution which called for three years of separation as a ground along with other marital offences, so you can see how our thinking has shifted under this kind of study that has been going on across the Church.

The Pastoral Institute is one of the specialized approaches to this problem and was a pilot project of our Church, the first one in Canada—we have one in Toronto now and another one is coming in Winnipeg.

The reason I mention this is that one of our programs is that of internship, and this is where we hope that some leadership and judgments of experience and training will be provided for this kind of program we are undertaking.

The main recommendation is that spoken about by the others: that the concept of marriage breakdown replaces the concept of marital offence as the

sole basis for granting divorce in Canada. There are problems created for us as counsellors or pastors, social workers of all kinds, by the present system of law, which we believe the marriage breakdown concept would help to solve.

I mention three of these. Some people are divorced before we can get them into counsel. A quick action for divorce comes out of a drinking party, though the marriage is by no means dead; yet the couple go into court, on the motion of a revengeful spouse or a hurt spouse, and divorce is accomplished before we can bring together the resources in the community that are available to help these people.

Then we have emotionally upset people coming to us wanting a divorce with decree *nisi*; but because they were not psychologically estranged, not emotionally divorced, they were not able to proceed to the final decree: they could not do it. They went into depression entailing other problems. In other words, the marriage was not emotionally or spiritually dead.

Secondly, some people cannot get a divorce and there is no way of helping them to rebuild their lives until they do get the divorce. Sometimes the marriage is unquestionably dead; you cannot even find the spouse; you cannot legally terminate the marriage. On some occasions Mr. Fitch has worked with us, often successfully, in bringing a happy conclusion to years of common-law marriage. I have never yet met a common-law couple, and we meet many of them, who wanted to live that way; they wanted to have it put right.

Not only is common-law marriage a festering sore as Mr. Hord has pointed out, but it affects many other lives when a couple have to go on living in that state.

The marital offence type of law requires one of the parties to look at the other spouse and not at his or her own behaviour. One of the reasons why this brief is so extensive is to tell you something of our experiences with people whom you are not likely to meet, as my colleagues have met them. You have to deal with this problem from the subjective point of view so that you can understand how it is that some people see things and do things that are often quite inconsistent with their real feelings.

We have to find out how people feel, and help to relieve them of these troubled feelings so that they can move back into reconciliation.

The Calgary Presbytery of The United Church of Canada has backed us unanimously in the presentation of this brief, and we hope you will study these new ways of facing the sociological and psychological problems that are involved. Our Church is involved, and so are many other Churches including Roman Catholics, in matters of leadership and training, and we will furnish the necessary support, speaking as Christians in this country, if you can bring about the desired reform.

The JOINT CHAIRMAN (*Senator Roebuck*): Thank you very much, Mr. Mullen, for a most informative address. We have arrived at the last witness, Mr. Douglas Fitch of Calgary. Mr. Fitch was admitted to the Alberta Bar in 1957 and has been in private practice in Calgary. He has been on the Inter-professional Advisory Committee of the Pastoral Institute of The United Church of Canada. Mr. Fitch.

Mr. Douglas Fitch, Interprofessional Advisory Committee, Pastoral Institute of the United Church of Canada: Mr. Chairman and gentlemen, I note from reading previous proceedings of the committee the question of marriage breakdown has come up on several occasions, and a short answer to this question is: It is an approach to the problems that arise in any divorce proceedings. Whenever people reach the stage where they are seeking a divorce there are certain questions that present themselves: Is this a dead marriage? It is a live marriage? Is it a marriage that is dying? Or is it a marriage which with understanding and proper treatment stands a chance of survival?

What we have in mind is a court of inquiry into the reasons leading up to the breakdown and not simply a tribunal to determine whether one member of the union is guilty of a certain type of marital offence such as adultery.

There are many ways in which the legislature could put a marriage breakdown law on the books. Many countries have the marriage breakdown concept as part of the law. Canada, England, Ireland, Spain, Italy are the only countries that do not have some form of the doctrine as part of the divorce law.

In Switzerland and West Germany there is no requirement for a fixed period. If one of the parties takes the matter to court the simple inquiry is: Is this marriage irretrievably broken down? The various grounds fall into a catch-all or basket provision, and if you cannot bring the conduct of a spouse under any of the fourteen headings you can still say to them: "If you stay separated for a certain number of years you automatically receive a divorce."

Those are two extremes, and the second is mechanical at any rate: a simple period of separation and you automatically get a divorce. Now, the spouse gives proof of a matrimonial offence and automatically gets the divorce.

On page 29 or our brief you will find one definition of marriage breakdown which commends itself to the Pastoral Institute. I quote:

DECREE OF DIVORCE: The court shall upon a petition by one of the parties to the marriage, decree dissolution whenever the marriage has irretrievably broken down.

PUBLIC POLICY: Notwithstanding the foregoing, the court may refuse to grant or delay the granting of a decree if in the opinion of the court the granting of the decree would be contrary to public policy.

PARTICULARS OF PUBLIC POLICY: Public policy permitting the refusal or delay of a decree of dissolution includes the following:

(a) that the issue of a decree will prove unduly harsh or oppressive to the respondent.

We have in mind such things as failure to make proper financial arrangements for the spouse.

(b) that the petitioner has failed to comply with a prior order or is likely to fail to comply with an order of the court concerning:

- (i) the maintenance of the respondent or of a child of the parties,
- (ii) custody of or access to a child of the parties.

This is the most important part of the definition:

PROOF OF MARRIAGE BREAKDOWN: Irretrievable breakdown of the marriage shall be proven by evidence that there is no reasonable possibility of a resumption of cohabitation and shall include evidence that the parties are in fact living separately and apart and have lived separately and apart for a continuous period (except for periods of cohabitation of not more than two months each that have reconciliation as a prime purpose) immediately preceding the date of the granting of the decree, such period to be either:

- (a) one year when the respondent has been guilty of adultery, extreme cruelty, sodomy, bestiality, or an attempt to commit sodomy or bestiality, or
- (b) three years in any other case.

This is the legal definition and it tells the litigants and solicitors what has to be proven. It has to be proven in court, and it is not a matter of the court's turning it over to marriage boards or expert witnesses; it is evidence that must be presented in court.

In the draft Act, which is Schedule A to our brief, we have tried to work out some changes in the law which we think might follow the change in the philosophy on which divorce is granted in respect of matrimonial offences.

I refer you to pages 43 and 44 where, beginning on page 43, you will find a Synopsis of Changes in Procedural and Substantive Law Contained in Draft Act. This contains a summary of recommendations. Not all these are by any means changes that are necessary from the change of matrimonial offence to marriage breakdown. We hope, however, it will be of some guidance in the other aspects of divorce law in Canada in addition to the basis on which divorce is granted.

You will note that in our definition there are two, shall we say, floor levels of evidence which must be presented to the court in every case before divorce is granted. There must be proof either of adultery, or, in the case of cruelty, of the fact that the parties have been separated for at least one year.

At a recent sitting of a divorce court at Calgary, Alberta, of the 45 cases tried, in 80 per cent the parties had been separated less than three years, in 58 per cent less than one year, in 24 per cent less than three months, and in 11 per cent of the cases, a month or less.

It is a mistaken notion that most divorces take a long time to obtain. Most are granted quickly and it is the exceptional case, the hard case, where at present no relief is obtainable, that comes to notice.

It has been suggested in previous discussions that divorce on the principle of marriage breakdown is a form of divorce by consent. I suggest that in the basis of every divorce there is a large element of consent, and I cannot think of any case in which there is more consent than there is under our present system. The evidence is supplied by the defendant, or the defendant tells the plaintiff where it can be got.

In most cases where the parties are separated adultery does take place in the course of human nature and if they get the consent of the defendant to admit it in court there is no problem. If they have money for a detective they can get it, but the defendant tells them where the evidence is.

Our suggestion is that the marriage breakdown doctrine has less resemblance to divorce by consent than the present system where the defendant seeks to supply evidence and the divorce is granted.

The question has been asked: Is marriage breakdown sufficiently well known in Canada to be feasible at this time? If the form adopted were simply separation for a period of three years after inquiry as to whether the marriage was irretrievably broken down, the answer would be: no, people do not understand that. But in the form in which we have submitted it, the period of separation is only one year where there is either adultery or cruelty.

This is something that lawyers and clients can understand: prove either adultery or cruelty and there is a year of separation. But with the passing of time, I believe the first part of our definition would have more importance, that is, the answer to the question: marriage irretrievable?

At first a judge might say: Prove the act of adultery, and after one year's separation there will be a divorce. Later on, however, the judge might well say: So what? There has been an act of adultery and you can separate for a year; but what have you tried to do about your marriage?

We suggest in our definition that there is a possibility for the matrimonial offence concept to be swallowed by the new concept. The old system would be swallowed by the new one and it would not be necessary to throw out the old system and replace it with an entirely new one.

As the idea of marriage breakdown must be looked at practically in terms of social workers, in the report "Put Asunder" there is a suggestion that each divorce trail would have some resemblance to a coroner's inquest. I do not think

this idea is useful. In many cases, proof of cruelty, together with separation of the parties, would make it obvious that there was no possibility of the marriage being retrieved. It would be only in a small percentage of cases that the court would need to go into a great deal of detail. It would possibly refer the parties to a counsellor.

It would help considerably if a lawyer would tell people: Unless you have been through the counsel process the court may say, "We are not satisfied that there has been a breakdown; why don't you go there now?"

It would be a very good thing eventually to have forensic social workers, but I do not believe it is necessary to start with under the form of marriage breakdown that we recommend.

The JOINT CHAIRMAN (*Senator Roebuck*): That is the most practical statement we have had yet.

Mr. WAHN: I recognize the importance of this concept of marriage breakdown and my question is directed to the witness for the purpose of understanding what he means by it. Could you put the question this way? If a married couple have been separated for three years and go to court for a divorce, is that classified as evidence of a marriage breakdown giving entitlement to divorce, or must they go further and satisfy the judge that in addition to being separated for three years there is other evidence which would indicate that the marriage has irretrievably broken down?

Mr. FITCH: That would be to some extent in the discretion of the judge. In some cases he might say, "I am for it". Other judges would be cautious and say: "You have been separated three years. What have you done about your marriage?"

The JOINT CHAIRMAN (*Senator Roebuck*): He would ask, why the separation?

Mr. FITCH: That would be one question.

Mr. WAHN: Would it not be necessary to decide whether you would permit the judge to dissolve the marriage in a case where the parties had been separated for three years, or whether he must go further and satisfy himself that there is no possibility of rehabilitation? Is it conclusive evidence?

Mr. FITCH: Under the definition, no.

Mr. WAHN: Where there would be one year of separation combined with adultery, this again would not be conclusive evidence to the court, and if it is its job to go into the broader question of whether the marriage has in fact irretrievably broken down—

Mr. FITCH: Depending on the circumstances.

Mr. WAHN: If the court actually does its job well and properly and in accordance with the statute, it would not be enough for it to satisfy itself that the parties have been separated for three years in one case or one year in the other, plus sexual offence, but you say the court should go further and make an investigation to see whether in fact the marriage has irretrievably broken down?

Mr. FITCH: If by investigation you mean further questioning in an inquisitorial sense, I would say no.

Mr. WAHN: I suppose the judge would have discretion as to how he could satisfy himself?

Mr. FITCH: Yes.

Mr. WAHN: I take it from your answer that no person would be entitled to divorce merely because he had been separated for a period of three years in one case or, in the other, one year plus the offence?

Mr. FITCH: It should not be automatic or it becomes divorce by consent.

Mr. WAHN: Suppose the judge does his job thoroughly and does not accept *prima facie* evidence, is it not possible a divorce proceeding under these conditions would take longer and conceivably be more expensive than divorce proceedings at the present time?

Mr. FITCH: It certainly could be and certainly should be longer and more expensive than a case requiring the proof of one act of adultery. Where the parties have been separated three years or, as the case may be, one year with cruelty combined, you would not need to go further than extreme cruelty or the fact that the husband has been absent three years and living with someone else. It would be obvious in such a case that you would not need to go further.

Mr. WAHN: Could you tell us what the cost would be of any contested divorce case—the total cost to the parties of any contested divorce case in Alberta at the present time?

Mr. FITCH: I believe it is the lowest in Canada: \$300 and disbursements of \$25 when only the plaintiff has a lawyer and there is no difficulty obtaining proof of adultery. As a matter of fact, under the Needy Litigants Act in Alberta they turn out needy litigants' certificates whereby the wife gets a divorce for nothing, and practically every lawyer has one in his office. Three hundred dollars is the going rate.

Mr. WAHN: It is conceivable that if you adopted the marriage breakdown theory the cost of divorce could rise?

Mr. FITCH: The cost to some people would go up; but to a woman who has been deserted by her husband and has no money and is living on welfare, that does not apply; she gets the needy litigant's certificate and can get the divorce at no cost to herself. All that would need to be proved would be that the husband had been gone three years.

Mr. WAHN: If there were no separation for three years, or for one year coupled with adultery, are there any other circumstances in which the judge could nevertheless satisfy himself that the marriage had broken down, and grant the divorce?

Mr. FITCH: We have been saying no, because we have gone through all the different grounds for divorce in different jurisdictions and have not found one yet that we thought could be fitted into one of these categories. But we had one difficulty in regard to persons in jail or in mental hospitals. We think that subject to judicial interpretation every case could be fitted into one of these two categories.

Mr. WAHN: On page 29 of your brief you say:

Irretrievable breakdown of the marriage shall be proven by evidence that there is no reasonable possibility of a resumption of cohabitation and shall include evidence that the parties are in fact living separately and apart—

I would suggest there are other circumstances in which the judge might satisfy himself that there was a marriage breakdown even though there was no separation for either one or three years.

Mr. FITCH: I am not a legislative draftsman but, with respect, I think it should have read "may include".

Mr. WAHN: You limit it to those two contingencies?

Mr. BREWIN: I suggest to you that when you say something "shall" include, and so on, and then stipulate certain things, you are clearly indicating those things. There are conceivable cases where it is evident that there is no possibility of a resumption of cohabitation—matters which it does not take a year or two to

determine. The extreme cruelty might be of such a nature that the court in its judgment might say: This is so clearcut that we will not hold this person up for a year.

Mr. FITCH: Yes; but unfortunately cruelty in many cases comes out of the petitioner's imagination and he or she describes it in such a way as to get a divorce. All we have done is to delay the divorce. The question might be asked: 'If the cruelty is as bad as you say, why did you not leave long ago?' Unless such a person has walked out for a year, and the trouble is not as bad as he or she thinks it is, what they should be asking for at this point is a judicial separation.

Mr. BREWIN: I prefer your draft to your explanation.

Mr. WAHN: There must be separation for three years before you consider the marriage as broken down. Is it sufficient if the separation is at will, period? If the husband gets fed up and leaves his wife, deserts her and stays away for three years, is this a three-year separation within the meaning of your marriage breakdown provision?

Mr. FITCH: It is in the sense that he has a right to apply to the court. He does not have to prove that he had good reason for getting out, but whether he got the divorce would depend on whether (1) his wife opposed it or (2) it was a matter of public policy. If it were flagrant, if he ran off with another woman without any good reason and his wife opposed it, I should think that under the heading of public policy the divorce would not be granted. No person should have the assurance that if he ran off with a mistress he could be sure that merely by staying away three years he could get a divorce.

Mr. WAHN: Suppose a man runs away, not with a mistress but simply to be free of his wife. He leaves for the sole purpose of living apart from her, and stays away from her for three years. Can he not then apply for a divorce under the marriage breakdown theory even if his wife does not want a divorce but wants to resume cohabitation?

Mr. FITCH: Yes, and usually he would get it; certainly he should. He has done everything he could in terms of maintenance of the children; that is assumed.

Mr. WAHN: Suppose the wife does not want the divorce because of religious views: she feels that divorce is immoral and wrongful. But he has been separated from her for three years and has behaved himself decently; he simply cannot live with the woman, they are incompatible. Under those circumstances, the wife not being guilty of any wrongdoing, would the husband be entitled to a divorce?

Mr. FITCH: Yes.

The JOINT CHAIRMAN (*Senator Roebuck*): Suppose he had not sent support in the interval would he be entitled to the divorce?

Mr. FITCH: That would be up to the court under the heading of public policy. On the question of people who oppose divorce from the other party because of religious convictions, the woman is imposing her religious views on her husband who, in our experience, may or may not be as guilty as herself.

Mr. WAHN: Have you investigated to see whether or not such a woman might feel she was guilty of some moral offence, some wrongdoing, in accepting the fact of the divorce in these circumstances, if divorce were against her religious tenets?

Mr. FITCH: That might be in some cases.

Mr. McCLEAVE: From a practical point of view, did you ever consult a woman when you came up with this philosophy?

The Rev. Mr. FIDLER: This is one of the places where there is some difference of opinion. The Commission on Marriage and Divorce had a woman on it, and

this is one of the places where we felt it was important to consider the possibility of attempted reconciliation. It could happen that a man has run away or left his wife when a separation would only increase the difference between them; whereas in the present state of things, as Mr. Mullen has pointed out, if they could be brought together it is possible, in fact there is evidence in the brief to support this belief, there could be a reconciliation.

The JOINT CHAIRMAN (*Senator Roebuck*): Suppose the fellow that runs away will not be reconciled?

The Rev. Mr. FIDLER: I am afraid you cannot force a reconciliation.

Mr. McCLEAVE: Did you consult women?

Mr. MULLEN: Women's groups have spoken on this. There was a lady lawyer, a Catholic, who spoke with us on the panel. They were right behind us at Presbytery level.

Mr. FITCH: I understand that in almost every country in the world one of the first battle cries of women is the liberalization of divorce laws. In most countries marriage breakdown forms part of the law. We have heard about the trap theory of marriage. Once the man enters the trap you have to keep a heavy door against him to hold the marriage together. But that is not marriage in any event; it is a prison; all you do is to prevent him from marrying a second time, and he is one of the 400,000.

Mr. HONEY: I understand Mr. Wahn has not concluded but I wonder if I could ask a supplemental question, which gives me a great deal of concern. The situation has already been described by Mr. Wahn where the man leaves, is supporting his wife and children adequately, so that there is no problem in that regard, but he simply does not wish to live with her. Do I take it from the evidence we have heard today you would suggest that, irrespective of the wishes of the wife, the husband having left her and supported her properly for three years, he would be entitled to divorce. I do not think we have had an answer to the question that has been asked in the case where the wife opposes the divorce because of her religious convictions.

Mr. FITCH: The only way you could prolong that marriage, except as a mere form, would be to enforce the restitution of conjugal rights, and we got away from that years ago. If you are to prevent the guilty husband from remarrying, we create a condition where the parties remain married in form only, and you cannot force them to cohabit. This will give rise to common-law marriages which the law will not countenance. Your question supposes the wife he has left to be innocent of all wrong, but I think it is unrealistic to talk about the innocent spouse except in a small percentage of cases.

The JOINT CHAIRMAN (*Senator Roebuck*): It is possible.

Mr. FITCH: Yes, it is possible. Any law will produce hard cases.

Mr. HONEY: It is the hard cases we are concerned with.

Mr. PETERS: I have been impressed with the last witness, though negatively. He produces a legal argument that is going to be the bane of the other witnesses; he negatives everything they have talked about. Marriage breakdown is a concept. If you tie it in to the legal aspects you negative all that we have heard. The other witnesses I agree with entirely; the last one I disagree with violently. When you get into legalistic terms you are in effect using legal grounds in conjunction with the breakdown theory and they are not compatible.

Mr. MULLEN: Mr. Fitch is completely in agreement with this marriage breakdown idea. Every one of us would be happy if you would just accept the marriage breakdown concept.

Senator BELISLE: I just wish to express my sincere thanks to the delegation. I was very much impressed.

The JOINT CHAIRMAN (*Senator Roebuck*): It has been a wonderful presentation, and I should like to hear from my Joint Chairman.

The JOINT CHAIRMAN (*Mr. Cameron*): First of all, I think we should express to the members of the delegation, in addition to our thanks, the regret that we could not continue for the hours it would take to explore their brief. I know that Mr. Wahn has many more questions he would like to ask, and so has Mr. Brewin, Mr. McCleave and others. We are sorry we are obliged to rise, but it is six o'clock. Gentlemen, we appreciate the very thorough and understanding way you have presented the subject matter. It is not what you would call a new and diffusive thought to all people, but to very many it is. Thank you.

The committee adjourned.

APPENDIX "19"

BRIEF

to

THE SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS ON DIVORCE

by the UNITED CHURCH OF CANADA

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Supplementary exhibit: MARRIAGE BREAKDOWN, DIVORCE, REMARRIAGE, a reprint of the second, and final, report of the Commission on Christian Marriage and Divorce approved by the Twentieth General Council of the United Church of Canada in September 1962, as published by The Board of Christian Education of The United Church of Canada.

1. CONCLUSIONS AND RECOMMENDATIONS

1. Whereas successive General Councils of the United Church of Canada have declared the need of revision of the laws respecting divorce in Canada, and

2. Whereas the Twentieth General Council affirmed that it is in harmony with the spirit of Jesus Christ and the teaching of the New Testament that we should hold in continual tension, both in the church and in the state, these two concerns:

- (i) To declare that marriage is intended to be the life-long and complete union of a husband and wife for their mutual partnership, for the procreation of children, and for the fulfillment of parental responsibility, and

- (ii) To acknowledge that in some marriages there is such grievous offence or abuse or neglect that the union is in fact destroyed, and

3. Whereas we acknowledge that in spite of the best efforts that may be put forth to prepare persons adequately for marriage, and in spite of the best help that may be offered married couples in marital distress, some partners do fail to achieve or to maintain marriage as an enduring and fruitful union, and

4. Whereas the "hardness of heart" which Jesus recognized as the reason for concession for divorce is expressed in ways other than in illicit sexual relations, and

5. Whereas broken and dead marriages may become festering sores in our society and a threat to the sanctity of marriage, and

6. Whereas social sciences have thrown new light on the causes of marriage failure, and the effects on children of serious friction between parents, and

7. Whereas we believe there are many different factors that may contribute to marital failure, some of which may be remedied or offset by adequate counselling or other therapy even when reconciliation seems improbable, and

8. Whereas the juvenile and family courts have demonstrated the success of calling to their aid the non-legal sciences, and the use of investigation diagnosis and treatment, and

9. Whereas the method of granting divorce by Resolution of the Senate is a misuse of its legislative function and, in addition, is inadequate in that it makes no provision for alimony or custody and welfare of children involved, and

10. Whereas the 22nd General Council of The United Church of Canada expressed the opinions that Canada's divorce laws need to be reformed and not just liberalized, and that the concept of "marriage breakdown" is a more suitable basis for considering grounds of divorce than is the concept of "marital offence", and that three years' separation of the married parties is in general a suitable period from which to establish whether a marriage has in fact broken down permanently.

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11. We recommend:

1. That the Divorce laws of Canada be reformed,
2. That the concept of "marriage breakdown" be substituted for that of "marital offence", as the basis for granting divorce,
3. That new marital court procedures to deal with distressed marriages be established, the primary concern of these procedures to be the preservation of marriage and family life, for the welfare of society and that these court procedures should provide:
 - (i) means whereby either consort could require the other to participate in conciliation procedure with a view to avoiding further legal proceedings.
 - (ii) that an attempt at conciliation be compulsory as a requisite to the obtaining of a separation or divorce.
 - (iii) that no divorce proceedings be initiated, except by special permission of the court, until three years of marriage have elapsed.
 - (iv) that, while conciliation or separation or divorce proceedings are in progress, the court shall have the power and the means to protect the interests and welfare of the children involved.
 - (v) that no decree of divorce become absolute until the court, by order, has declared that it is satisfied that proper arrangements have been made for the welfare of the children.

4. That courts draw upon the skills of ministers, social workers, marriage counsellors, medical doctors, and others trained in the social sciences in addition to lawyers and other court officials currently employed in attempting to effect conciliation.

(These conclusion and recommendations are based upon the actions taken by the Twentieth and Twenty-second General Councils of The United Church of Canada, meeting in 1962 and 1966, respectively.)

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2. INTRODUCTION

12. On behalf of The United Church of Canada, which has responsibility for the pastoral oversight of 20.1 per cent of the Canadian population according to the latest Canada Year Book, we welcome the appointment of this Joint Parliamentary Committee on Divorce.

13. The 20th General Council of The United Church in 1962, acting on the recommendation of a Commission that had studied the matter for six years, called upon the Federal Government to appoint a Royal Commission on Divorce to consider the revision of the divorce laws of Canada.

14. The 22nd General Council, in September 1966, commended Prime Minister Pearson "for inaugurating a study of this nation's divorce laws".

15. The Executive of the General Council authorized the national Marriage Guidance Council of the church to arrange for a presentation of the official views of The United Church of Canada on divorce to this Special Joint Committee of the Senate and House of Commons.

16. The following committee was appointed to prepare and present this Brief:

Rev. R. S. Hosking, B.A., B.D., D.D.—Toronto, Chairman of the Commission on Christian Marriage and Divorce which was appointed by the 17th General Council and reported to the 18th, 19th and 20th General Councils, member of the national Marriage Guidance Council, formerly Judge of the Toronto Family Court and General Secretary of the National Council of the Y.M.C.A. in Canada.

Rev. Frank P. Fidler, B. Sc., B.D., D.D.—Toronto, Secretary of the above Commission and of the national Marriage Guidance Council, Associate Secretary of the Board of Christian Education of The United Church of Canada.

Rev. W. E. Boothroyd, B.A., M.D., C.M.—Toronto, Member of the Commission and Chairman of the national Marriage Guidance Council, Chief of Psychiatry at Sunnybrook Hospital, Associate Professor of Psychiatry, University of Toronto.

Rev. J. R. Hord, B.A., B.D., S.T.M.—Toronto, Secretary of the Board of Evangelism and Social Service.

Mr. Roy C. Amaron—Dorval, P.Q., Member of the Commission, lawyer, convenor of the Law and Legislation Committee of Montreal Presbytery of the United Church of Canada.

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3. REASONS WHY THE UNITED CHURCH OF CANADA PRESENTS THIS BRIEF

17. The question may well be asked: Why does The United Church of Canada present a submission on divorce reform to this Parliamentary Committee?

18. If the Church believes that marriage should be a life-long union, as The United Church does, how can it speak in favour of divorce?

19. The United Church presents a Brief on divorce for the following reasons:

- (a) We believe that the Christian Church has a duty to instruct its members in the Christian ethic pertaining to marriage, and through its worship and fellowship to assist them in living up to this ethic. But the Church must also recognize that Christian partners fail in marriage, and after seeking divine and human aid, conclude that they should petition for separation or divorce which will provide release from what seems to them, and to many others in our society, an intolerable situation.
- (b) We believe, also, that the Christian Church has a responsibility to see that compassion and justice are shown to all persons in society. Some homes in our society are a "living hell" for husband, wife and children. If the granting of a divorce would relieve this situation and lead to a better arrangement for all concerned, we believe that the Christian Church should not oppose but rather support such action.
- (c) We do not believe that the Church should legislate for persons who are outside her membership. Since the Christian Church has, in the past, been influential in securing strict legislation regulating divorce, we believe that the Church, while upholding its views on monogamy before its own members and society, should offer to consider reasonable grounds for divorce not only for those of its own members whose marriages have broken down but also for those citizens in our secular, pluralistic society who do not accept the Christian point of view.

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4. SERIOUS INADEQUACIES IN THE PRESENT LAW REGARDING DIVORCE

20. The Twentieth General Council expressed deep dissatisfaction with the present divorce laws in Canada in which adultery is practically the only ground on which divorce is granted. There are many reasons for this criticism.

21. The present law encourages acts of adultery and falsification of evidence by some partners who seek to obtain the relief of divorce.

22. We question present procedures which require the taking of "adversary action in court", where one partner must accuse the other of a matrimonial offence and prove the defendant's guilt while maintaining his own "innocence" in court. "Such procedures aggravate the differences, multiply the bitterness and harden the antagonism of one partner for another."¹

23. Present restrictions prevent many unhappy couples, often the most conscientious, those who have not committed adultery and will not falsify evidence, from securing a divorce. Furthermore, broken and dead marriages become festering sores in our society and a threat to the sanctity of marriage.

24. The United Church has also expressed its opposition to the present provisions of granting a divorce by Resolution of the Senate. "It is inappropriate to expect a legislative body to exercise the necessary judicial function required in divorce actions. Moreover, there is no provision for considering the needs and welfare of the children. It is urgent that some better way be developed to deal with those partners whose only present recourse is to seek a private Act of Parliament to dissolve their broken marriage."²

¹ See page 14, *Marriage Breakdown, Divorce, Remarriage*, the reprint of action taken by the Twentieth General Council, published by the Board of Christian Education of The United Church of Canada.

² *Ibid.*

25. It is a well-known fact that a bad law brings disrespect to the whole legal system and court procedures.

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5. EXTENSION OF GROUNDS FOR DIVORCE

26. The Commission on Christian Marriage and Divorce which reported to the 18th, 19th and 20th General Councils, seriously considered the concept of "breakdown of marriage" as one ground or the sole ground for divorce in Canada. It was not at that time prepared to make a recommendation to the General Council based on this concept. Instead, it recommended that General Council "urge the Federal Government to appoint a Royal Commission on Divorce to consider:

- (a) such grounds for divorce, in addition to adultery, as wilful desertion for three years, gross cruelty (both physical and mental, carefully defined), and insanity that fails to respond after five years of treatment in an institution."

27. We are now prepared to express the opinion that the present law based on "matrimonial offence" is totally inadequate. A matrimonial offence may indicate the failure of a marriage but certainly need not do so in every case. The doctrine of forgiveness teaches us to forgive each other's sins and weaknesses and seek the grace of God to lead better lives in the future. Many factors other than "matrimonial offence" need to be taken into account in determining failure in marriage. Among those which may contribute are such things as immaturity, personal inadequacies, marked differences in background, inadequate preparation for marriage, and external interference (for example from "in-laws"). There are also many forces and pressures in society, economic, moral and social which threaten family life today.¹

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6. DIVORCE COURTS

28. The Commission on Marriage and Divorce spent a great deal of time studying alternatives to present court procedures, and the advisability of the setting up of special marital courts. The resolution passed by the Twentieth General Council was as follows:

"It was agreed:

- (a) that the General Council request the officials concerned to study the matter of establishing special marital court procedures to deal with distressed marriages, the primary concern of these procedures to be the preservation of marriage and family life, for the welfare of society.
- (b) that such court procedures should provide:
 - (i) means whereby either consort could require the other to participate in conciliation procedures with a view to avoiding further legal proceedings.
 - (ii) that an attempt at conciliation be compulsory as a requisite to the obtaining of a separation or divorce.
 - (iii) that no divorce proceedings be initiated, except by special permission of the court, until three years of marriage have elapsed.
 - (iv) that, while conciliation and later separation or divorce proceedings are in progress, the court shall have the power and the

¹ See pps. 114 f. *Marriage Breakdown, Divorce, Remarriage*.

means to protect the interests and welfare of the children involved.

(v) that no decree of divorce become absolute until the court, by order, has declared that it is satisfied that proper arrangements have been made for the welfare of the children.

(c) That courts draw upon the skills of ministers, social workers, marriage counsellors, medical doctors, and others trained in the social sciences, in addition to lawyers and other court officials currently employed in attempting to effect conciliation.¹

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29. While the Commission, in its recommendations in 1962, did not specifically use the term "marriage breakdown" as a definitive basis for divorce, we clearly recognize that it considered those deeper causes of marital failure, which the term now represents as such a basis. It recommended court procedures which would, in fact, take account of this condition as the basis for divorce action.

30. We are of the opinion that before a court authorizes divorce proceedings involving a married couple with children it should be satisfied beyond reasonable doubt that the continuation of the marriage bond would do more harm than good to the parents concerned and their children.

31. Before granting a divorce a court should also establish that the marriage has in fact broken down in the sense there had not been cohabitation for a period of three years or more.

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7. THE CONCEPT OF "MARRIAGE BREAKDOWN" AS THE BASIS FOR DIVORCE IN CANADA

32. At its Annual Meeting in February, 1966, the Board of Evangelism and Social Service of The United Church of Canada considered the advantages of granting divorce on the basis of "marriage breakdown". In the summer of 1966 the Archbishop of Canterbury's Committee set up to study the divorce law of England issued its report "Putting Asunder", with the strong recommendation that "marriage breakdown" be the sole basis for granting divorces in England. We find ourselves in agreement with the Committee's argument:

"We were persuaded that a divorce law founded on the doctrine of breakdown would not only accord better with social realities than the present law does, but would have the merit of showing up divorce for what it is—not a reward for marital virtue on the one side, and a penalty for marital delinquency on the other; but a defeat for both, a failure of the marital "two-in-one ship", in which both its members, however, unequal their responsibility, are inevitably involved together. So we arrived at our primary and fundamental recommendation: that the doctrine of the breakdown of marriage should be comprehensively substituted for the doctrine of matrimonial offence, as the basis of all divorce."²

33. We would like to emphasize three of the significant points which the Archbishop's Committee makes in its report.

(a) "Marriage Breakdown" is a triable issue. Actions and conduct which under the present law constitute matrimonial offences would still be available as evidence for breakdown, even though no longer in themselves grounds for a

¹ See pages 1-4, *Marriage Breakdown, Divorce, Remarriage*.

² Quoted from p. 18 *PUTTING ASUNDER*, the printed report of the Archbishop's Committee, published by London S.P.C.K. 1966.

decree. Other facts now treated as irrelevant could also be taken into account. But procedures would have to be changed. "The court could not be expected to reach true conclusions about the state of matrimonial relationships unless the existing accusatorial procedure were abandoned and something like procedure by inquest substituted for it."¹

(b) The question was considered: "Would it be fair for a marriage to be dissolved against the will of an unoffending spouse?" The conclusion was that it might not be fair but that it was almost inevitable. Of course, the court could and would in some cases refuse a divorce in the public interest but in most cases it would release partners if they were no longer living together. "To demand that a divorce law shall let no one be hurt is to ask the impossible. The law and the courts are faced with trying to uphold distributive justice in situations which, by their very nature, exclude wholly just situations. If then, as is widely held among responsible people today, the public interest requires as a general rule that 'empty' legal ties should be dissolved and that de facto unions and their issue should be legitimized, that has to put in the scales against the injury an unoffending respondent may suffer through the loss of married status."²

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(c) Another question dealt with in the report was: "How would maintenance and costs be assigned?" The Committee agreed that it was very important that after a decision had been made regarding the breakdown of the marriage, the court should then make a judgment regarding maintenance and costs, etc.³

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8. THE IMPORTANCE OF CONCILIATION PROCEDURES

34. In our opinion, one of the chief merits of the marriage breakdown concept is that it would prevent quick divorces and allow for conciliation procedures. Many experienced persons express their view that reconciliation procedures should not be made compulsory. However, the court could decide not to hear a case until it was satisfied that the parties had exhausted the resources of conciliation agencies. As The United Church requested in 1962 "Courts could draw upon the skills of ministers, social workers, marriage counsellors, medical doctors and others trained in the social sciences. . ." We would recommend that public funds be used to provide sufficient marriage guidance, counselling and conciliation agencies to serve the public need.

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9. RESOLUTION OF THE TWENTY-SECOND GENERAL COUNCIL REGARDING DIVORCE REFORM

35. The Twenty-Second General Council of The United Church of Canada, meeting in September 1966, passed the following resolution:

36. Whereas it is apparent that Canada's Divorce Laws require basic moderate reform rather than simple liberalization;

37. Whereas the General Council in 1962 urged the Federal Government "to appoint a Royal Commission on Divorce to consider:

- (a) such grounds for divorce, in addition to adultery, as wilful desertion for three years, gross cruelty (both physical and mental, carefully defined), and insanity that fails to respond after five years of treatment in an institution.

¹ *ibid*, p. 19

² *ibid*, p. 21

³ *ibid*, p. 23f.

(b) methods of granting divorce other than by Private Acts of Parliament;”

38. Whereas the concept of “marriage breakdown” (a three to five year separation of partners may be regarded as a test of marriage breakdown) is considered by some as a more suitable basis for the purpose of moderate reform than additional grounds based on the concept of “marital offence”;

39. Whereas the Prime Minister has recently requested a Parliamentary Committee to study Canada’s Divorce Laws:

40. BE IT RESOLVED THAT THIS GENERAL COUNCIL

1. Declare itself in favour of the concept of “Marriage Breakdown” as the basis for divorce in Canada.

2. Commend the Prime Minister for inaugurating a study of this nation’s divorce laws and present the official view of the United Church to the Parliamentary Committee.

3. Request Conferences, Presbyteries and other concerned groups of citizens in Canada to work for divorce reform in line with the concept in number 1 above.

4. Remind the people of the church of the need to exercise a ministry of understanding and healing in situations when a marriage breakdown is threatened or takes place.

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10. APPENDIX

VIEWS OF MARRIAGE AND DIVORCE

expressed by

THE UNITED CHURCH OF CANADA

1. *Views of Marriage*

According to a new order for the Solemnization of Marriage proposed for use in The United Church of Canada, “Marriage is a holy state of life, ordained by God that instincts and affections given by him might be fulfilled and perfected in purity and holiness. It was ordained by God that man and woman might have life-long companionship, help and comfort of each other. It was ordained by God that families might grow in goodness and walk in the way that leads to eternal life. It was honoured and sanctioned by Christ, and it is set forth in scripture as a symbol of the union that exists between him and his church.”¹

The Nineteenth General Council adopted the following statements describing a Christian understanding of the nature and intent of marriage.

“A Christian marriage is one in which husband and wife have publicly covenanted together with God, as they know him through Jesus Christ, in wholehearted and sincere devotion to him as well as to each other, to the end that they may live in unity throughout life by the help of his love and grace.”²

It also affirmed that “in marriage three purposes are fulfilled for the welfare of the individuals concerned and of society:

“PARTNERSHIP of a man and a woman is perfected as they live together so as to enjoy and complement each other in mutual comfort, help and love...

¹ See pages 9 and 10, *An Order for the Solemnization of Marriage*, The United Church of Canada, 1964.

² See pages 18f. *Marriage Breakdown, Divorce, Remarriage*.

"PROCREATION continues the creative activity of God and fulfills the spiritual and physical impulses of the sexual nature of a husband and wife in the begetting of children...

"PARENTAL RESPONSIBILITY in best fulfilled, and family life is enriched as both parents share in the care and upbringing of their children as a divine vocation..."¹

The Christian Church also recognizes the part which the family plays in building a stable social order, and the responsibility of the state in supporting and upholding the well-being of the family².

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2. Scriptural Bases for The United Church's Attitude toward Divorce

Since the Christian Church has had an important influence in determining the divorce laws in Canada, we believe that it is imperative to review the scriptural bases for the attitude of the Church toward divorce if we are to consider changes in the laws.

Christians refer to scriptural authority in determining matters of belief and ethics. We believe that there is scriptural authority for acknowledging the necessity of divorce in a sinful society while being opposed to the leniency with which divorce is sometimes granted and still affirming that it is the will of God that marriage is meant to be a life-long and indissoluble union.

Many Christians quote Mark 10: 2-12 to back up the so-called "absolutist view" that the Christian Church cannot recognize divorce under any circumstances and must refuse to remarry any person who has a former partner still living. We note, on the one hand, that our Lord reminds the Pharisees who are seeking to test him on the matter of the law about divorce that the Mosaic law permits divorce on account of "your hardness of heart" (that is, "the moral and spiritual obtuseness which rendered them incapable of responding to the demands of God", according to Dr. Matthew Black of St. Andrew's College, Scotland). On the other hand, Jesus affirms: "From the beginning of Creation, 'God made them male and female.' 'For this reason a man shall leave his father and mother and be joined to his wife, and the two shall become one.' So they are no longer two but one. What therefore God has joined together, let no man put asunder."

We are aware of the fact that "the canonical provisions of the Roman Catholic Church and the Anglican Church continue to declare that the marriage bond is absolutely indissoluble . . . Both of these communions, however, allow the relief of nullity in a variety of circumstances that somewhat modify the apparent rigidity of this absolutism."³

According to Matthew's version of the scriptural incident cited above a very important phrase has been added. It is known as the "exceptive clause". "Jesus said to them, 'For your hardness of heart Moses allowed you to divorce your wives, but from the beginning it was not so. And I say to you: whoever divorces his wife, *except for unchastity*, and marries another, commits adultery.'" (Matthew 19: 3-9)

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How are we to explain this addition? Matthew, who wrote at a later date than Mark, likely reflected a practical situation in the early church where divorce was recognized in exceptional cases. "It seems to reflect the early

¹ *Ibid.*

² *Ibid.*

³ See pages 21f. and 25, *Marriage Breakdown, Divorce, Remarriage.*

church's recognition under the direction of the Holy Spirit that unfaithfulness can destroy a marriage. Apparently the early church did not interpret and apply the words of Jesus as reported by Mark in a rigidly legalistic and absolutist sense."¹

In *1st Corinthians 7: 10-11* the Apostle Paul accepted Jesus' teaching on the permanence of marriage. "To the married I give charge, not I but the Lord, that the wife should not separate from her husband (but if she does, let her remain single or else be reconciled to her husband)—and that the husband should not divorce his wife."

However, Paul goes on to grant his consent to divorce in the case of a "mixed marriage" between a Christian and non-Christian. The Christian partner is not to initiate divorce proceedings. But if the non-Christian partner wishes to dissolve the marriage then it may be dissolved. We conclude that Paul describes a further extension of the grounds for divorce by the early church beyond the "exceptive clause" of Matthew.²

The Twentieth General Council of The United Church, taking into account these and other scriptural references, affirmed that:

"We believe that it is in harmony with the spirit of Jesus Christ and the teaching of the New Testament that we should hold in continual tension, both in the church and in the state, these two concerns:

- (i) To declare that marriage is intended to be the life-long and complete union of a husband and wife for their mutual partnership, for the procreation of children, and for the fulfillment of parental responsibility.
- (ii) To acknowledge that in some marriages there is such grievous offence or abuse or neglect that the union is in fact destroyed.

"It follows from the latter that there will be cases where, in the spirit of our Lord, we must admit that it is in the best interests of all the persons involved (including the children and society) that the marriage be dissolved by divorce."³

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APPENDIX "20"

BRIEF

to the

SPECIAL JOINT PARLIAMENTARY COMMITTEE ON DIVORCE

by

THE PASTORAL INSTITUTE
of

THE UNITED CHURCH OF CANADA
131 - 7th Ave. S.W., Calgary, Alberta

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¹ See pages 21f. and 25, *Marriage Breakdown, Divorce, Remarriage*.

² *Ibid.*

³ See page 26, *Marriage Breakdown, Divorce, Remarriage*.

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THE PASTORAL INSTITUTE

131-7th Avenue S.W., Calgary, Alberta

A MINISTRY OF THE

CHURCHES OF CALGARY

SPONSORED BY THE

UNITED CHURCH OF CANADA

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Purposes

THE PASTORAL INSTITUTE is a new pattern of ministry offered by the church as it seeks to relate helpfully to the needs of people in a rapidly changing society. It is the first attempt of its kind in Canada and was initiated in 1962 in Calgary, Alberta.

It would have been difficult to anticipate what use the church would make of the Sunday School pattern initiated by Robert Rakes in England for the purpose of teaching the three R's to working children. Over the years it has become an integral pattern of ministry. Could it be that the kind of Institute developed by Dr. Paul Popenoe over the last 40 years at the American Institute of Family Relations in Los Angeles also might be a pattern that would open new doors of service for the church? This wondering is what prompted the proposal for an Institute in Alberta in 1958 and again in 1961. The idea caught the imagination of a Committee studying the ministry of Central United Church, Calgary and the Institute was opened as a two year demonstration and pilot project. After a year and a half the Presbytery took responsibility for the next five years.

The ministry of the Institute was designed from the beginning to be more comprehensive in scope and more preventive in the focus of its services than that of the Pastoral Counselling Centres and Services developed in North America since World War II. Counselling is only one of several preventive and rehabilitative services offered by the Institute. In setting up the program in 1962 the aim was to draw together the interdisciplinary skills of Christian leadership, on an ecumenical basis and make them available to the whole community. The plan was to create a pool of the rich resources available, to organize and conserve the use of them for the wider benefit of church and community.

The responses to the Institute have more than justified the demonstration project and its usefulness to church and community. The supplementing and stimulating of agency programs; the participation of professional leaders and other faith groups; the fact that over 40 per cent of those who came had no pastor and no other church affiliation; the fact that only a few came who had been to other agencies first; the referrals from other agencies, physicians, psychiatrists, lawyers, teachers as well as clergy were responses that surprised even the founders.

Historical perspective

The Institute is not just a private community agency but a new way of carrying on the ministry of the church which has gone on as long as the Hebrew Christian tradition. Some believe this care is as old as human existence, going back to the primitive healer with his prayer, incantations and magic. The program is rooted in this religious heritage to extend and to deepen, in our time, the historic ministry of the church. It was founded by a small group of churchmen who are convinced that the intuitions of the biblical faith and the insights of the sciences of human behaviour are important for pastoral care in our rural, urban and secular society. The services of the Institute, in a church setting are available to all who seek them, regardless of the faith group or the lack of one.

The development of the program from the initial planning has been carried on in consultation with the Board of Evangelism and Social Service and The National Marriage Guidance Council of The United Church of Canada. A non-profit organization, the Institute is incorporated in Alberta under the Friendly Societies Act, and has a registered charter and set of bylaws. The program is operated by a Board of Directors responsible to the Calgary Presbytery of The United Church of Canada. Provision is made for other denominations to participate in the policy and programs of the Institute at all levels of work.

Departments and Programs

1. *Family Life Education.* This department has been developed to provide education and group guidance for young people in preparing for marriage as well as married couples seeking ways of successful family living and parenthood. The programs are planned by an Interdisciplinary Interfaith Committee on Family Life Education.

Some specific ones are:

- Conferences for youth on relationships with the other sex.
- Premarital education classes in series of eight weeks.
- Marriage education groups for couples in counselling.
- Family living and parenthood education courses.
- Speakers teams for conferences, workshops, seminars and meetings.
- Press and Radio and TV interviews and programs.
- Remarriage preparation for adults.
- Marriage checkup programs.

2. *Counselling and Consultation.* The programs of this department are designed to provide personal and confidential pastoral counselling, to help persons, couples and families to face and handle problems that are intimate and of the most ultimate concern. Many of these situations involve conflicts in the areas of courtship, marriage, family relations, daily work and religious life. The programs are under the supervision of an Interprofessional Advisory Committee on counselling and public issues. This committee too, is interdenominational and deals with public social issues as well as personal counselling situations. Some programs are:

- Assessments in Family Living
- Premarital Guidance for Young People
- Marriage and Family Counselling
- Personal and Group Counselling
- Marriage Breakdown and Divorce Counselling
- Family Debt Analysis
- Pastoral Consultations and Referrals

3. *Leadership Development.* The programs of the third department are to help develop through Supervised Continuous Pastoral Education, a new richness in pastoral ministry.

There are three objectives:

1. Greater understanding of the persistent human troubles that come to the clergyman, psychiatrist, youth leaders, church visitor, teacher, nurse, lawyer, doctor, psychologist, social worker in the day to day volunteer and professional work of the community.
2. Deeper awareness of the connection that urgent public issues of the world have with the personal troubles that people present to all those at work in the human disciplines.
3. Wider appreciation of the qualities of mind, heart, and spirit that make for better teaching, preaching, and serving by the people of the church.

Programs are designed to assist clergy and other professions to reach the potential of their helpfulness in the ministry of the church to the community. Many have special gifts for helping people in trouble. New opportunities are provided by the Institute to encourage and develop persons for vocation and avocation. The direction of this work is under an Interfaith, Interdisciplinary Supervision Committee.

Key programs are:

- Calgary Winter Seminars on Marriage and Family Education and Counselling.
- Calgary Spring Workshop on Supervised Pastoral Education.
- Banff Summer Seminars in The Theology and Skills of Counselling in the Church Tradition.
- Regional Workshops for Presbyteries, Ministerial Associations.
- Clinical Pastoral Education Programs at Hospitals and other Institutions.
- Counselling of Pastors and their Families.
- Laity Leadership Development Workshops.
- Church Leadership Consultation.

4. *Projected Departments and Programs.* There is encouragement both from the church and the community to expand the existing work, especially in the preventive fields of education and human development. Some of the departments and programs that were projected initially are still in the planning phase, but the first two listed below are approved by the Board and the Presbytery to go ahead.

Some of the projects and programs being studied and planned are:

- Personal Acquaintance Department
- Parish Internship Program
- Research Department
- Group Assessment Units in Family Living

- Family Debt Management Program
- Symposia on Public Issues

Policy on Referrals

Persons or families are eligible for the services of the Pastoral Institute regardless of race or religion, provided they can benefit from the resources offered. Those whose emotional disturbances indicate need for emergency or intensive psychiatric treatment understandably will need to be referred to the appropriate Specialists. Facilities for the treatment of children's problems have not been developed. However, the Institute staff do assist ministers or families in assessing these problems when they are referred for that purpose. This is proving a valuable service to pastors and families who are unfamiliar with the treatment resources of the Calgary area. The Institute programs to assist parents and families are proving of great value to children in that often the atmosphere of the home is improved.

Cost of Services

The Pastoral Institute, from its inception has been a work of faith, financed almost entirely by the churches and church members. The Calgary Presbytery of The United Church of Canada has underwritten the cost up to \$24,000.00 a year for five years. There have been corporation gifts, personal contributions and voluntary memberships from persons and churches of other denominations, as well as costs for testing and registration fees for training and other special programs. Many skilled professional persons are making time available for the teaching, counselling, consulting and planning of the programs. Many others serve on committees and the board. They have given leadership without remuneration as they would teach a Sunday School class or serve on a board of the local church. The Pastoral Institute could not carry out its ministry but for the generosity and devotion of its volunteer leaders.

Financial gifts are deductible for income tax purposes. You may help to extend this work by:

1. Supporting your own congregation's efforts to sustain the Institute.
2. Making direct gifts to the Pastoral Institute.
3. Becoming a member of the Pastoral Institute.

Annual memberships are

Individual	\$ 5.00
Sustaining	25.00
Patron	100.00 or more

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THE PASTORAL INSTITUTE
 of
 THE UNITED CHURCH OF CANADA
 13-7th Ave, S.W.
 Calgary, Alberta

BRIEF

Submitted on November 22nd, 1966 to the
 SPECIAL JOINT PARLIAMENTARY COMMITTEE ON DIVORCE

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MAJOR RECOMMENDATION

1. That the concept of “marriage breakdown” replace the concept of the “matrimonial offence” as the sole basis for the granting of divorce in Canada.

Additional Recommendations

2. That Parliament enact a comprehensive federal “Domestic Proceedings Act” including the many procedural and substantive changes required to make the law appropriate for modern conditions.

3. That “reconciliation procedures” receive statutory recognition, but that they not be compulsory in all cases, or part of the court structure at this time.

4. That the Federal Government make scholarships and bursaries available for graduate studies and training in the field of Marriage and Family Life Education and Counselling, on the basis of merit, including persons employed by religious denominations and private agencies.

5. That public funds be made available at the appropriate governmental level for qualified private agencies and qualified ministers providing:

- (a) Family Life Education programs.
- (b) Rehabilitative programs such as conjoint family and group counselling, S.O.S. (Help) and P.W.P. (Parents Without Partners), for those involved in marriage breakdown, divorce and remarriage.
- (c) Personal Acquaintance and Marriage Introduction Services on a professional and pastoral rather than a commercial basis.
- (d) Internship programs on an interdisciplinary, non-denominational basis to train social workers, clergy and those of other “helping” professions to operate these programs and new ones that may be developed to meet the needs of people in a rapidly changing Canadian society.

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INTRODUCTION

The Pastoral Institute

The Pastoral Institute of the United Church of Canada, Calgary, Alberta, is a society incorporated under the *Alberta Societies Act* as a non-profit benevolent institution. The Institute is financed primarily by the Calgary Presbytery of the United Church of Canada, and also receives grants for special purposes from other sources. While the Institute is mainly financed by the United Church of Canada, it is ecumenical in its outlook and receives support from members of various denominations.

The Interprofessional Advisory Committee of the Institute is a multi-disciplinary body including members of the clergy, physicians, psychiatrists, lawyers, social workers and others concerned with various aspects of domestic relations. This brief was prepared by the Committee in consultation with other interested persons, both within and without the Institute.

*Policy of this Brief**"Marriage Breakdown" Basis for Divorce the Major Recommendation*

The Pastoral Institute considers that the adoption of the concept of "marriage breakdown" and the elimination of the concept of "matrimonial offence" as the sole basis for divorce is by far the most important point for consideration by this Committee. For that reason the main body of our brief is directed to that issue. Nevertheless we consider that there are many other areas of our domestic relations law, both procedural and substantive that require amendment. We have attempted to incorporate into the partial draft "Domestic Proceedings Act" which is Appendix A of this brief, many of these changes that have come to our attention. We respectfully suggest that the work of this Committee will not be complete until a thorough review and revision has been undertaken, and we sincerely hope that the many changes suggested in Appendix A will be of assistance in such a review and revision.

While a reform of divorce law in Canada is urgent, behind that need are complex social issues. New social structures concerning marriage, the family and divorce, also can be developed in society. In Division I and Appendix B, we have tried to assist legislators in their difficult task, with suggestions in both of these areas.

*(Translation)**Divorce in Quebec and Newfoundland*

We deeply regret that due to the lack of technical and financial facilities we cannot prepare a French edition of this report for the benefit of our French-speaking compatriots. Any law must have the support of the majority of the citizens, otherwise it becomes an unsound law. For this reason and for others, we strongly recommend a reform of the divorce laws in the eight provinces of Canada which already have divorce courts. By the same token, the reforms which we suggest might be unsound for the provinces of Quebec and Newfoundland as they might not have the support of the majority of the inhabitants of those provinces. We have no way of knowing. For the above-mentioned reasons, we suggest that such urgent reforms apply to the eight other provinces only. (Intro. 1)

SOME HISTORICAL BACKGROUND

1. Discussions in Alberta.

In Alberta members of the Evangelism and Social Committee of the Alberta Conference of the United Church of Canada have been concerned with this problem for the last decade. The director of the Pastoral Institute has been a member of this committee these 10 years and on numerous occasions has presented papers, brought forward resolutions and made proposals of ways to attack the problem of marriage breakdown, divorce and remarriage.

In 1959 a resolution was approved as follows:

"BE IT RESOLVED THAT:

- (1) We recommend to the Federal Government that to the present grounds for divorce be added—"desertion for a three year period or a legal separation for a three year period.
- (2) That we urge the Provinces to enforce existing legislation and to pass new legislation to facilitate the payment of maintenance, alimony and support to married persons living separate and apart."

2. Conference Approval of the Institute.

In 1961, the enabling resolution for the establishment of the Pastoral Institute was adopted. Recommendations Re Family Life:

"A. We recommend that the Alberta Conference request the Boards of Christian Education and Evangelism and Social Service to consider making funds available for

- (a) Selected ministers to receive scholarships for post-graduate study in Marriage and Family Life Counselling.
- (b) To establish one or more Marriage Counselling and Family Life centres in larger population centres of Canada as pilot projects in the functional ministry.

B. We recommend that Pastoral Charges encourage their ministers and lay people to take summer courses in Pastoral Counselling with a view to raising the general effectiveness of the Pastoral Ministry by

- (a) Allowing extra time off during the summer season, and,
- (b) Providing small scholarships where necessary to make attendance at a recognized Summer School possible."

From the opening of the Pastoral Institute in 1962, Marriage Preparation, Family Life Education, Leadership Development programs have been aimed at prevention of marriage breakdown. Individual divorce counselling, group counselling for separated and divorcing persons and family counselling for parents without partners have been essential parts of the rehabilitation program at the Institute. The needs of troubled people for help to help themselves, and the lack of community concern or social structure to help those in these circumstances have made such programs essential.

At the Institute there has been a continuous concern to get at the public issue, namely, the need to reform Canada's divorce laws. For more than a year, members of the staff, the Interprofessional, the Board of Directors and other concerned community leaders have worked actively to prepare for this presentation, proposing a new basis for Canada's divorce law. They have spoken in churches and clubs, called public and committee meetings and continued to revise and refine points in the light of debate and discussion, over the last year or more.

3. *Board of Evangelism and Social Service, February 1966.*

The work on the divorce issue at the Pastoral Institute during the previous year, provided background for the following resolution which was adopted at the Annual meeting of the Board of Evangelism and Social Service in February 1966, and for the paper by Douglas Fitch "Let's Abolish All Grounds for Divorce" which appears in the Board Report. (Intro. 2) The resolution was approved as follows:

"Canada's Marriage and Divorce Laws

WHEREAS this Board is of the opinion that Canada's divorce laws need basically to be reformed and not just liberalized; and

WHEREAS this Board is of the opinion that moderate reform is essential to bring greater stability to family life and at the same time alleviate unnecessary human suffering; and

WHEREAS this Board is of the opinion that the concept of "marriage breakdown" is a basis more suitable to the purpose of moderate reform than additional grounds based on the concept of "marital offence"; and

WHEREAS this Board is of the opinion that three years' separation of the parties is in general a suitable period from which to establish whether a marriage has in fact broken down permanently; and

WHEREAS this Board is of the opinion that there are many aspects of Canada's marriage and divorce laws that require preparatory to revision:

BE IT RESOLVED THAT THIS BOARD:

- (1) Request Prime Minister Lester B. Pearson to appoint a Parliamentary Committee or a Royal Commission to enquire into the whole matter of our marriage and divorce laws.
- (2) Request Conferences, Presbyteries and other concerned groups of citizens in Canada to work actively for moderate divorce reform. (Intro. 3)

4. *Alberta Conference Study Brief in June 1966*

A brief on "Marriage Breakdown as a Basis for Divorce" was written at the request of the Standing Committee of Evangelism and Social Service of the United Church of Canada. It was prepared by the Director of the Pastoral Institute for circulation at conference to clergy and lay delegates for their study and the consideration of interested church boards throughout the conference. In the brief, theological, scriptural, historical bases were examined for making divorce on the basis of "Marriage Breakdown" the position of the church.

5. *"Putting Asunder"*

(Intro. 4) Report of the Archbishop of Canterbury was published during the summer. It came just before the meeting of the General Council of the United Church of Canada. Since it also takes the position of "Marriage Breakdown" as the most suitable basis for divorce, it has provided the best of encouragement.

6. *The Meeting of the General Council of the United Church of Canada, Waterloo, Ontario, September 1966*

Out of the years of work by many interested people has come not only the support of the Board of Evangelism and Social Service in Toronto for the position of "Marriage Breakdown". The Reverend J. R. Hord, Secretary of the Board presented the following resolution to the General Council on September 13, 1966 and gained almost unanimous approval by the delegates.

"BE IT RESOLVED THAT THIS GENERAL COUNCIL:

1. Declare itself in favour of the concept of "Marriage Breakdown" as the basis for divorce in Canada.
2. Commend the Prime Minister for inaugurating a study of this nation's divorce laws and present the official view of the United Church to the Parliamentary Committee.
3. Request Conferences, Presbyteries and other concerned groups of citizens in Canada to work for divorce reform in line with the concept in number 1 above.
4. Remind the people of the church of the need to exercise a ministry of understanding and healing in situations when a marriage breakdown is threatened or takes place."

This brief historical overview makes it clear that in 1959 we were thinking of three years of separation as grounds for divorce. But we saw it then as one more to be added to the "Matrimonial Offences" upon which divorce might be obtained. In recent years we have changed our position in the United Church of Canada to the concept of "Marriage Breakdown" as the basis for divorce in Canada.

DIVISION I

DIVORCE AS SEEN BY THE PASTORAL COUNSELLOR

The concern of pastoral counsellors in marriage breakdown, divorce and remarriage, although it may not be explicit is a three fold one.

- (1) The theological task is to help troubled people to search for truth and to think in terms of ultimate concerns in life.
- (2) The psychological aim is to bring them to new sensitivity and awareness in their relationships with one another.
- (3) The sociological undertaking is to enable them to relate to the society in which they find themselves with responsibility and integrity.

These aims are basic for human beings if they are to grow in their capacity to relate to the Creation and their fellow men, learn how to handle crises in life and bring more truly human relationships into the family and society. This kind of concern is essential in society if men and women are to develop the ability, freely and equally, to give themselves to each other, to their families and the nation.

A Major Task

Divorce reform involves a major undertaking which cannot be done by legislation alone. In a pluralistic society such as the Canadian one, the task of creating, in the individual and in the nation at all levels, the desire to tolerate differences in values and relationships in a basic one. This, along with the willingness to try to understand and to respect different points of view and ways of life is essential to a pluralistic society.

Marriage breakdown, divorce and remarriage are of vital concern to the church both in terms of what happens to individuals, and the social order of the nation. The discussion of divorce law in this country arouses strong feelings. This involves risk for the legislator, as for the churchman. Some people hold the view that divorce is contrary to the will of the Creator and to Natural law and must not be permitted. It is seen as a threat, not only to individual fulfillment and family stability, but to the nation and the human race. Others, equally sincere, feel that all societies have permitted divorce and a vow taken at any one moment in time cannot have an absolute binding effect over all other decisions in life.

Implications Reach Far Beyond Canada

The implications of work of this Special Joint Committee on Divorce will reach far beyond the wellbeing of Canada and Canadians. This country is in a position to give the most creative kind of leadership in divorce reform. It is a high privilege to appear before this committee to encourage and support the work of politicians and other legislators in the hope that laws will be drafted and other provisions made which will better serve the people of our time.

PART 1: THEOLOGICAL PERSPECTIVE

The role of the churchman in divorce counselling is one that is not clearly defined. Thus it is important at the outset to see these remarks in the context of a dynamic theological view of creation. The implications of divorce reform reach far beyond the wellbeing of the individual and the stability of the family to the wider social order of the world community. It is our hope that Canada will set a precedent in world responsibility, with fresh and creative legislation, on this complex social problem.

A dynamic view of creation, rather than a static one, is called for if it is to be clear that man is not a finished product but still in the making. Such a dynamic view can be seen in the giants of theology in this century. Only a few can be mentioned.

Some Dynamic Views of Creation

We see in PIERRE TEILHARD DE CHARDIN, the French R. C. JESUIT-SCIENTIST real efforts to assuage modern man's anxiety. He does this by elaborating a guarantee of evolution's success. He sees that process as ultimately

founded upon the physical and dynamic relationship between Christ, Mankind, and the material world.

ALBERT SCHWEITZER will best be remembered for his summing up of theology in the principle of reverence for life: "I am life that wills to live in the midst of life that wills to live." This ethical and spiritual principle, so simply and clearly stated and demonstrated in his own dynamic life of service, has been a source of inspiration and strength to multitudes the world over.

MARTIN BUBER, being JEWISH brought to his work that special sensitivity and awareness of the power of good and evil and especially the tragedy and suffering. Essentially his contribution is a deeply sensitive exploration of the relationship between man and man, and between man and the world. "Between man and man, we meet God." In an age of depersonalization, and in experiences as isolating as marriage breakdown and divorce, Buber has been a force for keeping alive the belief that man as a person may find his fellow-man as a person and in that discovery let loose the healing power of reconciliation and love.

PAUL TILLICH saw theology as a search for meaning in every dynamic relationship of human knowledge and activity. His concern with developing a new understanding of human nature led him to study widely in psychology and the social sciences.

REINHOLD NIEBUHR has made the major theme of his life's work, the nature of man and his political and social life. He has been deeply concerned with the paradox of man's universal humanity on one hand and his petty loyalties on the other. In these facts of life he sees the root of man's inhumanity to man.

JOHN BENNETT in pointing out that one of the themes of Christian Theology which needs great emphasis today is Christian humanism, also makes it clear that the "Death of God" is proclaimed, partly, to make room for man to be himself, to reaffirm a Christian humanism.

KARL BARTH strikes the same note when he chides the church for addressing man as though he were not human. He says that man will rightly defend himself against what he is told. He will not be convicted of sin if he is uncharitably and falsely addressed concerning his humanity. The Creator does not threaten the humanity of mankind.

All this implies, according to PIETER DE JONG, that man will continue to humanize the sexual polarity in human relationships. It also means that in a dynamic creation, society will be changing continuously and divorce laws, like others, will continue to need periodically, to be reviewed.

Freedom to Decide Essential to Morality

In considering divorce reform in Canada, the important thing is to make it possible for men and women to be free to work at the "re-creation" of their lives, when necessary. Those who would be restrictive and legalistic in legislation, imply that man is not morally ready to take responsibility for decisions of such ultimate concern as divorce and remarriage. In our view, men and women must be given the freedom and the dignity to make their own personal decisions, with guiding legislation, in matters of such personal and public concern. Not until then will they grow morally, in the exercise of responsibility to family and society.

Divorce Applies Directly to the Minority

Divorce law does not apply at all to the majority of people in any society. Other solutions are sought, including neurotic suffering because the failure of divorce is not acceptable. Divorce is not easily accepted except by a minority. At

the Pastoral Institute we find practically no evidence of impulsive decisions to seek divorce. In the studies of Cuber and Harroff (I-1) the same was found. In fact the overwhelming impression is the reverse. When divorce comes in most marriages it is "an end of the rope" decision after as many as twenty years of marital dissatisfaction. Most people are not concerned about divorce until it threatens directly their marriage or that of someone close to them. It is put this way: "You just put it off and put it off. By hindsight I have wondered why.

The state of wanting to and yet not doing it, though, isn't always the hell that it is some of the time. My friends who have been through the mill mostly agree with me—you keep hoping and no one knows what for—"

Marriages tend to drift, even though they are spiritually and emotionally dead, until an "engaging alternative" to the lackluster of the present relationship motivates one party to do something about the problem. Until then the pretense is maintained for public consumption because of the high social price of divorce.

Most Counsellors know how difficult it is for many men and women to face marriage breakdown, to accept failure, even when a marriage has broken down completely. Even the most utilitarian marriages with nothing intrinsic about them, are very stable. (I-2) They are rooted more deeply in human needs than any law can ensure. When two persons emotionally accept that a marriage has broken down, they are spiritually divorced already, and no legal structures can make a marriage for them by making divorce unattainable. And divorce can be made quite unattainable to many people either by costs that are prohibitive, as in the case of the Russians, (I-3) or on the grounds of adultery or collusion, both of which may be unthinkable or unattainable to the parties involved.

It seems to take economic crises to bring the financial and political power elites to awareness of a threat to the stability of national life. But to the churchmen, especially the pastoral counsellor, the economic is not the most basic factor in the dynamics of world creation. In theological terms he must examine continually the various factors involved. It is out of his philosophy of religion that his capacity for sound guidance will come for helping persons to think through in depth, the economical, sociological and psychological factors.

People Turn to Church for Help

The Report of the Joint Commission on Mental Illness and Mental Health in the U.S.A., indicates that more people turn to pastors in times of trouble than to any other profession. In volume 8 of that report, Richard V. McCann says:

"In a national study conducted for the Joint Commission on Mental Illness and Health, Gerald Gurin, Joseph Veroff, and Sheila Feld (1960) found that 14 per cent of their 2460 interviewees had gone somewhere for help about emotional or psychological problems at some time in their lives, and 42 per cent of these had gone to the clergy. The rest had gone to social, educational, or mental health agencies, the family physician, or to a psychiatrist or psychologist. The clergy were appealed to more frequently than any other resource for help in time of distress." (I-4)

People turn to pastors and pastoral counsellors especially in times of marriage, divorce and remarriage because these are matters of ultimate concern. We found at the Pastoral Institute in the first two years of operation, that over 40 per cent of the persons who came for help had neither a pastor nor a parish. They still turned to a program that is sponsored by the church for help in times of deepest trouble. Those who believed that only "church people" would go to a church sponsored service for counsel were quite surprised to see what actually happened.

Human Relationships

It may be an oversimplification to say that families today have little patience with attitudes of fear, mistrust and intolerance that curb their individual

freedom to try to make choices that are morally right and socially responsible, for their families and their society. They do despair of static and rigid views of life held by persons and institutions. Any dogmatism, whether by the controlling parent, church court, or government legislation, is seen as an obstacle to progress and out of touch with the real world—a means of perpetuating the kind of strife in the family, community and the nation which leads inevitably to unnecessary suffering and chaos.

Multitudes of young families see more clearly than their elders that any policy on marriage breakdown, divorce and remarriage which is based on fear, mistrust and ignorance of different points of view, must give way to guidelines that issue from faith, trust, and education, if life is to be more human in the family, in the nation and the world. Neither the sexual relationship in a good marriage nor the adulterous one in a threatened marriage, are the only factors. Nor are they even the basic factors. *The dynamics of human relationships are the powerful factors in human life, and these are learned long before marriage ever takes place.* They influence the climate of the whole family, the destiny of nations and the future of the phenomenon of man. Just as the sex relationship in life may reflect, as a barometer, something of the relationships of the marriage, so adultery in marriage breakdown can be no more than a symptom or an evidence that there may be a degree of breakdown. Adultery in itself cannot be taken as evidence that a marriage is completely broken down. The secrecy, the hypocrisy and the pious verbiage both in the courts and the church about this matter only evade life as people know it to be.

PART 2: PSYCHOLOGICAL FACTORS

Dynamic forces are at work in human relationships that either greatly strengthen or diabolically distort the whole outlook of couples depending on whether or not they have mastered the potentials of human relationships for achievements and blessings. The pastor-counsellor-educator in the church and community needs to make it clear that atomic energy and human energy are forces of comparable magnitude in the world. Each can be used for good or for evil or both. Man lived in blissful ignorance of atomic energy for thousands of years. But his awareness of having to relate to other people in all kinds of other relationships, including the sexual, has been there from the very beginning. As for his use of these relationships, almost every adjective in the language is applicable in our time—selfish, devoted; bestial, tender; sordid, beautiful; neurotic, inspiring; violent, gentle; a slave to, a master of. The will to live, and to live well in marriage, is a powerful and dynamic force in life. The moral use of it is a challenge to the human race.

Misuse of Sex for Divorce is Destructive

Whenever a culture has tried to build a morality on the assumption that sex is evil, the results have always included weakness of character and distorted personality. (I-5) The distorted use of the sexual relationship in marriage as a basis for divorce is diabolical. It is a demonic use of one of the precious gifts of life that not only damages the psychic life of individuals, but undermines the moral structure of the nation.

In terms of social structure, it might be argued that Canada's present divorce laws bring incalculable and unjust suffering to people. Church and government must act together to correct this social evil or appear to be more in the role of the "guilty parties" than any individuals involved in divorce actions.

In a paper presented to the National Council of Family Relations meeting in Toronto a year ago, Dr. Steven Demeter, social worker at the North York and Western Family Service Centre put it even more strongly.

"A husband can abuse his wife physically or mentally for several years, he can desert her, he can be gaoled, sent for life into a mental institution, but the wife cannot divorce him. A wife can put poison in her husband's coffee every morning; she might be locked up for it but he cannot get a divorce. In this country one can choose his domicile, can switch his religion, become an atheist, one can change his job, join any political party but one cannot get a divorce regardless of how much damage is done to the children who are the real victims of an unhappy marriage, and irregardless if one partner is slowly or rapidly driving the other to a nervous breakdown and to the mental hospital."

When divorce laws are written to help people direct their inter-personal relationships to moral objectives—life fulfilling objectives,—then, and only then, will they make for the strength and the integrity that gives stability to family and national life.

It is tragic from the Pastoral Counsellors point of view, when sex for so many, even today, tends to be regarded as evil, rather than as one of creation's gifts. It is equally tragic that a sexual offence such as adultery should be made the grounds for destroying a relationship that could be good in every other way. Rather, such marital offences should be seen as evidence of the need for seeking out proper help in getting at the relationships where the real problems are to be found. A human being's needs for love and a sense of worth are stronger than the physical sexual one. (I-6) When men and women become involved in adulterous relationships, these often are substitutes for relationships of meaning and worth which they are being denied. The Pastoral Counsellor tries to get at these relationships, in terms of the ultimate values and the specific needs of the persons; the needs to be respected and to be related to others. There is no doubt that the misuse of sex has been made to play a major role in both family and world suffering and evil, even by well intentioned religious people. But in considering the history of mankind it cannot be doubted that the most important role that the sexual relationship has played, has been for the world's good. It is urgent that Canada have new divorce laws that reflect the knowledge of human relationship that is available.

Mature Pastoral Counselling Needed

The Pastoral Counsellor, working with families in marriage breakdown, divorce and remarriage needs to be mature in his understanding of marriage relationships and of society's attitudes toward them. This is essential if he is to be helpful in bringing people to an awareness that relationships with other people are complex and difficult to handle. Love at first sight is a moving and compelling experience. As young people say, "We are being swept along by something bigger than we are". But love after 50 years is a blessing for which we might sing the doxology. It is known that physical attraction is by far the most common cause of marriage. But cherishing that attraction through life is far more of a spiritual than a physical achievement. For every couple who do not adjust physically, there are dozens whose minds never meet at all. That is, they never meet in a way that they can carry on intelligent conversation and enjoy companionship, sexual and otherwise, as men and women for a life time. The pastoral counsellor needs to be able to help couples to assess and improve their communication if they are to be able to resolve the conflicts that are inevitable, in ways that bring them closer together rather than cause them to drift into isolation, from one another. Otherwise, they become two lonely strangers under the same roof and marriage breakdown happens even if divorce does not follow.

Complete Fulfillment, an Unrealistic Goal.

One thing should be kept in mind if family life education and marriage counselling are to be realistic. Many married and unmarried people live happy and significant lives without the fullest satisfaction of needs. The problem as seen clearly by Fairchild:

"Entering marriage with romantic expectations, a couple expects to find in marriage complete fulfillment, a hope the Christian will regard as idolatrous. Modern Americans expect too much of marriage. They make greater demands of it than any other people; they want greater rewards from it psychically and physically. In our depersonalized, lonely society where it is the rare human being who dares to be more than a "part person" in the competitive swirl of activity, we try to get everything out of this one relationship. Satisfactions which, in other cultures, are found in wider family contacts, in work, in religion, and in the community are now expected from husband, wife, and children alone. Thus we make demands upon marriage, but not necessarily the right demands. We have high expectations, but not necessarily reasonable expectations. Consequently, disillusionment and disappointment are almost inevitable and they follow in the wake of idealized romantic love." (I-7)

In the dynamic views of the theologians of today, the Creator has not "created them male and female" without intending that sex should be a powerful force for good. It cannot be overstated, that, to make it the basis for destroying marriage, is evil. Thus, the pastoral counsellor is concerned that "marriage breakdown" be the only basis for dissolving a marriage. Again, adultery may be one evidence that the marriage is in trouble. When divorce is sought it should have to be proven in court whether adultery was casual or indicates that a marriage has broken down. *Adultery may point to the need for counselling and family life education rather than divorce.*

Churchmen who assume that permitting divorce on the basis of adultery is justified, presuming to follow the scriptures, may not have appreciated the depths of motivation that Jesus Christ considered.

"You have learned that they were told, 'Do not commit adultery'. But what I tell you is this: If a man looks on a woman with a lustful eye, he has already committed adultery with her in his heart." (I-8)

Man is quite capable of using any relationship in an immoral way and thus defeating the purpose of stable marriage. Anyone who is in doubt about the superficiality of this appreciation in Canadian society might spend an afternoon in court to observe the "divorce mill" in action. Thus it is necessary to work with governments who have to legislate for society where multitudes, many of them nominally Christian, do not think biblically or theologically when seeking solutions to problems of marriage breakdown.

Psychological Tests Useful

The use of psychological instruments at the Pastoral Institute provides a more specialized and objective way of assessing marriage breakdown. It can be appreciated more clearly whether emotional and spiritual divorce have occurred or not. The psychological factors have to be taken into account in the courts. The therapeutic principle should be taken into account in drafting legislation, if divorce law reform is to solve some of the present dilemmas.

The problems of money, religion, inlaws, alcohol and sex are not usually the causes of marriage breakdown. Often these are symptoms of psychological failure to establish communication, or of a breakdown of that communication. Psychosomatic ailments, neurotic patterns of behaviour, office affairs, alcoholic reactions and inlaw problems can hardly be considered satisfactory solutions to

poor psychological adjustments in marriage. When these are faced, at the deeper level of interaction, marriages often are better than before the crisis occurred. *Divorce is only one solution to marital problems and should always be considered a last resort*; only available when the marriage is psychologically broken down and spiritually dead. When a marriage is clinically beyond repair it should be dissolved. This is the time when pastoral counselling is urgently needed. It is when dissolving families are carefully counselled by pastors and others, that divorce is less disturbing to parents and children alike.

Psychological Awareness

In the world of today people are more concerned with psychological motives and meanings than in former times. This is more closely related to the pastoral counsellors' concern too. Legislation must be designed to make the family and society more truly human, loving and fulfilling. Before this can be done, careful study needs to be made of motivation. To concentrate on the actions of the "matrimonial offences" as a basis for divorce does not do justice to the research of this century in psychological depth. It is no longer acceptable that so many persons be tempted to commit adultery or perjury, which are neither theologically nor psychologically acceptable to them, in order to get out of a marriage that has broken down. The research in the complex motives of human life has yet to be taken seriously in drafting divorce legislation. The legally "innocent party", many times may be more psychologically guilty than the legally "guilty party".

Adding "Grounds" is not the Answer

The pandora's box of legal grounds for divorce, based upon the "matrimonial offence", in most countries, is evidence of the struggle to do justice to persons whose marriage is in trouble without coming to grips with the "marriage breakdown" as such. The determination of guilt and innocence in matrimonial offence is difficult, if not impossible, even with psychological tests and counselling. But "marriage breakdown" can be established with some certainty without the sinister need to establish blame. The mutual psychological involvement of both spouses in marriage breakdown must be given its due. The Archbishop's report puts it:

"As for the doctrine of breakdown of marriage, its virtue is that it calls attention, not just to actions, which when taken out of their context in particular marriage relationships can only mislead, but to the marriage relationship itself. If that relationship comes to be considered as a whole, then there will be a prospect of particular actions arising from it being interpreted aright; and if in consequence the depth and complexity of the relationship receive wider recognition, that will not decrease, but rather increase, the seriousness with which marriage is approached." (I-9)

When working with marriage breakdown, the pastoral counsellor will meet two sinister enemies—fear and guilt. These will come out of a breakdown in communication between a couple. The church has done more to destroy marriage than to prevent immorality, or divorce either, in using fears, taboos and guilt in family life education. Our approach is becoming more wholesome and positive but the guilt and shame motivations are still with us. They come out of the home backgrounds of the people who get married and they will be brought into new marriages from those backgrounds regardless of the other factors involved. It is here that the theological perspective of the pastoral counsellor is brought to bear on the psychological factors.

Divorce and Realized Forgiveness

The Creator's love and the pastoral counsellor's compassion for the rehabilitation of those who have failed are indispensable. In the case of marriage

breakdown, compassion should be exercised, help given, and divorce and even remarriage permitted. The prerequisite for remarriage, however, must be "realized forgiveness", says James Emerson in his book, *Divorce, the Church and Remarriage*. (I-10) This is the awareness of forgiveness, realized in the human relationships involved, to such a degree that a person is free from the guilt he feels and from the traits in himself which contributed to the first marriage failure. Only when personal responsibility for the divorce is understood and accepted, can a second marriage be a blessing. It is this awareness that has led the Pastoral Institute to develop new ways to help divorced persons. (Such as those proposed in Appendix B-2 and 3).

PART 3—SOCIOLOGICAL CONSIDERATIONS

The concern of the church, sociologically, is to see Canadian society ungirded with stable family life based upon responsible freedom and integrity. How is this possible? Sociologists are making it clear that family breakdown, like many other problems is a complex one in character and cannot be solved without some major changes in social structure. It is essential to recognize the magnitude of the task if we are to be able to accept the patchwork and pilot project nature of attempts such as the Pastoral Institute and its new patterns of programming. It is necessary to experiment with new structures and be willing to demonstrate, on a small scale, what might become large scale patterns of approach.

The sociologist helps other professionals and the public, to recognize and understand the damaging experiences of persons who are either going through a divorce; the dehumanizing, and for many, even degrading grounds for divorce in this country; the colossal insult to self respect of persons having to consider collusion or adultery to legally dissolve a marriage that is emotionally and spiritually dead. The sociologist assists the pastoral counsellor, the social worker, the psychologist, the lawyer and others to see the cultural differences, the socio-economic disparities, effects of urbanization and the pressures that these put upon family life. He explains to the legislators and the public the therapeutic principle essential to the court as suggested in Appendix A in proposing "the Domestic Proceeding Court"; interprets the place of Family Life Education and Counselling to the community and the courts; and clarifies the nature of social change in the area of marriage breakdown, divorce and remarriage.

The sociologist knows that it is not just a matter of drafting new divorce laws in this country; but attitudes of whole segments of society need to be appraised and changed. For example, the church has to make clear to the public its position concerning legislation and services for a pluralistic society, which may not be acceptable to the members of the church themselves. The aim is not to try to impose Christian requirements upon those who may not be Christian.

When we talk about the reform of divorce law in Canada we need to be clear about the goal. If we want to reduce the divorce rate it is easy to prohibit divorce or remove it from the majority by costly litigation. By stringent laws that would violate other values it would be relatively easy to ensure stability of the family. Happiness of the family as a goal is probably impossible to achieve in modern urban society. The goal of individual happiness is not entirely acceptable since many people have to be considered in the divorce situation. We want healthy homes for the children of the nation but just how do we get them? The stable home based upon responsible freedom, happiness, integrity, is an acceptable goal but it involves work on many fronts. It means

more than counselling individuals and families to change their attitudes toward one another, important as that might be.

There are many major tasks to be undertaken with vision, knowledge, and above all, planning together on an interfaith, interdisciplinary basis, if the leadership is to be forthcoming.

The main attacks which are being made on the problem are listed by William J. Goode, (I-11) as follows: (1) legal reform; (2) family counselling; (3) individual therapy; (4) clerical advice; (5) family life education; (6) techniques for the prediction of marital happiness.

At the Pastoral Institute several new structural approaches to the whole complex problem are being tested as pilot projects. Some of these are (7) Premarriage and Marriage Assessments both on individual and group basis; (8) Conjoint Family and Group Counselling; (9) Personal Acquaintance and Marriage Introduction Services; (10) Supervised Internship Programs.

Some elaboration of the above approaches to divorce prevention may clarify a few points.

(1) Legal reform is what brings us here and the government is to be commended for undertaking a problem so thorny and complex. The widespread acceptance of the position of the United Church of Canada and the Pastoral Institute we hope will make clear, beyond a doubt, that there is a significant "ground swell" of support for divorce reform—and reform, based on the concept of "Marriage Breakdown" as the sole basis for divorce.

(2) Family counselling is becoming an important part of the training of many professions. Teachers, physicians, lawyers, social workers, clergy of all faiths and many others are taking graduate training under supervision. The training programs of the Pastoral Institute since its opening in 1962 have been oversubscribed with those seeking further training. Internship programs are being planned to give continuous training opportunities in the churches under the supervision of the Institute. But we are hardly "scratching the surface".

(a) The need for trained personnel is great.

(b) Many will not come to counselling agencies and this increases the need for clergy, physicians and others to have better training.

(c) The need to learn from the sociologists how to relate to the lower socio-economic groups is a real one. All groups work best with those of the YAVIS (young, attractive, verbal, intelligent, successful).

(d) While counsellors work with individuals and families, the sociologists must be heard if we are to get at the public issues and social disorders that produce individuals, who cannot build stable family life. The reform of the divorce laws might change some of the structural problems for many families—for example; those living common-law because one or both partners cannot get out of a previous dead marriage.

The awareness at the Pastoral Institute of the public and sociological issues involved, which bring so many troubled persons and families for help, led to the preparation of this brief. The dilemmas and suffering of an estimated 400,000 Canadians living common-law and many more who haven't come to that,—yet, require that these public issues be faced and dealt with according to the knowledge which social scientists provide.

(3) Individual counselling and psychotherapy is only a partial answer for many people. Many divorced are not pathological, or emotionally unstable in any clinical sense, even though they cannot relate to a particular marriage partner. Many spouses are disillusioned to discover that the therapist had little effect on a problem that involved the whole family, or the whole community.

(4) The clergy have the same problem in their pastoral counselling and do not have the same authoritative role today as they once had. Although those who seek the pastoral counsellor usually are well motivated and desire to change attitudes, it seems to be symptomatic of our age that many do not follow through on programs of individual or group counselling long enough to benefit. Distractions are everywhere in our affluent society and the sociologist along with the mass media are needed if the public is to have an awareness of resources and how to use them.

(5) Family Life Education is a burgeoning field and at least recognizes that the problem lies in the socialization process, in the childhood period. New processes must be introduced if new kinds of persons are to emerge. Too often the programs touch only the high school students as our Sex Education Seminar at the Pastoral Institute did in the beginning. But as programs develop, it is our experience that in these programs we tend to move both ways from the teenage group which causes most concern, that is, to programs for parents and younger children. Family Life Education is a community responsibility and should involve home, church, school and other groups. It should be directed at influencing attitudes, relationships and goals in life rather than mainly the mind and body.

(6) When the psychological factors are taken seriously by churchmen and psychological testing is used at the pastoral counselling level, significant guidance can be given in predicting sound marriage as well as marriage breakdown. The Pastoral Institute files bear out that it has been possible to predict excellent marriages and to anticipate trouble ahead. Couples have returned after a few months, sometimes several years after marriage, to express their appreciation for the help they received in preparing for sound marriage. Others have returned to seek further help in avoiding marriage breakdown.

But there are a number of problems which require thorough researching if marriage prediction is to be taken seriously and make its potential contribution. That research may be undertaken some day at the Institute.

(7) Premarriage and Marriage Assessments.

The Personal Data Kits developed by the Pastoral Institute for the purpose of assessing engagement and marriage strengths have been based on 25 years of research and development of suitable Temperament Analyses at the American Institute of Family Relations in Los Angeles. We have drawn upon 10 years of similar scientific work with other assessment instruments at the Bradley Centre in Columbus, Georgia. Considerable use also is made of inventories, checklists and analyses developed by Family Life Publications, Durham, North Carolina.

The Personal Data Kits used at the Pastoral Institute have been developed especially for the parish clergymen, family physicians and social workers. Most of the procedures used have been tested over the years in regular pastorates. Many rural and urban churchmen of various faiths, trained in the seminars conducted by the Pastoral Institute each year, make use of these kits. They find them helpful in assessing the communication and soundness of engaged couples doing into marriage, to evaluate the strengths of a marriage and to indicate the breakdown of marriage. (See Appendix B. 1)

(8) Conjoint Family and Group Education and Counselling.

Family counselling by the conjoint method, that is by seeing all the members of the family at one time in the same room, is an innovation that was ignored until Nathan Ackerman (I-12) in New York, Dr. Murray Boiven at the National Institute of Mental Health, Bethesda, Md. and Dr. Donald D. Jackson. (I-13) Director, Mental Research Institute, Palo Alto, California and others tried it.

Conjoint family counselling does not consist of one person and one counsellor but takes the approach that the person's condition is not unique in his family

but is symptomatic of underlying family distress. Failure in family communication can be largely responsible for conflicts in the areas of money, religion, in-laws, sex, alcohol and in the handling of children. Families with good communication tend to handle all these areas of life effectively.

At the Pastoral Institute a large part of the long term counselling is carried out in groups. For practical reasons, "open groups" have been chosen for most of the group work. There are advantages to this approach, in that counsellors time goes further, many persons respond quicker and they can leave without disrupting the group or reducing it to an ineffective number. (See Appendix B. 2).

(9) A Personal Acquaintance and Marriage Introduction Service on a National basis and under the auspices of the church is being planned and proposed by the Pastoral Institute. Sociological research has provided some useful guidelines for this new kind of social structure. (I-14) It is anticipated that it will effect some necessary changes in Canadian society. We have been encouraged to feel that many persons would trust a pastoral non profit approach in such delicate and personal matters when they would not trust a business or agency approach. More and better marriages (I-15) can be brought about if this challenge is undertaken by the churches. The clergy know who many of the single, divorced and widowed persons are who will never meet a suitable partner without the acceptance of what may seem to many as an unorthodox way of meeting a partner. The churchmen of Canada can do more about this problem than anyone else and we plan to go ahead with it immediately. (See Appendix B. 3).

(10) Supervised Internship Programs on an interdisciplinary, interfaith basis are being developed by the Pastoral Institute. Pastors, Educators, Counsellors and others will be given various kinds of opportunity for supervised training. The goal is to prepare clergy and laity to use their lives with more maturity. This would come out of supervised experience and training while working with the real life situations and at the public issues involved. (See Appendix B. 4).

In short, the sociologists help us to see that divorce is a social problem more than an individual one. The divorced person bears an unjust burden of isolation at the hands of an uncaring society that hasn't faced up to its responsibilities. Some basic factors have to be recognized and faced if the ten approaches suggested above are to be effective. Some of these are:

(1) Grounds for divorce and other precipitants. What brings the final decision to seek divorce? There are any number of symptoms: adultery, drunkenness, desertion, non support, incompatibility, immaturity. These and many more are consequences of deeper and sociological processes. "Marriage Breakdown" as the sole basis of divorce, we believe, would precipitate divorces on a basis of more integrity.

(2) Marital Discord: What forces in society contribute to the breakdown of marriage? There are many: confusion of male and female and parental roles in the home, false expectations of marriage, credit buying and other socio-economic forms of insecurity, dating patterns in the community, lack of responsible family life, sex education, different cultural and religious backgrounds, work opportunities for mothers with small children. Most of these are on the increase in urban society and make urgent the focus on preventive, educational approaches.

(3) Ways of solving Discord: Why do some see divorce as a solution and others wouldn't consider it? It is claimed that there is less stigma on divorce. But it may be that divorced persons in an urban society can more easily avoid those who do not approve. The greater possibility of happy marriage and remarriage are important factors to be concentrated upon as we work at the total divorce problem.

The increased opportunities for divorced persons to maintain themselves and to get free of the spouse is more real today. The basis of divorce itself is the factor that concerns all of us because of its importance as a force that will contribute to divorce. It is not possible to know how much "Marriage Break-down" as the basis of divorce would improve the divorce rate, but we are confident that the risk should be taken and adjustment made as results become clear.

The great task before all of us is to make a concerted attack upon the basic problems of marital discord and easy divorce. All of the above described approaches, and any new ones that can be established, will be needed, because, these distresses are woven deeply into the fabric of the national life. A basic change in divorce law would help to focus efforts for the concerted, and cooperative undertakings proposed in this brief.

PART 4: COMMUNITY ORGANIZATION FOR DIVORCE PREVENTION

In summary, divorce from the point of view of the pastoral consellor is a complex problem of the community and society as a whole. The individual caught in the problem can be expected to bear only his personal responsibility in marriage breakdown and divorce. This needs to be balanced with the acceptance of a great deal more responsibility and concern by the community.

The churchmen's role in marriage breakdown, divorce and remarriage needs to be defined further, in terms of providing leadership and prospective, not only to his congregation, but as one of the team of community leaders.

The clergyman's participation is essential, but, if he is to be trusted, he should not be overly eager. When dealing with matters of such emotional involvement and suffering for many people, as marriage breakdown, the confidence of the community and its leaders has to be won. Move carefully and plan well for a comprehensive approach to the whole problem. Work with the leaders of the community so that they understand and accept the aims and the methods of approach. Some of these suggested steps might lead to a more positive outcome and more action than in the past.

(1) Establish a Leadership Group.

Try from the beginning to establish a leadership group of as many elements in the community as possible. It is important to help people recognize that divorce is a community problem, not just an individual or family failure. Each one in his own role in the community has a contribution to make. There should be school administrators, teachers, parents, clergy of all faiths, medical and other family helping professions, the communications media and others that may be known in the particular local communities to be interested.

(2) In a series of meetings, explore the problem.

Consider such questions as: What is causing marriage breakdown in our society? How can we understand the plight of those whose marriages have broken down? How can we help to meet their needs in church and community? How can we build a preventive program that will help to build more sound family life in this country? What exactly do we want family life education to accomplish? When should information about sexuality of man and sex education and family planning be brought into the programs and how? Who in this community can give leadership and perspective to the program that will lead us to the goals that we want? How can they be trained and be prepared for responsibility? How do we interpret to the community what we are trying to do in family life education, in family counselling, in marriage introduction, in leadership training.

(3) *Provide the leadership groups with study materials.*

The literature should be the kind that will expend their knowledge and understanding of the theological, psychological, sociological, the morea and socio-economic issues of marriage breakdown, divorce and remarriage. Provide a solid ground work for continuing discussions on the basis of the strengths and the stabiiliites of family life.

(4) *Involve the young people in the dialogue and the planning.*

Find out what it is that they want, what their needs and questions are; how they see their responsibilities in the days ahead. Involve each age group in planning for the group next younger than themselves in any educational programs.

(5) *Involve the Adults.*

Make sure that any effort to educate the young about responsible human relationships are matched by the efforts to the same with the adult population.

(6) *Family Life Education is a continuing process.*

It should be kept clear that the community cannot settle for a one-time stand, on an issue as complex as family breakdown and divorce. The goal—adults capable of using their humanity and their sexuality in mature and responsible ways—cannot be reached by a few lectures or speeches, but only by a continuing thoughtful approach at every level by all responsible persons and agencies in the community.

(7) *The Moral Issues are not new.*

Churchmen should realize and help others in the community to do so, that the moral issues which underlie divorce are no different from those concerning any other relationships in life. The whole community can be challenged and inspired to join in clarifying how people of all ages, races, religious at all economic levels can relate to each other creatively and nonexploitative in the many relationships of day to day living. Open discussion of these moral issues can go on in the homes, schools and the churches each within the special pattern of belief of it own communion.

(8) *The Need for Leaders.*

The big question that keeps most people from acting is—"Where can we find the persons trained and highly skilled in this type of educating and counselling?" And the answer of many who have been in the communities is, "You have them right there with you". As discussions and dialogue develop they will identify themselves. One way or another people with background wisdom, skill, ability to communicate comfortably and openly with young people and with troubled people, will come forward. They are already there. They may be the physicain, the home economist, family life educator, the nurse, guidance counsellor, physical educator, psychiatrist, social worker, youth worker, clergyman, elder, deacon, home and school person in the community. It remains for local representatives of the ministerial, medical, teachers, social workers associations to identify persons who might give leadership, to give them the supported opportunity to do so, and to help them to grow in that responsibility.

(9) *Community Workshops.*

The next step in bringing this about may be a series of community-wide training workshops for those who deal directly with family life education programs or work with those who are caught in the troubles in marriage breakdown, divorce and remarriage. As knowledge and experience grow, the leadership will grow too. It will broaden its outlook and want to share its findings and recommendations with others.

(10) *The Key is Community Willingness and Understanding.*

Remember that no preventive family life education program; no counselling program, for those caught in the suffering of marriage breakdown, divorce and remarriage will grow any faster, nor be any more successful than its own community's willingness and ability to understand and support it. One of the most important contributions churchmen can make, as community leaders, in these areas, is to foster this kind of community willingness, understanding and action.

DIVISION II

SOME ARGUMENTS FOR "MARRIAGE BREAKDOWN"
AS THE SOLE BASIS FOR DIVORCE

PART I: INTRODUCTION

The difficulties that Canada's divorce laws place in the paths of both marriage reconciliation and marriage dissolution where each is required have often been discussed at the Pastoral Institute, particularly in our Interprofessional Advisory Committee. The Alberta Conference of the United Church of Canada first went on record in favour of a form of "marriage breakdown" as long ago as 1959. One member of our I.P.A.C. spoke publicly on the matter in August 1963 and again in December 1965. By far the most authoritative and persuasive discussion of "marriage breakdown" is contained in "Putting Asunder", the report published in July 1966 of a group appointed by the Archbishop of Canterbury to recommend any appropriate changes in the divorce law of the United Kingdom. That report unequivocally endorses "marriage breakdown" as the sole basis for divorce. We respectfully concur with their recommendation.

PART 2: THE BASES FOR DIVORCE

"Only Four Bases in the World: Unilateral Declaration, Fault, Consent and Marriage Breakdown"

There are only four bases for divorce in the world, unilateral declaration, fault, consent and marriage breakdown. (II-1)

Unilateral divorce is the system in parts of the world such as Islamic countries where the husband has the power to divorce his wife generally without cause.

The concept of "fault", or "matrimonial offence", or "grounds" as it is sometimes called, chiefly adultery, cruelty and desertion, has been the only basis for divorce throughout most of Western Civilization until the present century when it is gradually being eroded by the concept known as "marriage breakdown".

"Fault, "consent", and "marriage breakdown" are each considered in detail in this brief. It is conceded, however, that these categories are not mutually exclusive; matrimonial offences such as adultery and cruelty are evidence that a marriage may be breaking down. And all bases contain an element of "divorce by consent", indeed, most divorces in Canada in substance are "consent divorces", although the form of the "matrimonial offence" is retained. And even in jurisdictions where particular matrimonial offences provide the only basis for relief, the courts have tended to interpret offences such as cruelty and desertion so as to make them under-cover substitutes for a general provision envisaging culpable destruction of the marriage.

PART 3: "DIVORCE BY CONSENT"

"A Red Herring"

Society has a vital stake in maximizing the number of life-long happy unions among its members, and "divorce by consent" is thought by most people

seriously to impede such an objective, by its effect upon both those contemplating marriage and those already married, childless or otherwise. In the statement of his views in the 1956 report of the *United Kingdom Royal Commission on Marriage and Divorce (The Morton Report)*, Lord Walker stated,

"I agree with those who think that to permit divorce by consent would be to destroy the concept of marriage as a life-long union." (II-2)

In the United States of America, one-quarter of all marriages end in divorce, mostly by "disguised divorce by consent". (II-3) There is a tendency among persons who reject a sacramental view of marriage to go to the opposite extreme and favour easy divorce. Strong reasons in terms of human welfare can be advanced for rejecting easy divorce.

"Putting Asunder"

"Putting Asunder" is the Report of a group of fourteen members of the clergy, the English Bench and Bar, and others concerned with marriage counselling and related fields, appointed by the Archbishop of Canterbury.

"in the hope of discovering whether a new kind of law of divorce might be devised such as would be free from the most unsatisfactory features of the present English law and yet would not weaken the status of marriage in the community." (II-4)

After an 18 month study, the Group in July 1966 recommended "marriage breakdown" as the sole basis for divorce and against "divorce by consent" as follows:

"The fatal defect of the consensual principal is not that it requires both parties to agree in wanting divorce (that spouses do agree on this not infrequently is a fact a realistic law needs to take into account), but that it subjects marriage absolutely to the joint will of the parties, so making it in essence a private contract. Since it gives the court, as representing the community, no effectual part in divorce, it virtually repudiates the community's interest in the stability of marriage. Moreover, if the covenant that initiates marriage is to be revocable by mutual consent, its intention cannot meaningfully be called "lifelong": provision for divorce can be reconciled with a lifelong intention only if divorce is subject to an authority that is independent of the will of the parties. Therefore we must emphatically reject divorce by mutual consent. Dissolution of marriage ought always to require a real exercise of judgment by the court, acting on the community's behalf." (II-5)

"But It Can't Be Eliminated"

Having stated the foregoing, it must be candidly admitted that no divorce law can entirely eliminate "divorce by consent" and the sooner this fact is recognized the better. In most cases that come to court, both parties want the marriage dissolved, and both are doing and refraining from doing all in their power to obtain the dissolution. Adultery and cruelty are magic keys which quickly unlock the door to freedom from the marriage. Proof of adultery or cruelty is obtained in most cases with the co-operation and consent of both parties.

"Canada Already Has Divorce by Consent"

A Canadian divorce, which may be based upon proof of a single isolated act of adultery, and is in the overwhelming number of cases unopposed, is in substance if not in form, a "divorce by consent". Adultery probably occurs in most cases when the spouses are separated for any substantial length of time, for, as stated by Judge Swift, the parties are placed

"in a situation where there is an irresistible temptation to the commission of adultery, unless they possess more frigidity or more virtue than usually falls to the share of human beings." (II-6)

Production of the evidence of the adultery, not the adultery itself, is usually the problem that cannot be solved without the consent of the adulterer. It is not unlawful for the spouse who is in fact guilty of adultery to furnish the other spouse with evidence of such adultery or to agree to facilitate the obtaining of evidence of such adultery. (II-7) "Consent" in obtaining the evidence of the adultery is thus the key to the obtaining of the divorce and the matrimonial offence is only incidental.

PART 4: THE QUICKIE DIVORCE-QUICKIE REMARRIAGE

"The Real Threat"

The "Quickie Divorce-Quickie Remarriage" is the real threat to the stability of family life, not "divorce by consent". As pointed out in the Registrar-General's Statistical Review of England and Wales for 1952,

"the bulk of divorce proceedings are instituted with a definite intention of subsequent, immediate remarriage." (II-8)

The best self test for a spouse considering divorce to ask is this:

"Is this marriage so bad that I would prefer no marriage for a substantial length of time, in its stead?"

If persons were unable to get a "Quickie Divorce-Quickie Remarriage", we believe many people would try to make their marriage work to avoid going through a period of "no marriage". Only by eliminating adultery and rejecting broadly defined cruelty and other grounds used for the "Quickie Divorce-Quickie Remarriage" can this practice be eliminated and family life stabilized.

As stated by Dr. Richard Foregger, St. Joseph's Hospital, Milwaukee, Wisconsin:

"If legislatures are willing to prohibit remarriage after divorce for a year, then they certainly should (as a preventive measure) be willing to prohibit divorce actions for a year while one or the other partner is undergoing therapy in the hope of saving the marriage." (II-9)

PART 5: CRITICISMS OF ADULTERY (ESPECIALLY A SINGLE ISOLATED ACT AS A BASIS FOR DIVORCE)

"Seldom the Real Cause"

Lord Chancellor Birkhead, House of Lords, 1920

"Adultery is a breach of the carnal obligations of marriage. Insistence upon the duties of continence and chastity is important; it is vital to society. But I have always taken the view that that aspect of marriage was exaggerated, and somewhat crudely exaggerated, in the Marriage Service. I am concerned today to make this point, by which I will stand or fall, that the moral and spiritual sides of marriage are incomparably more important than the physical side . . ." (II-10)

Sir A. P. Herbert

"Is ten minutes of adultery worse than three years of desertion or a lifetime of cruelty?" (II-11)

Father James Roberts, "The B.C. Catholic, 1966"

"...the moral offense (which may have been a single, unpremeditated lapse) is used vindictively as a punishment meriting divorce. Adultery is the axe that splits the marriage asunder. The United Church thinks this is unfair to the complexity of the marriage relationship and that consequently divorce based on such grounds alone is a social evil." (II-12)

Dr. Richard Foregger, *St. Joseph's Hospital, Milwaukee, Wisconsin, 1966*

"...the third person making the triangle generally is the result of the previous marital discord and tension—not the cause of it..." (II-13)

"Time" Magazine, February 11, 1966

"...the whole U.S. approach begins with a disastrous premise. Instead of recognizing that both parties are almost always partly to blame, U.S. law demands verified proof of "fault" by one partner—and only one. The insistence seems almost sadistic: the "innocent" party must prove his or her mate "guilty" of offences for which divorce is the punishment. The result is that the typical U.S. divorce trial is a farce that totally abdicates society's interest in salvaging marriage whenever possible."

The Pastoral Institute

The single, isolated act of adultery proven in court is merely the key that unlocks the door to freedom. Dr. Kinsey told us 17 years ago that half of all married men commit adultery, and later surveys indicate the percentage is probably even greater. It is not hard to prove adultery if both parties want it to be proved. But if the defendant chooses to defend the action, it is often difficult to prove adultery. The anomalous result is adultery used as a means to obtain a "Quickie Divorce-Quickie Remarriage" by consent, and where there is no consent, adultery can seldom be proven and no relief is available to the injured party.

PART 5: DANGER OF MULTIPLYING "MATRIMONIAL OFFENCES" OR "GROUNDS"

"Pandora's Box"

As shown by the various private bills introduced in the Twenty-Seventh Parliament, each reformer along conventional lines of matrimonial offence offers a different list of "matrimonial offences". More than 47 "grounds" have received the approbation of legislators in the various United States of America including the following:

"public defamation of the other"

"indignities"

"incompatibility"

"the joining of a religious sect believing cohabitation unlawful"

Parliament should not open this Pandora's Box of "grounds" or "marital offences" for as the years go on there will always be pressure to add new and flimsier marital offences or grounds to the list. We should not debase this vital institution by permitting the instant dissolution of one marriage for trivial reasons and the instant contracting of another. Genuine marital offences such as repeated adultery, extreme cruelty and desertion are valid reasons for relief from an existing marriage and as such are valid bases for judicial separation and for determining questions of alimony, custody and matrimonial property. But adultery and cruelty when used as bases for the dissolution of marriage which is the common objective of both spouses in most divorce cases are nothing more than vehicles for "Quickie Divorces-Quickie Remarriages" by consent. "Desertion" on the other hand is close to "marriage breakdown" with the addition of an element of "fault" that is frequently fictional, but "desertion" is unnecessary when "marriage breakdown" is the basis for divorce.

PART 7: "MARRIAGE BREAKDOWN"—WHAT IS IT?

"Marriage Breakdown" is a basis for divorce that adopts the policy that a marriage which has irretrievably broken down in fact should be dissolved in law.

Conversely a marriage should not be dissolved in law until it is clearly demonstrated that in fact it has irretrievably broken down. In most jurisdictions a period of separation between the parties is the primary proof that the marriage has irretrievably broken down. "*Putting Asunder*" recommends proof of the breakdown to include three years of separation and in addition

"Actions and conduct which under the present law constitute matrimonial offences, though no longer in themselves and by themselves grounds for a decree, would still be available as evidence of breakdown; in addition the court would be enabled to take other facts into account which at present are treated as irrelevant." (II-15)

One definition of "marriage breakdown" which commends itself to the Pastoral Institute is as follows:

Decree of Divorce. The Court shall upon a petition by one of the parties to the marriage, decree dissolution whenever the marriage has irretrievably broken down.

Public Policy. Notwithstanding the foregoing, the Court may refuse to grant or delay the granting of a decree if in the opinion of the Court the granting of the decree would be contrary to public policy.

Particulars of Public Policy. Public policy permitting the refusal or delay of a decree of dissolution includes the following:

- (a) that the issue of a decree will prove unduly harsh or oppressive to the Respondent.
- (b) that the Petitioner has failed to comply with a prior order or is likely to fail to comply with an Order of the court concerning:
 - (i) the maintenance of the Respondent or of a child of the parties,
 - (ii) custody of or access to a child of the parties.

Proof of Marriage Breakdown. Irretrievable breakdown of the marriage shall be proven by evidence that there is no reasonable possibility of a resumption of cohabitation and shall include evidence that the parties are in fact living separately and apart and have lived separately and apart for a continuous period (except for periods of cohabitation of not more than two months each that have reconciliation as a prime purpose) immediately preceding the date of the granting of the decree, such period to be either:

- (a) one year when the Respondent has been guilty of adultery, extreme cruelty, sodomy, bestiality, or an attempt to commit sodomy or bestiality, or
- (b) three years in any other case.

"Society, Through the Court, Should Decide Who Should Have the Right to Remarry"

Under the "matrimonial offence" system of divorce, the so-called "innocent spouse" is the sole judge who decides whether the so-called "guilty party" can ever remarry. Conversely, apart from the lucky "innocent spouse" who obtains proof of the adultery of his or her "guilty spouse" without the co-operation of that "guilty spouse", the "guilty spouse" is the judge who decides whether the "innocent spouse" can ever remarry. The "guilty spouse" does this by concealing his or her misconduct and refusing to volunteer evidence of such misconduct.

While the "ground of separation" form of "marriage breakdown" put before this Committee by the Canadian Bar Association is a distinct improvement over the "matrimonial offence" concept, nevertheless it is the least attractive form of "marriage breakdown". If the period of separation of the parties is the sole criterion for determining the irretrievable breakdown of the marriage, the party

chiefly responsible for the breakdown would know with certainty that he or she would eventually gain the right to remarry. It is true that that right would not be gained for some years, but it shares the defect of the "matrimonial offence" in that the parties, not society, make the ultimate decision. If the matrimonial offence or the period of separation is proven, the court has no choice but to grant the decree.

Under the form of "marriage breakdown" we advocate, society through the court would make the ultimate decision as to whether to grant the decree and the right to remarry. In most cases such right to remarry should eventually be granted because it is in the best interests of society for the parties to a broken home to try to rebuild new family lives. Society has a vital interest in the stability of family life, and society should assert that interest by giving to its representative, the Court, and not to the parties only, the final decision.

PART 8: PRESENT EXTENT OF "MARRIAGE BREAKDOWN" AS A BASIS FOR DIVORCE

"Marriage Breakdown" in one form or another is part of the divorce law of:

Australia (5 years)	Netherlands (5 years)
Austria (3 years)	New Zealand (3 years)
Belgium (3 years)	Norway (1—2 years)
Bulgaria (no fixed period)	Poland (no fixed period)
China (no fixed period)	Portugal (10 years)
Czechoslovakia (no fixed period)	Russia (no fixed period)
Denmark (1 1/2—2 1/2 years)	Sweden (3 years)
France (3 years)	Switzerland (no fixed period)
Germany (Western) (3 years)	United States (24 states) (1, 2, 3, 5 or 10 years depending on state)
Greece (no fixed period)	Yugoslavia (no fixed period)
Hungary (no fixed period)	

(II-16)

The philosophy behind "marriage breakdown" is found in English law in the unanimous judgment of the House of Lords expressed by the Lord Chancellor, Viscount Simon in *Blunt vs. Blunt*:

"The interest of the community at large, to be judged by maintaining a true balance between respect for the binding sanctity of marriage and the social considerations which make it contrary to public policy to insist on the maintenance of a union which has utterly broken down".

(1943) A.C. 517

It is reflected in these questions which are part of the standard evidence in divorce cases in Alberta and in other jurisdictions:

"Have you forgiven his/her adultery?"

"Would you take him/her back?"

Other examples are referred to in *Power on Divorce*. (II-17)

In "Putting Asunder", the group expresses the opinion that "In practice...the law is...feeling its way towards the doctrine of the breakdown of marriage". (See page 39 of this brief for full quotation)

PART 9: ADVANTAGES OF "MARRIAGE BREAKDOWN" AS THE SOLE BASIS FOR DIVORCE

Two Major Purposes:

"Eliminate the Quickie Divorce-Quickie Remarriage"

and

"Give Eventual Relief to All Situations of Hardship"

It is a mistaken notion that most divorces take a long time to obtain. Most are granted quickly and it is the exceptional case, the hard case, where at present no relief is obtainable, that comes to notice. At a recent sitting of a divorce court at Calgary, Alberta, of the 45 cases tried, in 80% the parties had been separated less than 3 years, in 58% less than 1 year, in 24% less than 3 months, and 11% of the cases, a month or less. Marriage breakdown would eventually permit all marriages to be dissolved where no reconciliation had been accomplished, and at the same time would delay this mass of "Quickie Divorces" now granted before time, sober second thoughts, and marriage counselling can intervene. The quickie divorce attracts one of the sharpest criticisms of the law and lawyers from priests, ministers, rabbis, social workers and others engaged in marriage counselling. Under our system of "instant divorce" following one isolated act of adultery, the parties in an undefended action can be divorced before the counsellor has had time to try to save the marriage.

ADDITIONAL ADVANTAGES OF MARRIAGE BREAKDOWN AS THE BASIS FOR DIVORCE

"Relief for the Non-Perjurer and Non-Adulterer"

Eventual relief is given to those persons whose marriages have broken down but who do not engage in extra-marital relations. It is ironic that under the present law, most of the persons who break the mores of our society and commit adultery are quickly divorced, yet those who commit neither adultery nor perjury are permanently denied relief.

"Eliminate the Fiction of the "Guilty Party"

The fiction of the guilty party is eliminated. As every marriage counsellor and divorce lawyer knows, there are no domestic situations in which the fault is all on one side. Too many plaintiffs leave divorce court under the illusion that their virtue and their spouse's vice have been proven, whereas the "fault" in fact may be more or less equal.

"Let the Court Hear Full Argument on Property and Maintenance"

In many cases, questions of alimony and property are settled before the parties get to court, either by a wife anxious for a divorce waiving alimony she should rightly receive because the evidence of adultery is available for an uncontested divorce but not for a contested case, or by a husband anxious for a divorce making a crippling property settlement in favour of a spouse who would not otherwise consent to bring the action. Under marriage breakdown, after the lapse of the statutory period, the right to dissolution of the marriage is virtually incontestable. The parties can negotiate a property settlement on more or less equal terms or failing agreement, the court can hear the full evidence and argument.

"Stop the Vengeful and Vindictive Spouse"

Vindictive spouses are stopped from permanently preventing the remarriage of the "guilty spouse". How often does the cruelty of one spouse aid in

driving the other into the arms of another man or woman. Our present law leaves to the person in some ways the least capable of judging, the permanent fate of the other.

"Vengeance is mine, I will repay, says the Lord". (Romans 12:19 RSV) Society, through the court, not the so-called "innocent spouse", should make the final decision as to whether the so-called "guilty spouse" should eventually have the right to remarry.

"Covers All The Situations"

Under marriage breakdown, divorce is available in all cases in which the experience of time has shown that the marriage is permanently broken down. It is unnecessary to have any other basis for divorce.

"Eliminate the Means Test"

The present means test for divorce is eliminated. It is rare for the rich with resources for private investigators and property settlements to fail to obtain a divorce. For the poor, common-law is too often the solution.

"Slow Down Teen-age Remarriage"

The delay necessitated by "marriage breakdown" makes second ill-advised marriages by teen-agers virtually impossible.

"Stop Encouraging Adultery"

Spouses are no longer encouraged to commit adultery to provide grounds. As Lord Walker states in the Report previously referred to,

"It is not, I think, doubtful that people do commit adultery—solely in the expectation that divorce will follow..." (II-18)

"Reduce the Confusion for Children"

In "Children of Divorce", psychiatrist J. Louise Despert illustrates in the story of Mary and other emotionally disturbed children the effect of divorce and particularly the "Quickie Divorce-Quickie Remarriage".

Dr. Despert notes that

"Mary was not quite three years old when her mother divorced and remarried within a few weeks."

The second divorce came when Mary was five and one-half:

"In the very last months of the school year, when Mary had actually become able to sleep several times during nap and had shown other promising signs, there was a second drastic change at home. (Her mother's) second marriage was even shorter-lived than her first. Again there was a divorce and again a quick remarriage..." (II-19)

After each such quick divorce and remarriage, Mary's illness deepened. There were of course many factors involved, but Mary's mother's quick decisions were among them. Under "marriage breakdown", the Quickie Divorce-Quickie Remarriage would be abolished, and children as well as their parents would be given time to adjust to the rupture of old relationships before new ones are thrust upon them.

"Let People Keep Their Religious Convictions"

The present pressures on persons with religious convictions against divorce would be relieved. It is not uncommon for a person with such convictions to eventually give in to the pressures of the spouse with no such conviction and eventually "give" a divorce. Under marriage breakdown, the spouse without such convictions would take the legal proceedings and the other spouse would

not re-marry even though legally entitled to do so. Under the present law, the party against whom no matrimonial offence is provable, who is often just as responsible for the breakdown of the marriage, can impose his or her religious convictions on a spouse of a different faith. It should also be noted that members of most churches are sometimes permitted by their churches to sue for divorce. Only if the member of the church remarried would he or she break canon law. (II-20)

PART 10: RESPONSES TO SOME POSSIBLE CRITICISMS OF "MARRIAGE BREAKDOWN"

Is "Marriage Breakdown" Really "Divorce by Consent"?—No

While we believe for reasons stated above that our prime concern should be with the "Quickie Divorce-Quickie Remarriage" and not "divorce by consent" as such, we respectfully concur with the opinion of the Archbishop of Canterbury's Group in "Putting Asunder" concerning the sharp difference between "marriage breakdown" and "divorce by consent":

"... the essential characteristic of divorce by consent is that marriage is treated as a private contract of partnership, terminable at the joint will of the parties themselves without any effective intervention by the community. The doctrine of breakdown on the contrary, at any rate in the form we have been considering, requires that it shall be the court that decides whether a marriage ought to be dissolved or not. In principle therefore it is irreconcilable with divorce by consent. If it were made the basis of the divorce law, the agreement of the parties in wanting divorce would not be a bar, and might even count in favour of a decree; but in no case would such agreement suffice of itself to effect divorce. It would always be necessary for the court to try the issue of breakdown according to the evidence; and the court, if not satisfied that the marriage had in fact broken down irreparably, would have a duty to refuse a decree despite the express agreement of the parties. As for the particular instance cited (separation by agreement with a view to obtaining divorce) it is no doubt true that, if breakdown were to be incorporated into the law in the shape of a determinate "ground of separation", with the length of separation required duly stated, consenting parties would be able to arrange a divorce in much the same way as some now arrange desertion. But that would not show divorce by consent to be inherent in the principle of breakdown any more than current malpractice shows it to be inherent in the principle of the matrimonial offence. Moreover an *arranged separation* would not necessarily be incompatible with the genuine breakdown of the marriage in question, whereas arranged desertion is incompatible with a genuine matrimonial offence. So if any anyone thinks there is an argument here for the superiority of the principle of the matrimonial offence over the principle of breakdown, he is greatly deceived." (II-21)

Substituting "volunteered evidence of adultery" for "arranged separation", the above remarks apply with equal force to Canada.

Is "Marriage Breakdown" A Triable Issue?—Yes

Again we respectfully adopt the conclusion of "Putting Asunder":

"The evidence we have received suggests that judges would be reluctant to be put in the position of having to make predictions about the future of marriages. But in fact a judgement of breakdown does not require any greater measure of prediction than (for instance) the judgement that the proved conduct of a spouse would, if continued, cause injury to the health of the other spouse. In both cases it is a present probability that has to be assessed. We are assured that, having con-

sidered the history of a marriage, the reasons alleged for its failure (together with, in contested cases, the arguments put forward on the other side), and the efforts which have been made—or not made—to achieve reconciliation, a court should find it possible to determine the probability of the joint life being revived. Indeed this is precisely what a judge is required by the existing law to decide if asked to admit a petition during the first three years of a marriage. Moreover, it could hardly be more difficult to decide whether there was a prospect of reconciliation than it now is to decide which, if either, of the parties is guilty of desertion, when the decision depends, as it so often does, on the skill of their tactical manoeuvres.” (II-22)

*Innocent Spouses Would be Divorced Against Their Will—
There Are No Innocent Spouses in Broken Homes*

In broken homes, there are no innocent persons, there are only relative degrees of fault. These relative degrees of fault can be taken into account in deciding the question of alimony, custody and settlement of the matrimonial property. Once the marriage has permanently broken down, its dissolution in law does nothing more than declare what is the fact of the situation. Theologically each person has his own interpretation. But the purpose of positive law is to describe the real relationships existing between the parties. The dissolution of the marriage in law takes away nothing from the so-called innocent party which that party has not already lost in the permanent breakdown of the marriage.

People Would Marry Lightly—They Do Now

The knowledge that divorce would always be eventually possible theoretically might encourage persons to marry lightly. But we believe that few more would enter marriage lightly than the number that do now, simply because they knew that three years after its end, a new marriage might be contracted without the consent of the previous spouse. The present law providing for “Quickie Divorce-Quickie Remarriage” does more to encourage ill-considered marriage than would the eventual and delayed relief provided by marriage breakdown.

Adultery Among Those Waiting—No More Than Now

We believe that many people would respect society’s judgment and refrain from sexual relationships until society permits them to remarry, provided that the period was not too long and they were reasonably certain that the right to remarry would eventually be granted. Others would be satisfied only by a law that destroyed the concept of marriage as a life-long union. The institution of marriage is not strengthened by making legal a union that is formed by one sudden whim and dissolved by another.

Easily Proved by Perjury—Not as Easily as Adultery or Cruelty

Some say marriage breakdown could be too easily abused by perjured evidence. As stated by C. P. Harvey, Q.C., a prominent English lawyer,

“a valid marriage... is the only condition precedent to divorce that cannot be circumvented somehow”. (II-23)

The length of separation of the parties is more readily verified by independent evidence than is an alleged act of adultery or cruelty committed in private.

*The Divorce Rate Would Rocket: Speculation
“Putting Asunder”*

“The system we propose would enable some who cannot get divorces under the existing law, except by resorting to questionable expedients, to get them

legally, and others who cannot get divorces at present because their spouses are unco-operative to get them against the will of those spouses. At first, therefore, one would expect a rise in the number of decrees made. On the other hand, there are probably divorces obtained under the present system, on the superficial ground of some matrimonial offence, which would not have been obtainable if breakdown had had to be proved. Again, the existence of the bar of delay where matrimonial offences are concerned may encourage some who feel dissatisfied with their marriages to act immediately, while they have a ground to petition on, whereas under the system recommended the need to show breakdown might rather encourage them to wait. Unfortunately the Australian statistics cannot help us here, both because the "ground of separation" has not been long enough available for a definite pattern to appear, and also because in Australia that ground is merely added on to the list of matrimonial offences. Consequently it seems to be anyone's guess whether or not the number of divorce decrees would increase in the long run. In our opinion, however, the bare arithmetic of the matter is not of prime importance. What matters most is that, if there are to be divorces, they should be granted in cases where the spouses have decisively failed to solve the problems of their relationship in any other way, and not in cases where a matrimonial offence alone—of which the significance may be peripheral—had been proved." (II-24)

The Hon. Mr. Justice Scarman

*Justice of the Probate, Divorce and Admiralty Division, High Court of Justice
Chairman, Law Commission*

"So far as I have been able to discover, Australian experience since the introduction of separation as a ground for divorce shows that there has been no startling increase in the numbers of divorce. There was a rush of cases to relieve the suffering of many years during which divorce had been available in some States on much more restricted grounds, but once the rush had been met the newly available ground did not make any very great difference: significantly the old established grounds of desertion and adultery continue to be used." (II-25)

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It is impossible to correlate divorce rates solely with the ease of divorce. There are too many other variables such as the mobility of the society, its age and traditions, and the presence or absence of stress factors such as war and depression. England for example has a divorce rate roughly comparable with the Netherlands where unopposed divorces are usually granted without evidence being heard. (II-26) But it is the "marriage failure rate" not the "divorce rate" that should concern us. "Marriage breakdown" we believe would lower the "marriage failure rate" by giving adequate time for counselling and reconciliation, and that is one of its chief virtues.

PART 11: PUBLISHED COMMENTS FAVORING MARRIAGE BREAKDOWN"

Calgary Herald, July 26, 1945

"... the most interesting aspect of the New Zealand law (is that) a divorce may be granted to a couple who have been legally separated for more than three years. That seems like a sensible law. It doesn't make divorce too easy. Neither does it make divorce too difficult. It simply provides for divorce where the marriage has been clearly proven a failure."

Wolfgang Friedmann, "Law in a Changing Society", 1959

"one possible compromise between these conflicting considerations would appear to be a right for either spouse to be able to obtain a divorce on the ground

that she or he had lived apart from the other spouse for a specific period. After several years of continuous separation, it may fairly be surmised that the matrimonial community is beyond repair. The alternative to the legal dissolution of marriage after a separation for a number of years is not a restoration of the marriage bond, but maintenance of the fiction of a marriage by a legal tie, which will drive one or the other or both spouses to sexual and other relations with outsiders, clandestinely or under a social stigma, rather than openly. The law in such cases does not serve the sanctity of the marriage, but it preserves sanctimonious righteousness which will, in fact, increase adultery, fornication, and personal bitterness." (II-27)

"Time" Magazine, February 11, 1966

"The most sensible solution would be a system that readily grants divorce only after skilled clinicians confirm that a marriage is beyond repair. In many cases, divorce might be harder to get; in all, it would be far more humane."

"Putting Asunder", 1966

"In practice, then, the law is moving away from basing divorce on a finding concerning the delinquency of one of the parties towards basing it on a finding concerning the state of the marriage relationship and the demands of distributive justice. In other words, it is feeling its way towards the doctrine of the breakdown of marriage. In our opinion this is a move away from superficiality towards a serious attempt to deal justly both with the complexities of the matrimonial relationship itself and with the interests of other persons upon whom the conduct of the spouses may have impinged. The social context of the family is thus recognized. We therefore recommend that the process be completed as soon as possible by openly substituting the principle of breakdown for the principle of the matrimonial offence." (II-28)

Honourable Mr. Justice Scarman, 1966

"Where the ordinary man criticizes the law is in its exclusive reliance on the doctrine of the matrimonial offence. He asks, reasonably enough, why should divorce be available only if a matrimonial offence can be proved. Here I think he puts his finger on the nerve of the problem. In Australia and New Zealand the matrimonial offence has been retained but there has been added divorce upon the ground of separation irrespective of the responsibility for the separation. This is really divorce for irretrievable breakdown, the breakdown being presumed to occur from the fact of separation of a defined duration—in Australia five years, in New Zealand seven years. Very recently some Private Members have introduced a Bill—a direct succession to previous gallant attempts—to enable a further marriage to be contracted by either spouse when separation has persisted for five years. . . . I think that we could well follow the Australian and New Zealand precedent and support the idea behind the Private Members' Bill, and that if we did so the ordinary man's objection to the substantive law of divorce would be largely met." (II-29)

PART 12: INADVISABILITY OF A SEPARATION AGREEMENT OR JUDICIAL SEPARATION AS A CONDITION PRECEDENT TO A DIVORCE UNDER "MARRIAGE BREAKDOWN"

In some jurisdictions a separation agreement or a judicial separation must be obtained at the beginning of the period of separation in order to obtain the divorce after the period of separation has run. One of the chief merits of "marriage breakdown" is that it can make judicial proceedings unnecessary during the time of stress and uncertainty immediately following the separation

of the parties. If judicial proceedings are necessary to settle custody, maintenance and property, they must be available in judicial separation or other proceedings, but no good purpose would be served by compelling the parties to enter into legal proceedings which are otherwise unnecessary as a condition precedent to a possible divorce action years hence. So far as possible at the time of separation the parties should be with their minister, social worker, psychiatrist and marriage counsellor, not instructing their solicitor to institute unnecessary litigation.

PART 13: CONCLUSION CONCERNING "MARRIAGE BREAKDOWN"

"Canada Can Lead"

New York State has recently enacted marriage breakdown as part of its new divorce law. At a time that consideration was being given to dropping the marriage breakdown provision of the bill to ensure passage of some of the other reforms, *Life Magazine* commented:

"If this happens, New York State will have made it only into the 19th Century, not the 20th, and will have lost its chance to draft a model for the rest of the country." (II-30)

New York State has since enacted marriage breakdown, but it has also opened wider the "Pandora's Box" of matrimonial offences. New York State has thereby made it into the early 20th Century, and the opportunity remains for Canada to draft a model for other nations to follow, and for the welfare and betterment of all its citizens. "Putting Asunder" noted that the English law, the Herbert Act, based on "matrimonial offence",

"as it stands is unsatisfactory, all the judges and lawyers who gave us evidence agreed, however much they disagreed concerning the remedies to be applied . . . As a piece of social mechanism the present system has not only cut loose from its moral and juridical foundations: it is, quite simply, inept." (II-31)

For too many years Canada has been a market-place for obsolescent English statutes. At a time that the 1937 Herbert Act is under such severe attack in England, it is inconceivable that Canada should adopt the same when a better basis, marriage breakdown, is available.

Respectfully submitted,
The Pastoral Institute, Calgary, Alberta
The United Church of Canada

"W. E. Mullen"

W.E. Mullen, Pastoral Director

"Robert E. Hatfield"

Dr. Robert E. Hatfield, Chairman,
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"Douglas Fitch"

Douglas Fitch, Interprofessional Advisory Committee

APPENDIX A

A PARTIAL DRAFT "DOMESTIC PROCEEDINGS ACT"

Introduction

Policy of This Draft Act: Constitutional Questions Omitted

In this draft act, The Pastoral Institute has attempted to follow a "functional" approach, i.e., to deal with the problems of divorce law in particular and domestic proceedings in general in the manner best suited to the nature of the problems and without reference to the division of legislative powers between Parliament and the Provincial Legislatures as set out in sections 91 and 92 and elsewhere in the British North America Act. Possibly all sections of this Act are within the powers of Parliament particularly under heading 26 "Marriage and Divorce" of section 91. Possibly provincial enactments of parts are required. Possibly a constitutional reference to the Supreme Court of Canada is required. See *Power on Divorce, passim*, concerning the constitutional questions involved. But undoubtedly major revision of many aspects of our domestic relations law is required.

*Synopsis of**Changes in Procedural and Substantive Law Contained in Draft Act*

1. A new Court to be known as the "Domestic Proceedings Court" to be established by act of Parliament having jurisdiction over all aspects of domestic proceedings in those provinces whose courts now have jurisdiction to grant decrees of divorce. (Section 3).
2. The Domestic Proceedings Court to be divided into a High Court Division having a plenary jurisdiction over domestic proceedings and a Family Court Division having a limited jurisdiction similar to existing Family Courts. (Section 3).
3. Supreme Court and County Court judges initially to be judges of the High Court Division, similar to the jurisdiction Supreme Court judges have in the Bankruptcy Court. Family Courts where they now exist to continue their function supplemented by magistrates and juvenile court judges in areas in which Family Courts have not yet been established. (Section 4).
4. Married women to have a separate domicile to give them access to the Court where they permanently reside. (Section 5).
5. Reconciliation procedures to be recognized as an important part of domestic proceedings but not as part of the court structure at least at this time. (Sections 6 and 7).
6. Separation agreements to be enforceable or variable by court order. (Section 11).
7. Decrees of judicial separation to be convertible into decrees of divorce when lapse of time and other evidence shows the marriage has irretrievably broken down. (Section 18).
8. Voidable marriages to be dissolved instead of retroactively decreed to be a nullity. (Section 20).
9. Decree of presumption of death to include a decree of dissolution of marriage. (Section 21).
10. Traditional period of seven years for presumption of death from the days of sailing ships to be shortened to three years in line with modern communication. (Section 21).

11. No final decree to be granted unless adequate arrangements for children and maintenance have been made. (Section 23).

12. Children to have separate representative in proceedings when the Court deems the same to be advisable. (Sections 27 and 28).

13. Summary Maintenance Order to be granted by Family Court Division based on assessment of need not "fault". (Section 30).

14. Authority for court to order lump-sum maintenance settlements and to dispose of other matrimonial property. (Sections 31 and 35).

15. Privilege with respect to questions concerning any adultery of the witness to be abolished where proof of that adultery would be material to the decision of the case. (Section 38).

16. Foreign divorce decrees to be recognized on the basis of reciprocity. (Section 39).

17. Actions for alienation of affection and similar actions supposedly protecting a husband's proprietary rights in his wife to be abolished. (Section 40).

18. Delay in bringing or prosecuting an action to be abolished as a discretionary bar. (Section 41).

19. Connivance, collusion and condonation to be discretionary not absolute bars. (Section 42).

A PARTIAL DRAFT "DOMESTIC PROCEEDINGS ACT"

1. This Act may be cited as the "Domestic Proceedings Act".

Comment: New. "Domestic" has a broader meaning than "Matrimonial". "Proceedings" from New Zealand Act is preferred to the word "Causes" used in the English and Australian Acts since the idea of a "lis" which is suggested by the word "cause" is less suitable to domestic proceedings than is the case in such other branches of the law as torts and contracts.

2. Interpretation.

In this Act, unless the context otherwise requires—

(1) "Child" includes any child, legitimate, illegitimate or adopted, of both spouses, or any child, legitimate, illegitimate or adopted of one spouse who has been accepted as one of the family by the other spouse.

(2) "Court" means the Domestic Proceedings Court.

(3) "Furniture" includes household appliances and effects; and also includes furniture and household appliances and effects that are subject to a security interest vested in a third party.

(4) "Matrimonial home" means any dwelling (including a leasehold premise) being used exclusively or principally as a home by one or both of the parties to a marriage in respect of which a decree of judicial separation, divorce, nullity, or dissolution of marriage is or has been granted, in any case where:

(a) either or both of the parties or the personal representative of one of them—

(i) owns the dwelling; or

(ii) owns a specified share of any estate or interest in the land on which the dwelling is situated and by reason of reciprocal agreements with the owners of the other shares is entitled to the exclusive occupation of the dwelling; or

- (iii) holds shares in a company which owns any estate or interest in the land in which the dwelling is situated, and by reason of holding those shares, is entitled to the exclusive occupation of the dwelling; and
- (b) either or both of the parties owned the dwelling or the specified share in land or held shares as the case may be, at the date of the petition.

Comment on SS. (3) and (4): Cf. N.Z.M.P.A. 1963 S.55. (New Zealand Matrimonial Proceedings Act, 1963, No. 71)

Relate to sections 34 & 35.

(5) "Minister" means the Solicitor-General or such other member of the Cabinet as may be charged with the administration of this Act.

(6) "Superintendent of Child Welfare" means any public official designated under any provincial statute to enquire into or represent children involved in any proceeding under this Act.

Comment: New. Relates to section 28.

3. Constitution of Court:

- (a) There is hereby constituted a court of record to be called "The Domestic Proceedings Court".
- (b) The Court shall have jurisdiction with respect to any of the causes hereinafter referred to save and except causes in respect of which both of the parties are domiciled in Quebec, Newfoundland or any other province in which this Act has not been proclaimed in force.
- (c) The Court shall have exclusive jurisdiction both civil and criminal in all cases in which parties adverse in interest are or were married to each other and in all cases relating to:
 - (1) Restitution of Conjugal Rights
 - (2) Separation
 - (3) Divorce
 - (4) Nullity
 - (5) Presumption of Death and Dissolution of Marriage
 - (6) Custody
 - (7) Adoption
 - (8) Affiliation
 - (9) Wardship
 - (10) Maintenance and Alimony
 - (11) Consent to Marriage
 - (12) School attendance
 - (13) Crimes in which the party injured or one of the parties injured is or was married to the accused or one of the accused

but nothing herein contained shall be deemed to include jurisdiction relating to the administration of estates other than that provided in sections 22 and 31.
- (d) The Court shall be composed of two divisions to be known as the High Court Division and the Family Court Division.
- (e) The Family Court Division shall have jurisdiction only with respect to such of the above matters as the Governor-General in Council may from time to time decide.
- (f) All proceedings in the Domestic Proceedings Court shall be held in open court unless in the opinion of the presiding judge the interests of justice require that the proceedings be held in camera.

4. Judges of the Court

- (a) *High Court Division.* All judges whose Letters Patent appoint them to the High Court Division of the Domestic Proceedings Court whether or not they are appointed to any other court and all judges of the Supreme and County Court of the provinces in which the Domestic Proceedings Court has jurisdiction appointed prior to the coming into force of this Act shall be *ex officio* judges of the High Court Division of the Domestic Proceedings Court.
- (b) *Family Court Division.* All judges whose Letters Patent appoint them to the Family Court Division of the Domestic Proceedings Court whether or not they are appointed to any other court and all magistrates, provincial family court and juvenile court judges of the Provinces in which the Domestic Proceedings Court has jurisdiction appointed prior to the coming into force of this Act shall be *ex-officio* judges of the Family Court Division of the Domestic Proceedings Act.

Comment on ss. 3 & 4. The Domestic Proceedings Court is intended to bring into one forum all aspects of domestic proceedings. Mr. Justice Scarman states his reasons for favoring establishment of a separate Family Division of the Supreme Court as follows:

“Yet decentralization and devolution of the administration of justice are necessary. I would hope in the context of divorce law that one might see the problem being met somewhat along these lines—family courts established at regional centres, presided over by lawyers having at least the status of County Court judges, and making use in some, if not all, cases of lay justices as members of the court: they should be selected from those experienced in juvenile and matrimonial work. The nearest existing analogy to the family court would be the composition of quarter sessions. The work of these family courts should be controlled on points of law either by a Family Division of the High Court or by a Family Division of the Court of Appeal.” (A-1)

Quentin Edwards an English barrister, in an appendix to “Putting Asunder”, states as follows:

“The possibilities of reforming the Probate, Divorce and Admiralty Division have been widely canvassed in recent years. It has been suggested that its three limbs should be severed, probate jurisdiction being assigned to the Chancery Division, admiralty to the Commercial Court, which is part of the Queen’s Bench Division, and matrimonial to a court on a new model. Possible reforms of the circuit system of assize have also been much discussed, and definite proposals to enlarge the jurisdiction of county courts to include certain matrimonial causes have been made by the Lord Chancellor. If changes on this magnitude are to be made, and if the substantive law is to be altered on the lines indicated in the body of this report, serious consideration might well be given to establishing an entirely new system of courts. These could exercise not only the matrimonial jurisdiction of the present Divorce Division, but also jurisdiction in all other personal and domestic matters—in short, the whole of what has come to be called “family law’.” (A-2)

No substantial change would be needed to establish a Domestic Proceedings Court along the foregoing lines. Transitionally the justices, judges, magistrates, family court and juvenile court judges of our existing courts would exercise jurisdiction substantially the same as that now exercised by them, with the exception that county court judges would have their jurisdiction increased to be comparable to that now possessed by English and British Columbia County

Court Judges as Divorce Commissioners and local judges of the Supreme Court respectively. (A-3) No substantial increase in the number of judges required is anticipated; the number of divorce cases which would be brought to trial under "marriage breakdown" by persons who are now permanently denied relief would be counterbalanced by the mass of "Quickie Divorces" now racing through our courts whose flow would be inhibited. Effective reconciliation procedures would also offset the costs if additional courts were necessary by the savings to society in the welfare and other costs incurred by broken homes. The Domestic Proceedings Court would be similar to the present Bankruptcy Court which uses the clerks of the Supreme Court and other personnel in most parts of Canada.

There is no lack of judges in Canada today with the legal training and temperament required to adjudicate the vexing and exasperating issues before a Domestic Proceedings Court. Training in the behavioural sciences is however virtually non-existent among the members of the legal profession, understandably inasmuch as the need for such training has never been demonstrated in the ways in which a specialized Domestic Proceedings Court could make apparent.

In the June 28, 1966 proceedings of this Committee, Mr. Justice A. A. M. Walsh, Senate Commissioner, in discussing transfer of Quebec and Newfoundland divorce jurisdiction from the Senate to the Exchequer Court reflected the opinion of many members of the bench and bar towards domestic proceedings:

"That system would have various advantages. One is that there would be a variety of judges who could hear these cases. It might be necessary to appoint additional judges but they would rotate on it and one person would not be left doing nothing but divorce work for his life, as it might be at present. I personally feel not only that it is not an assignment one would want to continue for life but that it is not good for any judge to hear just one type of case. After three, four or five years, inevitably he will become somewhat stale at it and a fresh approach would be better. I think it is more desirable that there should be three, four, five or six different judges contributing to the jurisprudence on the matter and hearing the cases, than that one or two judges should do nothing else indefinitely."

We respectfully disagree with Mr. Justice Walsh's views on specialization. To a greater extent than any other branch of the law, domestic proceedings require not only sound legal training but the insights that can be provided by the behavioural sciences. Only by adopting the specialization urged by Mr. Justice Scarman can we develop such courts as the Family Court of Toledo, Ohio, in which Judge Paul Alexander presided. (A-4)

A separate Domestic Proceedings Court would also in time modify the "accusatorial system" into the "investigative system" more appropriate in domestic proceedings. In most lawsuits the court is adjusting rights between the parties each of whom may be counted on to put forward their own best case under the accusatorial system. In domestic proceedings the court must also take into account the interest of society in the preservation of the family (A-5)

5. Domicile

(1) For the purposes of this act, the domicile of a married woman, wherever she was married, shall be determined as if she were unmarried and (if she is a minor) as if she were adult.

(2) For the purposes of this Act, the domicile of any personal shall be determined in accordance with the law of Canada.

Comment: N.Z.M.P.A. 1963 S.3.

"All Persons Permanently Resident in Canada Should Have Access to Canadian Domestic Courts"

The concept that the domicile of a married woman is the domicile of her husband is a vestigial remnant of the idea that a married woman is some sort of "property" of her husband. The creation of a separate domicile for husband and wife is in line with the notion of the equality of the sexes, and is one means of making Canadian courts available to all persons permanently resident in Canada. As stated by Mr. Justice Scarman,

"It was a misfortune when in *Le Mesurier v. Le Mesurier* divorce jurisdiction was held to be based upon the domicile of the husband. The principle has denied relief to countless unhappy women. Its inequities have led to a number of concessions which are today to be found in section 40 of the Matrimonial Causes Act, 1966". (A-6)

The niceties of legal theory, assuming any are involved, should give way to the welfare of countless unhappy Canadian women.

PART I

Reconciliation Procedures

6. Marriages of Less Than Three Years

(1) Subject to this section, proceedings for a divorce shall not be instituted within three years after the date of marriage except by leave of the court.

(2) The court shall not grant leave under this section to institute proceedings except on the ground that to refuse to grant the leave would impose exceptional hardship on the petitioner.

(3) In determining an application for leave to institute proceedings under this section, the court shall have regard to the interests of any children of the marriage and to the question as to whether there is any reasonable possibility of reconciliation between the parties before the expiration of three years after the date of the marriage.

7. Reconciliation Adjournments

(1) In any proceeding under this act, it shall be the duty of the court to consider the possibility of reconciliation between the parties to the marriage, and if either party shall request it, or if, in the opinion of the court, from the nature of the case or the evidence or the attitude of either party, there is a reasonable possibility of reconciliation, the court may adjourn the proceedings to afford an opportunity for such reconciliation and may nominate or appoint a suitable agency or person with experience and/or training in the field of marriage counselling, or in special circumstances, some other person, to endeavour to effect a reconciliation.

(2) If, after more than three months from the date of adjournment under this section, one of the parties requests a resumption of the hearing, it shall proceed.

(3) No evidence of any information received or anything said or admission made to anyone pursuant to proceedings under subsection (1) of this section shall be admissible in any court or before any person or body acting judicially.

(4) Disclosure of any information obtained pursuant to this section except insofar as it is required by the duty of the appointed party, is an offence punishable on summary conviction.

Comment: Cf. Mr. Wahn's Bill C-58 ss. 4 & 5 & U.K.M.C.A. 1965 S.2
(United Kingdom Matrimonial Causes Act, 1965, Chapter 72)

"Reconciliation Should Be Part of Our Procedures in Domestic Disputes but Should Not be Compulsory in All Cases or Part of the Court Structure at This Time."

Compulsory counselling as a condition precedent to the bringing of a divorce action is not advisable because:

- (i) There must be some motivation to seek counselling to give any substantial possibility of reconciliation.
- (ii) One to three years delay required by Section 17 of this Act before divorce can be obtained gives substantial opportunity to seek counselling before there is a divorce.
- (iii) There are at present insufficient personnel and facilities in Canada to do competently all of the counselling which compulsory provisions would require. The principle of reconciliation would be discredited by the inadequate treatment many persons would have to receive.
- (iv) Where there are such features as long-term desertion or incurable insanity, counselling would in most cases be of no avail.
- (v) Greater experience in the field is needed before a decision is made as to whether reconciliation procedures should be:
 - (A) private or voluntary,
 - (B) organized but independent of the court,
 - (C) directly connected with the court, or,
 - (D) a combination of the above (A-7)
- (vi) Part of the evidence proving the irretrievable breakdown required by section 17 would usually be evidence that marriage counselling had been tried and failed. Parties would thus be encouraged to seek counselling and some marriages might be saved in the process. In a sense this may be called compulsion.

PART II—Restitution of Conjugal Rights

8. Decree.

If one party to a marriage refuses to cohabit with the other party, the court may in its discretion, give a judgment for restitution of conjugal rights.

9. No attachment.

No such judgment shall be enforced by attachment.

10. Non-compliance with Decree.

If the Respondent fails to comply with the judgment of the court for restitution of conjugal rights within three months of the granting of the decree, the defendant shall thereupon be deemed to have been guilty of desertion without reasonable cause, and a decree of judicial separation may be granted in the same proceedings upon notice to the Respondent although the period of two years mentioned in section 12 has not elapsed.

Comment: Cf. Alberta D.R.A. ss. 3, 4 & 5 and U.K.M.C.A. 1965 s. 13 (Alberta Domestic Relations Act, Revised Statutes of Alberta, 1955 Chapter 89).

PART III—Separation

11. Enforcement of Separation Agreement.

(1) The Court may on application by either of the parties or on behalf of a child of the parties, enforce, rescind, alter or vary any provision of a separation agreement entered into between husband and wife.

(2) Proceedings under this section shall so far as possible be in a summary manner.

Comment: Cf. U.K.M.C.A. 1965 ss. 23, 24 & 25. Separation agreements have the advantages of economy and celerity to settle the terms of a short or a long-term separation. They have the disadvantage of difficult enforcement, which would be rectified by this section.

12. *Judicial Separation*

(1) A judgment of judicial separation may be obtained from the Court either by a husband or by a wife if his wife or her husband, as the case may be, has since the celebration of marriage been guilty of

- (a) adultery,
- (b) cruelty,
- (c) desertion
 - (i) for two years or upwards without reasonable cause, or
 - (ii) constituted by the fact of the wife or husband, as the case may be, having failed to comply with a judgment for restitution of conjugal rights, or
- (d) sodomy or bestiality, or an attempt to commit either of these offences.

Comment: Cf. Alberta D.R.A. s. 7 and U.K.M.C.A. 1965 s. 12.

13. *Effect of Judicial Separation.*

After a judgment of judicial separation has been granted

- (a) neither the husband nor wife is under any duty of cohabitation, and
- (b) the wife shall, during the continuance of the separation, be considered as a *femme sole* for the purposes of contracts and wrongs and injuries and suing and being sued in a civil proceeding, and for all other purposes, and shall be reckoned as *sui juris* and as an independent person for all purposes.

14. *Property on Intestacy.*

After a judgment of judicial separation, the property of a spouse in the event of his or her dying intestate during the continuance of the separation devolves as the property would have done if the spouse had been then dead.

15. *Liability of Husband*

(1) After a judgment of judicial separation and during the continuance of the separation, the husband is not liable in respect of any engagement or contract his wife has entered or enters into, or for a wrongful act or omission by her, or for any costs she incurs in any action.

(2) Notwithstanding sub-section (1), where in or after a decree of judicial separation, alimony has been decreed or ordered to be paid to the wife, and it is not duly paid by the husband, he is liable for necessities supplied for her use.

Comment: on Ss. 13, 14 & 15: Cf. Alberta D.R.A. ss. 11, 12 & 13

PART IV—Divorce

16.

(1) *Decree of Divorce.* The Court shall upon a petition by one of the parties to the marriage, decree dissolution whenever the marriage has irretrievably broken down.

(2) *Public Policy.* Notwithstanding the foregoing, the Court may refuse to grant or delay the granting of a decree if in the opinion of the Court the granting of the decree would be contrary to public policy.

(3) *Particulars of Public Policy.* Public policy permitting the refusal or delay of a decree of dissolution includes the following:

- (a) that the issue of a decree will prove unduly harsh or oppressive to the Respondent.
- (b) that the Petitioner has failed to comply with a prior order or is likely to fail to comply with an Order of the court concerning:
 - (i) the maintenance of the Respondent or of a child of the parties.
 - (ii) custody of or access to a child of the parties.

17. *Proof of Marriage Breakdown.*

Irretrievable breakdown of the marriage shall be proven by evidence that there is no reasonable possibility of a resumption of cohabitation and shall include evidence that the parties are in fact living separately and apart and have lived separately and part for a continuous period (except for periods of cohabitation of not more than two months each that have reconciliation as a prime purpose) immediately preceding the date of the granting of the decree, such period to be either:

- (a) one year when the Respondent has been guilty of adultery, extreme cruelty, sodomy, bestiality, or an attempt to commit sodomy or bestiality, or
- (b) three years in any other case.

18. *Divorce in Judicial Separation Proceedings.*

Where a decree of judicial separation has been granted, and application may be made in that action for a decree of divorce in absolute form at the expiration of at least three months from the date of entry of the decree of judicial separation and at the expiration of:

- (a) at least one year from the physical separation of the parties, by the Petitioner in any case in which the Respondent is adjudged to be guilty of extreme cruelty, sodomy, bestiality, or an attempt to commit sodomy or bestiality, or
- (b) at least three years from the physical separation of the parties, by the Petitioner or the Respondent in any other case or in any case mentioned in subsection (a) in which the Petitioner has not previously applied.

Comment: Duplication of proceedings is eliminated. (A-8)

PART V—Nullity and Dissolution of Voidable Marriage

19. *Jurisdiction in Nullity.*

A petition for a decree of nullity of a void marriage or for Dissolution of a Voidable Marriage, whether the marriage is governed by Canadian law or not, may be presented to the Court in the following cases, and in no other case:

- (a) Where the petitioner or the Respondent is domiciled or resident in Canada at the time of the filing of the petition; or
- (b) Where the purported marriage was solemnized in Canada.

Comment: Cf. N.Z.M.P.A. 1963 s. 6.

20. *Grounds for Annulment.*

(1) The Court may decree nullity of marriage upon the ground that the marriage is void.

(2) A marriage is void where

- (a) either of the parties is, at the time of the marriage, lawfully married to some other person; or
- (b) the parties are within the prohibited degrees of consanguinity or affinity; or
- (c) the marriage is not a valid marriage under the law of the place where the marriage takes place, by reason of a failure to comply with the requirements of the law of that place with respect to the form of solemnization of marriages; or
- (d) the consent of either of the parties is not a real consent because
 - (i) it was obtained by duress or fraud; or
 - (ii) that party is mistaken as to the identity of the other party, or as to the nature of the ceremony performed; or
 - (iii) that party is mentally or otherwise incapable of understanding the nature of the marriage contract; or
- (e) either of the parties is not of marriageable age under the law.

(3) *Jurisdiction in Voidable Marriage.* A marriage, not being a marriage that is void, may be dissolved when the Court is satisfied that an incapacity to consummate the marriage existed at the time of the marriage and also when the hearing of the petition commenced and that

- (i) the incapacity is not curable or
- (ii) the Respondent refuses to submit to such medical examination as the Court considers necessary for the purpose of determining whether the incapacity is curable, or
- (iii) the Respondent refuses to submit to proper treatment for the purpose of curing the incapacity.

Except that a decree of dissolution of marriage shall not be made on petitioner's ground where the Court is of the opinion that by reason of the petitioner's knowledge of the incapacity at the time of the marriage, or the lapse of time, or for any other reason, it would in the particular circumstances of the case, be harsh and oppressive to the Respondent, or contrary to the public interest, to make a decree; or

- (b) either party to the marriage is
 - (i) of unsound mind;
 - (ii) a mental defective; or
- (c) either party to the marriage suffering from a venereal disease in a communicable form; or
- (d) that the Respondent was, at the time of the marriage, pregnant by some man other than the Petitioner, or, that some woman other than the Petitioner was, at the time of the marriage, pregnant by the Respondent,

Except that a decree of dissolution of marriage shall not be made by virtue of sub-paragraph b, c, or d, unless the Court is satisfied that

- (i) the Petitioner was, at the time of the marriage, ignorant of the facts constituting the ground;
- (ii) the Petition was filed not later than twelve months after the date of the marriage; and
- (iii) marital intercourse has not taken place with the consent of the Petitioner since the Petitioner discovered the existence of the facts constituting the ground.

Comment: Cf. Mr. Peters Bill C-19, s. 6 & 8 and N.Z.P.A. 1963 s. 18. "Attacks of insanity or epilepsy" from the U.K.M.C.A. 1965 s 9 included in Bill C-19 are omitted. These illnesses are no greater reasons for a dissolution of marriage than are attacks of tuberculosis or rheumatic fever, and are out of keeping with modern medical knowledge. Section 20 (3) (d) is taken from Section 18 (2) (d) of the New Zealand Act in preference to Section 8 (3) (d) of Bill C-19 to give equality between the sexes. Voidable marriages should be dissolved as in the New Zealand legislation and as suggested by Mr. Justice Scarman to avoid the difficulties that arise with retroactive annulment of voidable marriages. (A-9)

PART VI—Presumption of Death

21. Decree of Presumption of Death and Dissolution of Marriage

(1) Any married person domiciled in Canada may present a petition to the Court alleging that reasonable grounds exist for supposing that the other party to the marriage is dead and praying to have it presumed that the other party is dead and to have the marriage dissolved.

(2) The Court, on being satisfied that such reasonable grounds exist, may make a decree of presumption of death and of dissolution of marriage.

(3) In any such proceedings, the fact that for a period of three years or upward the other party to the marriage has been continually absent from the Petitioner, and that nothing has happened within that time to give the Petitioner reason to believe that the other party was then living, shall be evidence that he is dead in the absence of proof to the contrary.

(4) Unless the context otherwise requires, provisions of this Act and of any other enactment, so far as they are applicable with any necessary modifications, shall apply to a Petition and a decree under this section as they apply to a Petition for a divorce and a decree of divorce respectively.

Comment: Cf. U.K.M.C.A. 1965 s. 14 and N.Z.M.P.A. 1963 s. 19. Such marriages should be dissolved to avoid the anomaly of the absent spouse returning. Three years instead of the traditional seven years is in keeping with modern communication and with the period of separation required to create a rebuttable presumption of marriage breakdown.

PART VII—Custody and Maintenance of Children

22. Custody and Support Agreement or Order

(1) Where parents are not living together, they may enter into a written agreement with regard to the custody, control, education and support of and access to the children of the marriage.

(2) If the parents fail to reach an Agreement on the matters mentioned in sub-section (1), either parent may apply to the Court by notice of motion for its decision.

(3) Upon such application the Court may make such order as it sees fit.

(4) The Court may alter, vary or discharge the Order on the application of either parent, or after the death of either parent on the application of a lawfully appointed guardian.

(5) The Court may by order provide for the maintenance of the infant by payment by the father or by the mother, or out of an estate to which the infant is entitled, of such sums from time to time as the Court deems reasonable, having regard to the pecuniary circumstances of the father or of the mother, or to the value of the estate to which the infant is entitled.

(6) The Court may on application by either of the parties or on behalf of a child the subject of any such order, enforce, rescind, alter or vary any provision of any such custody agreement entered into between a husband and wife or any order under this section.

(7) Proceedings under this section shall so far as possible be in a summary manner.

Comment: Cf. Alberta D.R.A. ss. 48 & 49.

23. *Arrangements for Welfare of Children.*

No final decree of judicial separation, divorce, nullity or dissolution of marriage shall be made unless the Court is satisfied that:

- (a) arrangements have been made for the custody, maintenance, and welfare of every child of the marriage under the age of eighteen years (or in special circumstances of or over the age of eighteen years) and that those arrangements are satisfactory, or are the best that can be devised; or
- (b) it is impractical for the party or parties appearing before the Court to make any such arrangement; or,
- (c) there are special circumstances justifying the making of a final decree, notwithstanding that the Court is not satisfied that any such arrangements have been made,

Provided that the Court shall, in every case where it makes a final decree pursuant to the provisions of this paragraph, first obtain a satisfactory undertaking from either or both of the parties to bring the question of the arrangements for the children before the Court within a specified time.

Comment: Cf. U.K.M.A.C. 1965 s. 33 and N.Z.M.P.A. 1963 s. 49.

24. *Custody of Children*

(1) In any proceedings for restitution of conjugal rights, judicial separation, divorce, nullity or dissolution of marriage, the Court may from time to time, before or by or after the final decree, make such order (whether an interim order or a permanent order) as it thinks just with respect to the custody and education of any children of the marriage under the age of 18 years (or in exceptional cases of or over the age of 18 years.)

(2) The Court may from time to time discharge, vary or extend any order made pursuant to sub-section (1) of this section.

(3) Any order may be made under sub-section (1) of this section, and any such order may be varied or extended, notwithstanding that the Court has refused to make a decree or to give any other relief sought.

(4) Unless otherwise specified in the order, an order for custody in respect of a child under the age of 18 years shall expire when the child attains the age of 18 years, provided that an order for custody, or a variation or an extension of an order for custody, having effect after the child who is the subject of the order has attained the age of 18 years shall be made only in exceptional cases.

Comment: Cf. U.K.M.C.A. 1965 s. 34 and N.Z.M.P.A. 1963 s. 51.

25. *Maintenance of Children*

(1) In any proceeding for restitution of conjugal rights, judicial separation, divorce, nullity, or dissolution of marriage, the Court may from time to time before or by or after the final decree, make such order (whether an interim

order or a permanent order) as it thinks just with respect to the maintenance by either party to the marriage of any child of the marriage

- (a) who is under the age of 18 years at the date of the making of the order; or
- (b) who is or over that age at that date, in any case where it appears to the Court that the child is engaged in a course of full-time education or training or is because of physical or mental disability incapable of earning a living and that it is expedient that payments toward the maintenance of the child should be made.

(2) The Court may at any time, if it thinks fit, upon the application of either party to the marriage, or of any person having custody of the child in respect of whom an order under this section is made, or of the personal representative of a party against whom the order is made, extend, vary or cancel any order made under sub-section (1) of this section. Any order extending any such order may be made under this sub-section, notwithstanding that the order has expired.

(3) Any order may be made under sub-section (1) of this section, and any such order may be varied or extended, notwithstanding that the Court has refused to make a decree or to give any other relief sought.

(4) Subject to the provisions of sub-section (5) of this section, any permanent order for maintenance made under sub-section (1) of this section and any extension thereof shall be for such term as the Court specifies.

(5) No order made under sub-section (1) of this section in respect of a child under the age of 18 years at the date of the making of the order, and no extension of any such order, shall have effect after the child attains the age of 18 years, unless the Court so directs in any case where it appears to the Court that, after attaining the age of 18 years, the child will be engaged in a course of full-time education or training or will be because of physical or mental disability incapable of earning a living and that it is expedient that payments toward the maintenance of the child continue to be made after the child attains the age of 18 years.

(6) Any order made under this section shall, unless the Court specifies otherwise in the order or in any variation or extension thereof, bind the personal representative of the party against whom it is made.

(7) Any order made under this section having effect in respect of a child of or over the age of 16 years, and any variation or extension of any such order, may be subject to such conditions as the Court thinks fit.

Comment: Cf. N.Z.M.P.A. 1963 s. 52 and U.K.M.C.A. 1965 s. 1934.

26. *Settlement of Property on Children*

(1) The Court may, if it thinks fit, on making any decree of restitution of conjugal rights, judicial separation, divorce, nullity, or dissolution of marriage, order a settlement to be made to the satisfaction of the Court of the property of the husband or wife or any part of such property for the benefit of the children of the parties or any of them.

(2) The Court may make such other orders and give such directions as may be necessary or desirable to give effect to any order made under sub-section (1) of this section.

Comment: Cr. N.Z.M.P.A. 1963 s. 53

27. *Representation of Children in Proceedings*

(1) In any proceedings under this Act, the Court may direct that any children of the marriage be represented by counsel if it is of the opinion that such a course is expedient.

(2) The Court may make such order as it thinks fit as to the payment by any party to the proceedings of the solicitor and client costs of any such counsel.

Comment: Cf. N.Z.M.P.A. 1963 s. 54

28. *Intervention of Superintendent of Child Welfare*

(1) In any proceedings the Court may if it thinks fit refer any matter to or request a report concerning any matter from the Superintendent of Child Welfare concerning the custody, maintenance or welfare of any child of the marriage or of either of the parties.

(2) A copy of any such report shall be given by the Clerk of the Court to counsel appearing for the Petitioner and the Respondent, or if either party is not represented by Counsel, to that party.

(3) The Petitioner or Respondent may tender evidence on any matter referred to in any such report.

(4) In any proceedings under this Act, the Superintendent of Child Welfare or a party duly authorized by him shall, at the request of the Court, appear to assist the Court with respect to any matter relating to the custody, maintenance and welfare of any child of the parties or either of them.

Comment: Cf. N.Z.M.P.A. 1963 s. 50

Part VIII—Maintenance

29. *Summary Maintenance Order*

(1) Whenever a husband or father has failed to make adequate provision for his wife or child or children, regardless of whether the spouses are living apart, a judge of the Family Court Division may grant an order for maintenance of the wife and children of the marriage or void marriage upon the basis of need and without enquiry as to "fault".

(2) Such order may be terminated by an order of a judge of either the High Court Division or of the Family Court Division.

Comment: New. While issues of "fault" and therefore of ultimate liability for maintenance should be tried by the High Court Division, nevertheless there is a need for a summary procedure with a saving of time and expense that can be adequately dealt with in the lower court. In many cases the making of a Summary Maintenance Order can avoid the necessity and expense of judicial separation proceedings. Some provincial statutes permit the making of similar magistrate and family court orders usually with a finding of "fault" that is necessarily based on very limited evidence. Mr. Justice Scarman advocates legislation "enabling either spouse to apply to the Court for financial relief without having to prove wilful neglect or a right to matrimonial relief other than financial support." We respectfully agree. (A-10)

30. *Order for Maintenance*

(1) The Court may, if it thinks fit, at any time make an order for interim maintenance and costs for the wife and on or at any time after the making of any decree of restitution of conjugal rights, judicial separation, divorce, nullity or dissolution of marriage, order the husband and his personal representative to pay to the wife for any term not exceeding her life such periodical sum for her maintenance and support as the Court thinks reasonable, provided that no such order shall be made if the wife has married again.

(2) Subject to any agreement by the parties to the contrary, any order under this section, and any order under section (32) of this act extending or varying any such order, shall cease to have effect if the wife marries again.

31. *Payment of Capital Sum*

(1) In addition to or instead of making any order under this part of this Act, the Court may, if it thinks fit, on or at any time after any decree of divorce,

- (a) order the husband or his personal representative to pay to the wife such capital sum as the Court thinks fit;
- (b) order a settlement to be made to the satisfaction of the Court of the property of the husband or of the husband's estate, or any part thereof, for the benefit of the wife.

(2) An order under this section for the payment of a capital sum may provide that the sum shall be payable at a future date specified in the order, or shall be paid by such instalments specified in the order as the Court thinks fit.

Comment on Ss. 29 & 30. Cf. U.K.M.C.A. 1965 ss. 15-22 and N.Z.M.P.A. 1963 ss. 39-41.

"The Courts Should Have Authority to Award Capital Sums in Lieu of Periodic Alimony Payments"

It is in the best interests of the parties and of society that where possible financial arrangements between the parties which are the cause of much strife be terminated by a final settlement along with the other aspects of the dead marriage. At the same time, the court should have authority to make an all-inclusive disposition of such things as the matrimonial home and furniture, as provided in section 35.

32. *Variation of Maintenance Order*

Upon it being made to appear

- (a) that the means of either the husband or the wife have increased or decreased, or
- (b) that either party has been guilty of misconduct, or being divorced, has married again, the Court may from time to time vary or modify such order either by altering the times of payment or by increasing or decreasing the amount, or may temporarily suspend the order as to the whole or any part of the monies so ordered to be paid and may again revive the order wholly or in part or suspend or rescind the order for payment of any capital sum or portion of a capital sum which has not been paid at the date of application, as the Court thinks fit.

Comment: Cf. Alberta D.R.A. s. 26.

33. *Enforcement of Maintenance Order*

(1) Maintenance orders for the benefit of a wife or former wife or the children of the parties may be enforced in any manner now provided for enforcement of a civil debt or as provided in the Alimony Orders Enforcement Act.

(2) Where a spouse has made default in payment of any alimony or maintenance ordered to be paid, the Court may make an order requiring the spouse's employer to deduct a stated amount each month from such spouse's salary and remit the same to the Clerk of the Court or such other party as the Court may direct, or the Court may require such amount to be deducted and paid to the Department of National Revenue together with such employee's income tax deducted at source.

Comment: Preserves the existing enforcement system and adds a continuing type of garnishee similar to that provided in section 120 of the Income Tax Act and in addition adopts Mr. Justice Scarman's suggestion that such payments be

made through the Income Tax Department. Such a procedure would cause no additional burden on employers who must make remittances to the Department in any event. (A-11)

PART IX—Matrimonial Home

34. Notice to Third Parties.

No order shall be made under this part of this Act with respect to any furniture or matrimonial home in which any party other than the parties to the action has any interest other than an interest by way of security, without notice to such other party.

Comment: Cf. N.Z.M.P.A. 1963 s. 56

35. Possession and Vesting Orders.

The Court may at any time make an interim order for the possession of the furniture and of the matrimonial home or either of them and on making a decree of restitution of conjugal rights, judicial separation, divorce, nullity or dissolution of marriage, the Court may vest ownership of the furniture and the matrimonial home in either party, partly in each party, or in the parties as tenants in common, or may order the same sold and the proceeds disposed of as the Court thinks fit,

Provided that nothing contained in such order shall affect the rights of a third party having an interest as a creditor therein.

Comment: Cf. N.Z.M.P.A. 1963 ss. 57, 58 and 59.

PART X—Appellate Jurisdiction and Appeals from the Domestic Proceedings Court

36. Appeals from the Family Court Division.

(1) An appeal shall lie from any judgment or order of the Family Court Division to the High Court Division.

(2) Such appeals shall be heard by way of trial de novo by a single judge of the High Court Division in either civil or criminal appeals.

37. Appeals from the High Court Division.

An appeal shall lie from any judgment or order of the High Court Division to the Court of Appeal of the Province or Territory designated to hear appeals from the superior courts of first instance for the province in which the proceeding is commenced.

Comment: on ss. 36 and 37. Appeal provisions are substantially the same as those that now exist in some provinces.

PART XI—Miscellaneous

38. Evidence as to Adultery

(1) A witness in proceedings under this Act, whether he is a party or not, may be asked, and is bound to answer, a question the answer to which may show, or tend to show, adultery by or with the witness where proof of that adultery would be material to the decision of the case.

Comment: Cf. U.K.M.C.A. 1965 s. 43 and N.Z.M.P.A. 1963 s. 69. Evidence of a witness' own adultery when relevant should be compellable evidence like other evidence in civil proceedings. The present privilege does nothing to protect the sanctity of marriage; it is a cloak covering immoral behaviour and has given rise to our system of "disguised divorce by consent".

39. *Recognition of Foreign Decrees*

(1) The validity of any decree or order or legislative enactment with respect to any matter dealt with under this Act (whether before or after commencement of this Act) by a Court or legislature of any other jurisdiction shall, by virtue of this section, be recognized in all Canadian courts, if:

- (a) one or both of the parties were domiciled in that jurisdiction at the time of such decree, order or enactment; or
- (b) such decree, order or enactment would be recognized in the jurisdiction in which one or both of the parties were domiciled at the time of such decree, order or enactment; or
- (c) the foreign decree or order is substantially similar to a decree or order that any Canadian court would have been entitled to make under this Act in substantially similar or reciprocal circumstances.

Comment: New. Cf. N.Z.M.P.A. 1963, s. 82 (A-12)

40. *Abolition of Actions for Criminal Conversation, Enticement, Alienation of Affection and Loss of Consortium.*

Actions for criminal conversation, enticement, alienation of affection and loss of consortium are hereby abolished.

Comment: New—These actions originally reflected the theory that husbands had property rights in their wives. They are now rarely prosecuted and are used chiefly as a means of harassment. (A-13)

41. *Delay.*

Delay in bringing or prosecution of any proceedings under this Act shall not be a bar thereto.

Comment: New. The discretionary bar of delay, which should not be confused with condonation, penalizes the party who does not rush to litigation or is slow to give up hope that his or her marriage can still be salvaged.

42. *Condonation, Collusion and Connivance Discretionary Bars.*

The Court may in its discretion dismiss any petition if the petitioner has condoned any matrimonial offence complained of or has been guilty of collusion or connivance.

Comment: Cf. U.K.M.C.A. 1965 S. 42 and N.Z.M.P.A. 1963 S. 31 Attempts at reconciliation may in law be condonation, collusion or connivance. These bars should be discretionary not absolute, to be exercised by the court chiefly when there has been an attempt to thwart the course of justice. Collusion is now a discretionary bar in the United Kingdom and New Zealand.

43. *Coming Into Force of this Act.*

This Act or any part thereof shall come into force on dates fixed by proclamation and notwithstanding the provisions of section 3 (b) may be proclaimed in force in part only of Canada.

APPENDIX B

NEW STRUCTURES CONCERNING MARRIAGE, THE FAMILY AND DIVORCE

1. *The Pastoral Institute: A New Pattern of Ministry.**Some Methods of Assessing Marriage and its Breakdown*

The church needs to be concerned for the psychological and pastoral factors involved in marriage breakdown, divorce and remarriage. Countless occasions for educating those planning for marriage as well as those who were caught in the tragedy of marriage breakdown present themselves to the clergy and lay leaders of the church, if they are sensitive and approachable. This kind of pastoral work is both a duty and a privilege that should be given top priority.

The methods used at the Pastoral Institute, in assessing marriage breakdown, may seem more appropriate for the specialized ministry of pastoral counselling than for the pastor of a parish. However this is not so. The instruments used for gathering data, evaluating personality and assessing temperament, have been researched as to their effectiveness and validity, both for the persons seeking help, and the various professions using them. Research and training in marriage and family life education, marriage counselling and the training of churchmen in pastoral counselling with these approaches, has been going on for years. (B-1)

(a) *Personal Data Kits*. These kits developed at the Pastoral Institute in Calgary work well for the parish pastors. Rural and urban churchmen of many faiths, who are trained in these methods in the seminars conducted by the Pastoral Institute each year in Calgary and Banff are making use of these kits. They find them helpful in assessing the communication and soundness of engaged couples going into marriage, to evaluate the strengths of a marriage or to indicate the breakdown of marriage. A minister in southern Alberta wrote to the Institute:

"After a week away from the summer seminar at Banff, my appreciation to you and thereby to the whole school is greater than it was the day we adjourned. I had a profitable and wonderful experience there. You are to be thanked a thousand times. . . . I learned so much about myself and about people and about resources which are available as we confront the counselling perplexities."

The psychological instruments contained in these Personal Data Kits can aid physicians, social workers, and others as well as clergymen in making a rapid assessment of the situations bearing on marriage breakdown and other family problems. Research has shown that with these kits, as much data often can be gathered with a half an hour of the professional or volunteer worker's time, as could be obtained in 5 to 6 hours of interviewing. Significant clues as to the outcome regularly come to light in the first session with a couple. What this means in terms of valuable time and costs involved to the churchmen, the professional or volunteer worker can be appreciated.

A brief description of these Personal Data Kits may clarify how they are used to evaluate the resources and strengths of an engaged couple, and to assess the need for counselling in the case of marriage breakdown, divorce and remarriage.

The Personal Data Kit is *not* a series of psychological tests, nor is it the equivalent of a psychiatric examination but it does get at psychological and psychiatric factors. It was not designated to subject the individual making it, to a penetrating exploration of his inner secrets and complexes. The kit is on the other hand, a set of forms which permit and assist an individual to write

comprehensively about himself and thus provide his counsellor very useful information in the way that he would like it expressed. The Personal Data Kits which we use at the Pastoral Institute are made up according to the person or the couple's needs and contain appropriate selections from the following list of instruments.

1. An identifying Information Sheet;
2. A Taylor-Johnson Temperament Analysis;
3. A Cornell Index;
4. A Mooney Problem Check List;
5. An Information Check List;
6. A Biographical Review;
7. The "X" or "Y" Forms of the Sex Knowledge Inventory;
8. The Religious Attitude Inquiry;
9. A Dating Problems Checklist;
10. A Courtship Analysis;
11. Marriage Prediction Schedules;
12. Marriage Role Expectation Inventory.

Not all of these instruments are used in each case. They are chosen, and the kit is made up according to the troubles that are presented by the individual or couple, or the circumstances of the marriage plans.

It is unrealistic for us as churchmen or any others in society to talk about stable family life or marriage breakdown, divorce or remarriage without coming to terms with the psychological factors involved in marriage relationships. If this is so, then what about the content of the counsellor-educators, discussions and presentations on these matters?

A team approach is basic to the whole task of family life education and counselling as it is undertaken at the Pastoral Institute. This has a great deal to do with the kind of content and presentations that are made. One such program is the marriage education. The classes meet from 8:00 to 10:00 p.m. every Monday night of the year except holiday Mondays. The groups run in revolving series of eight nights with different professions giving leadership on various topics. Physicians, bankers, lawyers, clergy and others, with presentations and group interaction, cover the following topics:

- Successful Marriage
- Standing Up to Family Influence
- Managing Family Finances
- Companionship, Recreation and Social Activities
- Masculine and Feminine Roles
- Psychological Factors of Temperament
- Sexual Factors in Love Fulfillment
- Spiritual Values and Family Goals

The Family Life Education programs led by ministers and doctors working with the Pastoral Institute attract hundreds of young people at a time. A few of the hundreds of responses will indicate how methods of these new patterns of ministry get to people.

"This seminar has given me a clearer insight into the church's feeling toward sex and has given me a more pleasant outlook towards love, marriage and interpersonal relationships. It has been an excellent seminar and I believe it has helped most, if not all the people here, to understand more completely the wonders of love and marriage."

Parents and youth leaders are brought together for similar seminars. Comments like this are received regularly after these programs:

"This seminar has shown me that the church is willing and anxious to take up the challenge of helping us bring up our teenagers to be responsible citizens in society and happy and well adjusted individuals in their own right. I believe that this is a much needed approach to the problems our young people and their parents face in this modern accelerated age. It is heartening to know that the church is trying to keep up with the changes in our society, in active participation, and not merely giving it lip service. Teenagers must be confused by the complex demands on them and sometimes they pay much more attention to an informed, interested outsider than they do to their own parents and community leaders."

The relationships of human sexuality cause great anxiety in society today and the doctor-minister teams at the Institute have been able to help families in this basic way. Dr. William Masters of the Masters-Johnson team in St. Louis put it accurately when he said:

"Aside from the instinct for self-preservation, there's nothing that affects every man, woman and child in the world to a greater degree than basic sexuality." (B-2)

Their research and writing of "Human Sexual Response" (B-3) have provided more sound data than has ever been available before, for clergy and others who are asked to give family life leadership. Teams are always used at the Institute and they are backed up responsibly by the Interprofessional, Interfaith Advisory Committee and the Board of Directors.

(b) *The Quality of Family Life*. The quality of family life education that goes on in the home, the church and the community is a most urgent matter. Psychological, moral and religious characteristics are emphasized as the essence of the nature of life. Physical aspects are managed, as any others, according to the understanding, the meaning and worth of persons. Somehow we are coming across to our youth in our day with the feeling that sex and sin are synonymous. Similarly, we are coming across to people in our society that sex is the chief sin by which they can break up a marriage rather than solve any problems that have led to unhappiness.

Family life education, family counselling are ways of providing more responsibly for an infinite variety—a never ending wealth of resources where persons want to make life a new adventure. Marital adjustment is not a fact that is achieved in one day like paying off the mortgage. It is an on-going process that is inexhaustible in its potential for new and enhancing experience. Young people should be learning before they ever start to plan their own marriages and their own family lives, that research makes it clear that if there were only ten factors involved in our expression of love and affection for one another (there are many more than that) there would be 3,628,800 (B-4) different possible permutations of ways in which we could arrange new and interesting rewards for our partners. That means that we could have a new dividend of love for each day of the first 10,000 years of our marriage. I think you will agree that most people are hardly "hitting on one cylinder". With such blessings in life, what difference would the children's depravity make even if it were total?

(c) *Relationships the Deciding Factors*. It is important to make clear that relationships are the deciding factors in whether there will be an intrinsic, utilitarian or a broken marriage. (B-5) The report of the Archbishop of Canterbury supports the experience at the Institute.

"From the psychological point of view the mutual interaction between husband and wife in marriage constitutes by far the most impor-

tant of all adult human relationships. In recent years it has been depth psychology that has thrown most light on it." (B-6)

On the following page, the Taylor-Johnson Temperament Analysis (B-7) profiles illustrate how one of the instruments in the Personal Data Kits can show the relationships in marriage and marriage breakdown. They are used as a physician uses X-rays to provide evidence of a condition at the time.

Profile A indicates favorable communication, understanding and acceptance of the husband by the wife. To grant a "quickie divorce", without counselling, even in the case of the adultery may be quite unjustified.

Profile B indicates a breakdown of communication, understanding and acceptance of the wife by the husband. To not be able to obtain a divorce on the basis of "marriage breakdown", and be granted release from an emotionally and spiritually dead marriage would be tragic, if no adultery were ever involved.

The use of these instruments selected for our Personal Data Kits provides a more specialized and objective way of assessing marriage breakdown and whether emotional and spiritual divorce has occurred or not. The psychological factors need to be taken into account in the courts and in drafting legislation if divorce law reform is to solve the present dilemmas.

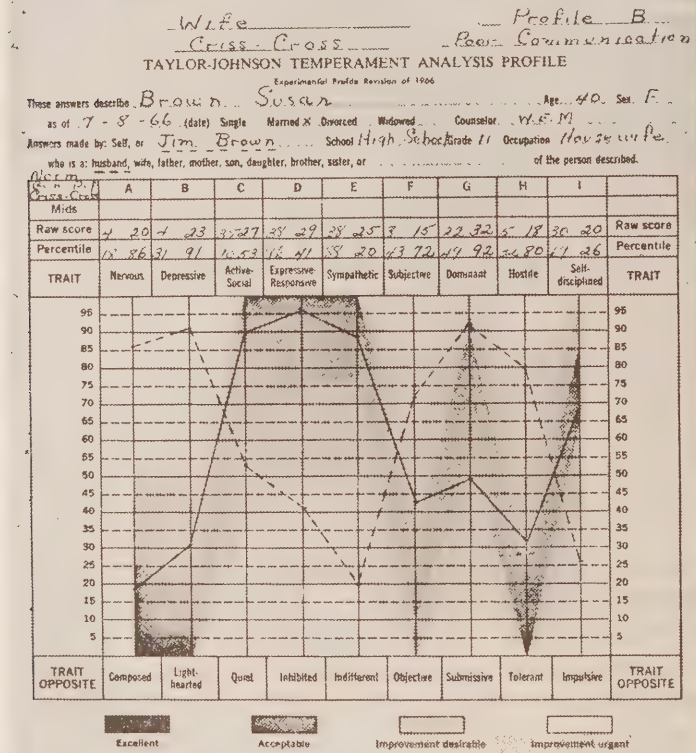
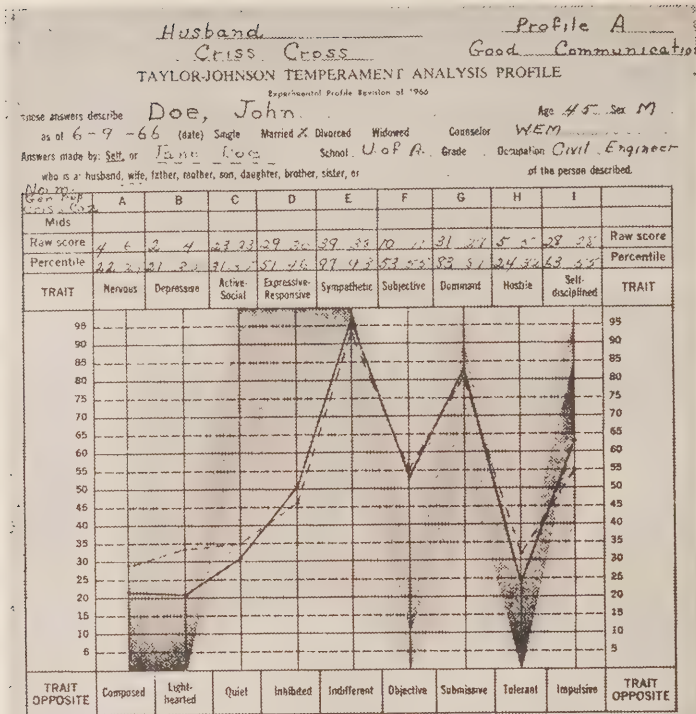
The problems of money, religion, in-laws, alcohol and sex are not usually the causes of marriage breakdown but often are evidence of a failure to establish communication, or a breakdown of that communication, as illustrated in these profiles. Psychosomatic ailments, neurotic pattern of behavior, office affairs and alcoholic reactions can hardly be considered satisfactory solutions to poor marital relationships. When they are faced at the deeper level of interaction in relationships, marriages often are better than before the crisis occurred.

Divorce is only one solution to marital problems and should always be considered a last resort, only available when the marriage is psychologically broken and theologically dead. A marriage that is clinically beyond repair, should be dissolved. When the break comes is the time when families need pastoral support, guidance and counselling. Families that are carefully counselled by pastors and others, find divorce less disturbing to parents and children alike, than the "cold war" of a dead marriage. A mother of two children, whose marriage ended in divorce after counselling at the Pastoral Institute left Calgary to teach school in another city. Her letter to the Institute speaks for many.

"If I ever manage to recapture that quality that life previously held for me, you will have been a gigantic stepping stone toward its achievement. You wielded a powerful influence on me; replacing bleak despair with hope, resentment with sympathy, and exuding the faith that despite all, God still is in all. I accepted your kindness, understanding, and help, with full knowledge that I must return to circulation as generously of these qualities as I have so generously received. I hope the memory of recent events remains poignant enough for me to discharge my part of the bargain. If all is not to have been indeed in vain, my life must need be a far shinier example, and when our paths cross again, the need for crutches no longer existent. I gratefully thank you, and may God's richest blessings encompass you, as well they must".

In the world of today people are more concerned with psychological motives and meanings than in former times. This is more closely related to the theologians and the pastor's concern too. Legislation must be designed to make the family and society more truly human, loving and fulfilling. Before this can be done, careful study must be made to consider motivation. When divorce is based on the actions of the "matrimonial offences", due consideration is not given to the

JOINT COMMITTEE



Excellent Acceptable Improvement desirable Improvement urgent

DEFINITIONS

TRAITS

Nervous — Tense, high-strung, apprehensive.
Depressive — Pessimistic, discouraged, dejected.
Active-Social — Energetic, enthusiastic, socially involved.
Expressive-Responsive — Spontaneous, affectionate, demonstrative.
Sympathetic — Kind, understanding, compassionate.
Subjective — Self-centered, emotional, illogical.
Dominant — Confident, assertive, competitive.
Hostile — Critical, argumentative, punitive.
Self-disciplined — Organized, methodical, persevering.

OPPOSITES

Composed — Calm, relaxed, tranquil.
Light-hearted — Happy, cheerful, optimistic.
Quiet — Passive, socially inactive, thoughtful.
Inhibited — Restrained, unresponsive, repressed.
Indifferent — Thoughtless, unsympathetic, insensitive.
Objective — Fair-minded, reasonable, logical.
Submissive — Passive, compliant, dependent.
Tolerant — Accepting, patient, humane.
Impulsive — Disorganized, uncontrolled, changeable.

Note: Important decisions should not be made on the basis of this profile without confirmation of these results by other means.

research of this century in psychological depth. That is to say nothing about the people involved. Let Nancy Taylor White speak for them:

"I'm now a divorcee. There are as many different causes of divorce as there are divorced men and women. But I am convinced that the great majority of us share one thing, and that is an abhorrence of the way by which a marriage is dissolved in this country. It is, I firmly believe, an example of the grossest kind of immorality."

The common people of Canada know better than that. Continually they ask,

"Why should many persons be driven to commit adultery or perjury when neither is emotionally or morally acceptable to them, in order to get out of a marriage that has broken down? Is it not because research in the complex motives of human life has yet to be taken seriously in drafting divorce legislation?"

The legally "innocent party", many times is more psychologically guilty than the legally "guilty party". From the evidence of the marriage counselling program at the Pastoral Institute and many other centres, the psychological dynamics needed to be taken seriously by the legal profession, the clergy, and other professions. The use of the Personal Data Kits is a way of trying to do that at the Institute.

The Pastoral Institute pattern of ministry can be set up in any population centre even on a voluntary basis. It should always be set up on an inter-faith, inter-disciplinary basis and grants might be considered from public funds since the program is open to the total community. This pattern of ministry is in no sense a duplication of service or in competition with others but a way of supplementing in a rich variety of resources, both for education and for counselling, that can be made available in a community.

2. Conjoint Family and Group Counselling

(a) *Conjoint Family Counselling* is a method of seeing all members of the family at one time in the same room. The theory points to the importance of seeing all members of the family to understand a child's emotional disturbances.

The Taylor-Johnson (criss-cross) Temperament Analysis is a useful device in getting a clearer picture of the role relationships in a family. In a family of four, for example, where the children are teenagers, sixteen relationships can be shown. Father completes a T-JTA on himself, his wife and each of the young people. The other three members complete theirs in the same way. Family communication can be assessed, the distress often can be pinpointed and education and counselling set up according to their needs.

The conjoint method has advantages. With this approach it is possible to strengthen new behavior, to prevent one member from being chosen as the "scapegoat" to reflect a family disorder, to help the family to maintain integrity and change behavior that has become destructive.

(b) *Group Counselling* is another extended form of individual counselling. But there are both qualitative and quantitative differences. This method more approximates many life situations and universalizes individual problems. It grew out of the economic need for counselling services during World War II and counsellors' dissatisfaction with the individual approach.

The church has always moved on such small groups as "the church in thy house". (B-8) The group sometimes represents the substitute family for those with no close ties. The use of men and women as co-leaders in the groups adds further to the family feeling and participants even compete to gain the counsellor's attention, as often seen in the family.

The group permits social experiment in a controlled situation and self-evaluation and understanding come easier. In the search for relationships marital partners will be able to listen to other members when they no longer hear their spouse, and gain understanding of how they upset one another. The inherent provision for successful social interaction with people in supervised circumstance makes it possible for many to reverse failure patterns in their relationships at home and at work.

The group method is not a substitute for individual and conjoint family counselling but provides more than an adjunct to these. Groups provide a helpful way of "tapering off" or "launching" persons back into the full give and take of life in the community.

At the Pastoral Institute these methods have been in use for about three years. For practical reasons we use "open groups". Those who are ready leave the group one by one and new ones are added in the same way. These groups perpetuate themselves, and one group of "Married-Singles" or "Formerly Marrieds" is in its third year of weekly meetings. Other groups have been running for a term of months. Open groups have the advantage of persons coming in and leaving when ready without disrupting the whole group or reducing it to a small number of participants.

The groups meet each Wednesday from 8:00 to 10:00 p.m. and vary in size from ten to twenty members. Group leaders meet prior to meeting each week to evaluate the functioning of the groups and to make necessary decisions as required.

Those caught in marriage breakdown and divorce have benefitted most from the groups at the Institute. They are well motivated because of their circumstances and follow through the best on a long term program of rehabilitation. Some have resisted the group suggestion at first.

"It took us weeks to get up nerve enough to ask for counselling. We don't believe in advertising our problems. You don't think we'd discuss our private lives with a bunch of strangers."

Yet often persons come to feel emotionally secure enough in the group to bring up things they wouldn't tell the counsellor at first. One person put it this way:

"I can discuss everything in the group. I feel that I am among friends."

Little consideration is given to the persons' social status, economic standards, religious affiliation or lack of it, age, or length of marriage. Scattering persons, as the Lord does, has not seemed to create any problems. Even persons bordering on psychotic reaction, those with neurotic and antisocial behavior and others with marginal problems seem to do no noticeable harm to one another. Many functioned noticeably better and were terminated, and others are able to remain outside of the hospital and keep functioning with new hope.

3. *Personal Acquaintance and Marriage Introduction Service*

(a) *The Need for New Social Structure*

The rate of divorce in Canada indicates that people are not realistic in the personal and social criteria by which they choose their mates. A new scientific, pastoral structure, to assist in better mate selection is a social need in Canada.

Such a program should combine some elements of the approach of the Eastern cultures, where families chose the partners, and the individual, romantic freedom of the western ways, if it is to be a more sound approach.

An organized service based on a revolutionary plan, and sponsored on a national basis by the church is being initiated by the Pastoral Institute. With the

participation of the clergy and the congregations, men and women can have a better than average chance for happy marriage, with responsible freedom of choice, in spite of the suspicions and misconceptions that surround such unorthodox methods.

There are many reasons for this poignant social need. (B-9) The search for suitable mates so often is fruitless in small communities where the choice is limited. The diversity of races and religions is becoming a large factor with increased travel and other forms of communication. The over emphasis upon complete fulfilment as a goal in marriage, puts heavy responsibility on marriage, that requires more carefully matched partners. The imbalance caused by the industrial distribution and mobility of male and female population adds to the difficulty of men being where the women are. Since propinquity is still the chief factor in marriage, new ways are needed to bring people together.

The rise of large urban population centers and the psycho-socio-economic needs to strengthen the family, also add to the complexity of the problem. Gone are the days when everyone knew everyone else in the community, and every married female was a cupid for her friends. The choice is well put by one who writes,

"It's between which I fear most: meeting a stranger or not meeting anyone."

"I learned to keep my eyes open wherever I am," a 37-year-old woman says.

"I now have no prejudice against any avenue of meeting. I even met a very fine man on a subway platform one time. You have a number of disappointments that way, and sometimes I am even frightened, but I feel I must take every chance. You never know when or where you'll meet someone."

The formerly-marrieds (F.M.'s) find it difficult to meet suitable mates and recognize the need to resort to unorthodox approaches.

"The search for new partners is a free-for-all in which divorced people seldom hesitate to use the unconventional methods." (B-10)

It is important to provide more sound social methods for the single, divorced and widowed persons to get together. Scientific advances have decreased the distance between places and increased the distance between people. Anyone who can enjoy the services of Air Canada should be able to appreciate Personal Acquaintance and Marriage Introduction Services. They will help unmarried, marriageable Canadians to get together, against almost unsuperable odds, and without loss of self-respect, privacy and dignity.

(b) *Types of Services*

There are four types of services in America, all categorically dubbed "lonely hearts clubs". They are listed by Los Angeles sociologist, Karl Miles Wallace. (B-11)

1. Correspondence clubs.
2. Personal Contact clubs.
3. Social clubs.
4. Clubs which offer a combination of the services
4. Clubs which offer a combination of the services of the above three types.

(c) *Need for Church Sponsorship*

It is very difficult to conduct an introduction service profitably and reputably in our society. Dr. Paul Popenoe, Director of the American Institute of Family Relations in Los Angeles, in 1959 indicated to the director of the Pastoral

Institute in Calgary that the church should move into this field. He suggested that the church initiate such a service in Canada, on a national basis, with a major denomination assuming the initial responsibility. At first when it was mentioned to the courts of the church, it seemed almost necessary to remind delegates that this was not a "lonely hearts" joke. But now churchmen are more sensitive to the growing magnitude of the social problem involved and many feel that the time has come for the project to be launched. The Calgary Presbytery in 1962 approved the Pastoral Institute with this planned as one of its future projects.

The high mortality rate of commercial introduction services is a great concern to scientists like Dr. Popenoe and Dr. Wallace. The clubs cannot stay solvent long enough to gain the confidence of society. The latter writes,

"Of 211 correspondence clubs in 1950, when I wrote for circulars, only 31 were going concerns when I checked them again in 1953. This is a normal mortality rate; seventy-five per cent fail within four months of their inception." (B-12)

It is obvious what this does to persons who sought the services that went broke.

The church has the confidence of society in matters of marriage and the family. The Pastoral Institute, as a new church structure, operated on a non-profit basis, and in cooperation with many faith groups, has flexibility, support and professional consultation to initiate such a project.

(d) *The Goal*

The goal of the Pastoral Institute to bring persons together for acquaintance, and possibly marriage, is four fold:

- (i) *Compatibility in Personality.* Persons applying for membership will be required to complete a Personal Data Kit with instruments designed to assess temperament, sociability, conformity to social standards, attitudes toward sex, money and religion, and so forth.
- (ii) *Contemporary in Age.* It will take some time to build up a large enough membership to provide a wide selection of potential partners. This is where the pastors who know the marriageable persons in the church and community; the unmarried, the divorced and the widowed persons can make a contribution in helping to introduce these persons to the service if it would be useful to them. A large membership is essential to have the range of age groups to ensure selection on this basis as well as personality.
- (iii) *Comparable Cultural Background.* The cultural background of members will be assessed according to personal tastes and interests as well as occupation, education, socio-economic status, racial and religious origins.
- (iv) *Confidential Protection.* Sound marriage rather than exciting adventure will be the emphasis. Screening by the use of Personal Data Kits will discourage most of the exploitive trouble makers. The fees will be on a small registration and larger marriage deposit basis. The registration for introductions will cover a set period of time and the deposit of the marriage fee for successful applicants will be held in trust. If the time lapses without a mate, the deposit would be refunded with interest and if marriage follows it would go to the Pastoral Institute. The fee structure along with the careful selection of members on the basis of Personal Data Kits should give good protection against exploitation of members.

(e) Who Will be Served?

Dr. Wallace in his research, was quite unprepared for the kind of people who joined his service. It was not "the poor, the inept and the uneducated" as myth would have it. There were more men than women, more in middle and upper-socio-economic levels of society, and a few neurotics. The less gregarious and shy persons responded well and the conventional type of persons, rather than the eccentric, made use of the service. (B-13)

(f) A National Correspondence Service.

There are many advantages to the correspondence type of service being the main one. Although the others mentioned above can be combined with it where Pastoral Institutes or other professional and volunteer resources are available.

Most people are individualistic, proud and sensitive enough to prefer the dignity of anonymity, as well as freedom from a "welfare" atmosphere, and that of volunteer do-gooders and church workers. They are looking for dates and mates rather than therapy which most of them do not need. Where they want help they would be free to seek it through their pastor or other resources he might suggest.

The self-consciousness and embarrassment of having to go to gatherings of others and be looked over, holds little attraction to most of the people who will respond readily from the privacy of their own homes. They can be reached through literature distributed through their churches, and advertising in national church and other publications.

The correspondence services also will recruit from the entire nation. Letters provide the opportunity to speak forthrightly, early in the exchanges, even using pseudonyms, if preferred. This way the courtships are briefer, ranging from one to nineteen months. (B-14)

(g) The Divorce Problem is Reduced.

The marriage rate was about 11 per cent of the members in Dr. Wallace's program. (B-15)

"The record appears to be a very model of stability. But—were the brides and grooms of P.A.S. happy?

Three-fourths of those who returned our surveys emphatically answered, yes. As far as we could determine, about one P.A.S. marriage in twelve ended in divorce courts. As we have seen, the figure for the nation is approximately one in four."

It is the sociologists undertaking to make us aware of existing knowledge and of the need of new social structures. The church has a responsibility along with others in society to implement that information in the ways that are most important.

4. A Pastor-Educator-Counsellor Internship Program

The Leadership Development Department of the Pastoral Institute has initiated a number of programs of continuous education for pastors and others. All of them have been over subscribed in terms of the numbers that could be handled efficiently.

The next proposed community demonstration project is an Internship program.

(a) Proposed steps to be taken for an Internship Program for clergy and laity of all faiths.

(i) Establish an interfaith, interdisciplinary supervision committee representing the university, the helping professions and broad faith groups.

- (ii) Provide the committee and the interns, continuously, with life situations, the unresolved social and public issues behind the troubles people bring, along with education and experience in dealing with them through workshops, seminars, evaluations, symposia, conferences, films and literature.
 - (iii) Involve leaders of many areas of the community; young people, parents, leaders of industry, government, professions etc., in continuous search, discussion and planning for leadership relevant to the challenges of today.
 - (iv) Plan for Internship Training on supervised, Interfaith, Interdisciplinary basis as a continuing process. The goal is to send out clergy and laity, capable of using their lives in more mature, fruitful and responsible ways. The method is to assume much of the academic and to go beyond it in providing growing experience in relating that background to the real issues upon which life is won or lost.
 - (v) Increase the awareness that the life situations, which confront the clergy and laity of the church and community are no different than those that underly any other relationships or responsibilities in life. The whole community can be more effectively challenged inspired and helped to relate to each other, creatively and non-exploitatively, in the many relationships of day to day living in the family, community and world.
 - (vi) Identify through these steps the resource persons of the church and community. Most of those needed are already there. They need only to be involved and freshly equipped. They are the physicians, executives, homemakers, nurses, teachers, students, laborers, clergy, recreation leaders "Y" workers etc.
 - (vii) Enlist the support of professional associations through a small, qualified group consisting of competent staff directors, consultants, and professional volunteers. As knowledge and experience grow in a progressive community, the leadership and the demands for that leadership, everywhere will grow too. These demands upon the Institute from Calgary and other communities across Canada are beyond present resources.
- (b) Facilities Available.
- (i) Large churches of several denominations in the community have shown their willingness to accommodate the programs of the Pastoral Institute by providing offices, conference rooms, lecture halls, chapels, group counselling and meeting rooms. So far this has been on a rent free basis.
 - (ii) Highly skilled professional persons have continuously made their time available on a weekly basis for leadership, supervision, typing etc. without remuneration. This kind of commitment to a well thought out and planned program can be counted on.
- (c) Planned Methods of Procedure
- (i) Carry out the developing demonstration projects of the Institute until 1970 when complete reports and evaluation would be carried out under outside and objective leadership.
 - (ii) Enlist more staff that is available and qualified to work with the university, the other helping professions in the community, and the theological colleges of participating churches.

- (iii) Provide much more opportunity for trainees on an Internship basis in various programs of special training experience using the particular resources of this community.
- (iv) Establish a Scholarship Fund to assist clergy and laity to take advantage of the Internship opportunities.

(d) Background of this Proposal

The Pastoral Institute represents many years of training, experience, planning and demonstration on the part of the directors, staff and professional volunteers of the Presbytery area. It carries the complete endorsement of the Calgary Presbytery of the United Church of Canada, and from 1962 to 1969, financial support up to \$24,000. a year.

The first proposals for the Pastoral Institute were made to the Edmonton Presbytery of the United Church of Canada in 1958, to the Alberta Conference and the Calgary Presbytery in 1961. The Institute was approved by the Calgary Presbytery as a demonstration project in November 1961 and established July 1, 1962. It was the first Institute of its kind in Canada. One has opened now in Toronto. In Winnipeg, Vancouver, Edmonton and Windsor, similar institutes are being considered, to work also, on an interfaith basis.

As these Institutes develop and work together, new social structures, such as those proposed in this brief, and others not yet anticipated, will appear and help to meet these special needs of Canadians.

APPENDIX C

"THE MYTH OF THE MULTIPLE DIVORCEE"

A common argument against "broader" divorce laws is based on the belief that if divorce is made too easy, the community will cease to think that marriage is intended to be a life-long union, and that the "multiple divorcee" who treats marriage as a series of temporary affairs will become the rule. Some statistics from the 1960 United States, which in most states has wide-open easy divorce by consent, challenge this assumption. In "This U.S.A.", the authors, one of whom is the former Director, U.S. Bureau of the Census, comment as follows:

"Actually the divorce rate today (9.2 per 1000 married females annually) is no higher than it was twenty years ago, substantially lower than it was after World War II (17.9 in 1946), and mildly lower than in 1950 (10.3).

"Divorce has somehow managed to become the moral-values bogey-man of our time, and it is readily pointed to as proof of a decaying society. And yet, divorce is one of the humane civilized legal tools of mankind and is recognized as such by feminist movements in developing nations the world over. Its purpose, for any who may have forgotten, is to allow a woman or a man a new choice of a marriage partner if the original choice was so inappropriate as to make life miserable. Divorce might be promiscuous or immoral if repeated again and again by the same people, involved, as it were, in a martial round robin—somewhat like the alleged behavior of certain sun-glassed citizens of the west coast. But that is not the case—as is indicated by this statistic: of all divorcees, 97 per cent of the men and 96 per cent of the women have been divorced only once. Typically, they either marry again and stay married—or they do not marry again.

"This pattern of one-divorce-only seems to express these psychological truths: (1) Those who are mismated and feel that they can make a go of another marriage, actually do make a go of another marriage. (2) Those who themselves feel that they cannot live happily in the marriage situation try marriage once, fail at it, but never try again. Which seems to suggest that divorce is working best not for those who marry promiscuously but for those who have made a mistake and are not inclined to repeat it. It is a more useful act than its publicity portrays.

"Although the divorce rate is down marginally in the decade between the 1960 and 1950 censuses, it has been high (relative to earlier years) for the past thirty or so years. This fact—coupled with the incidence of never remarried divorcees, the increase in elderly persons and the decline of spinsterhood—has substantially raised the percentage of our "currently divorced" population. As determined by the Decennial Census, in 1940 the percentage of those currently divorced in relation to the total adult population was 1.4 per cent. In 1960, that figure was 2.5 per cent, representing not a high divorce rate today, but a cumulatively high rate over a period of several decades." (C-1)

The fact that few people in the population of the United States avail themselves of the opportunity for "easy divorce" on more than one occasion is reassuring. It indicates that the scandalous and well-publicized antics of a few are not indicative of life even in a society whose laws have unlimited potential for mass divorce.

On the other hand, these figures do not mean that Canada should adopt "American-style divorce by consent". The multiple divorcee is not as great a

problem as most people think, but a 1 in 4 failure rate for first marriages is unacceptably high. Quite apart from the effect upon children involved, the parties to a divorce never escape unhurt. Often the ones who show the least apparent damage are most seriously affected, for they have built emotional barriers that may make it difficult to relate to others and to succeed in a future marriage. Sometimes they are still capable of passion but incapable of love.

We recognize of course that it is the "marriage failure rate" not the "divorce rate" that primarily concerns us. Even in the United States there are more people living separate from their spouses than there are divorced people. (C-2) But we doubt whether in all the divorces in the United States the marriages had irretrievably broken down. As stated by Dr. Forreger in a previous quotation:

"... legislatures ... should (as a preventive measure) be willing to prohibit divorce actions for a year while one or the other partner is undergoing therapy in the hope of saving the marriage." (C-3)

APPENDIX D

REFERENCES AND BIBLIOGRAPHY

REFERENCES

Introduction

Intro. 1—Divorce in Quebec and Newfoundland. We regret that we do not have the resources available to provide a French language edition of this brief for the convenience of our French speaking fellow countrymen. Any law must have a consensus of support among the citizens of the community or else it becomes a bad law. For that reason alone, and also for several other reasons, we strongly favour divorce reform in the eight provinces of Canada which now have divorce courts. By the same token, the reform we advocate might be a bad law in Quebec and Newfoundland because it did not have a consensus of support among the citizens of those communities. We do not know. For these reasons, we urge our arguments for reform only with respect to eight provinces.

Intro. 2—"Dead or Alive", p. 168. Also Alberta Conference Report 1959, p. 20 and 1961, p. 22.

Intro. 3—"Dead or Alive", centre pages VII and VIII.

Intro. 4—"Putting Asunder", p. 33 ff.

Division I

- I-1 "The Significant Americans", p. 89 ff.
- I-2 Ibid. p. 106 f and 132 f.
- I-3 "Sourcebook in Marriage and the Family", p. 446 f.
- I-4 "The Churches and Mental Health", p. 69.
- I-5 "Let Your Husband Be a Man and Your Wife a Woman", p. 13.
- I-6 "Reality Therapy", p. 9.
- I-7 "Christians in Families", p. 39.
- I-8 Matthew 5:27-28. (NEB) "Toward a Christian Understanding of Marriage, Marriage Breakdown and Divorce", pp. 18-35.
- I-9 "Putting Asunder", p. 145.
- I-10 "Divorce, the Church and Remarriage", p. 49 ff.
- I-11 "Sourcebook in Marriage and the Family", p. 450 ff.
- I-12 "The Psychodynamics of Family Life" Introduction.
- I-13 "Modern Medicine of Canada", Vol. 20, Number 11, November 1965, p. 69.
- I-14 "Men, Women and Marriage", Section on Marriage Introduction Services.
- I-15 "Love is More Than Luck", p. 15 ff.

Division II

- II-1 *Encyclopedia Britannica*, 1965, Vol. 7, p. 513 ff.
- II-2 "Morton Report", p. 340.
- II-3 Wattenberg & Scammon, p. 36.
- II-4 "Putting Asunder", p. vii.
- II-5 "Putting Asunder", p. 34.
- II-6 Quoted in *Payne*, "Working Paper on Judicial Separation", 1. 28.
- II-7 "Power on Divorce", p. 81.
- II-8 p. 39 ff. Quoted in *Friedmann*, p. 184.

- II-9 *Vancouver Sun*, May 21, 1966.
- II-10 *Life of Lord Chancellor Birkenhead*, p. 349.
- II-11 *Calgary Herald*.
- II-12 Reprinted in *Vancouver Sun*, May 26, 1966.
- II-13 *Vancouver Sun*, May 21, 1966.
- II-14 *Mackay*, p. 67.
- II-15 "Putting Asunder", p. 18-19.
- II-16 "Morton Report", p. 380, *Feifer*, and *Gayn*. New York State adopted "marriage breakdown" in 1966. A longer period is required in some of these jurisdictions when there is no prior judicial separation or separation agreement. See page 40 of this brief for argument against such a condition precedent.
- II-17 pp. 24-41.
- II-18 "Morton Report", p. 340.
- II-19 pp. 151-185, esp. p. 168 and p. 178.
- II-20 *Roberts*.
- II-21 "Putting Asunder", pp. 41-2.
- II-22 "Putting Asunder", pp. 44-5.
- II-23 Quoted in *Friedmann*, p. 180.
- II-24 "Putting Asunder", p. 43-4.
- II-25 *Scarman*, "Family Law", p. 15.
- II-26 "Morton Report", p. 381.
- II-27 p. 186.
- II-28 "Putting Asunder", p. 37.
- II-29 *Scarman*, "Family Law", pp. 15-16.
- II-30 February 11, 1966, p. 4.
- II-31 "Putting Asunder", p. 32. In his presidential address to the 1966 Annual Meeting of the Canadian Bar Association, J. T. Weir, Q.C., LL. D., stated: "Canada has been the heir of England with the rest of the Commonwealth of the finest traditions for the administration of justice in the world. . . we all stood—and still stand—in awe of the English way: in fact, so much so, that we tend to make a change in our law only after England has done so. This fear of newness, of only following the English lead, is still with us, as is disclosed in dozens of examples in the proceedings of this Association. On so many occasions when this Association has advised change, that change (if it came at all) came only because England did it first." (Address printed in the *Canadian Bar Journal*, October, 1966).

Appendix A

- A-1 *Scarman*, "Family Law", pp. 10-11.
- A-2 "Putting Asunder", p. 136.
- A-3 *Scarman*, "Family Law", p. 3.
- A-4 *Despert*, p. 233.
- A-5 *Scarman*, "Family Law", pp. 6-7.
- A-6 *Scarman*, "Family Law", p. 12. *Le Mesurier v. Le Mesurier* (1895) A.C. 517.
- A-7 *Foster*, *passim*.
- A-8 *Payne*, "Working Paper on Judicial Separation", pp. 17, 72-74.

- A-9 Scarman, "Family Law", p. 13.
- A-10 Scarman, "Family Law", p. 20.
- A-11 Scarman, "Family Law", p. 19.
- A-12 cf. *Travers v. Holley* (1953), p. 246.
- A-13 Payne, "Working Paper on Tortious Invasion of the Right of Marital Consortium" and *Eleventh Report of the Law Reform Committee* (Loss of services, etc.), Cmd. 2017 (1963).

Appendix B

- B-1 (a) *Family Life*, p. 3, publication of American Institute of Family Relations.

"The Johnson Temperament Analysis which the Institute has used for a quarter of a century and which it has shared with many thousands of counsellors in North America will not be available in its present form after the end of this year. It was developed by Dr. Roswell H. Johnson, for 25 years Director of the Department of Counselling at the Institute, and measured eight important traits... A revised form has been developed by Robert M. Taylor, a former associate director of the American Institute of Family Relations, Department of Counselling, with the cooperation of Dr. Johnson. Beginning January 1, 1967, those who want to use the test may order it from: Psychological Publications Inc., 5300 Hollywood Blvd., Los Angeles 90027.

They will find no difficulty making the change since the new Taylor-Johnson Temperament Analysis has the same general form as the older test.

...The test was carefully standardized at the University of Denver and elsewhere. A.I.F.R. psychologists believe it is an improvement which will continue to enjoy the popularity of its predecessor but be even more useful."

- (b) *Training Ministers for Mental Health Work* by David S. Shapiro, Ph.D., The Reverend Richard N. Robertson and Leonard T. Maholick, M.D., *Journal of Pastoral Care*. Vol. XVI, No. 3, Fall 1962, pp. 149-156. This paper is a report of observations of workshops for clergymen conducted by the Bradley Center Inc., a private, non profit psychiatric facility in Columbus, Georgia where research in methods of assessing mental health has been going on for more than 10 years. Address of the Bradley Center Inc., 1327 Warren Williams Road, Columbus, Georgia, 31901.

- (c) *Opening Doors for Troubled People* by David S. Shapiro, Ph. D. and Leonard T. Maholick, M.D., is a more detailed report of the successful outcome of their efforts to devise, simple, ingenious, time-saving techniques for conducting mental health assessments with the use of Data Kits by practitioners in all the helping professions.

- B-2 a. "Two Sex Researchers on the Firing Line", Masters & Johnson, *Life*, June 24, 1966, p. 51.
- b. "A Defense of Love and Morality", Masters & Johnson, *McCalls*, November 1966, p. 102.
- B-3 "Human Sexual Response", Masters and Johnson.
- B-4 "Let Your Husband be a Man and Your Wife a Woman", p. 14.
- B-5 "The Significant Americans", p. 106 and p. 132.
- B-6 "Putting Asunder", p. 140.

- B-7 "Taylor-Johnson Temperament Analysis Manual", Psychological Publications, Inc., Los Angeles.
- B (p. 76) "The Degrading Way I Had to get My Divorce", Nancy Taylor White, Chatelaine, September 1966, p. 29.
- B-8 "Laity: The Church in the House". Bulletin of the World Council of Churches, April 1957, p. 5 (Romans 16:5; II Corinthians 16:19; Colossians 4:15; Philemon 2.)
- B-9 "Love is More than Luck", p. 23 f.
- B-10 "Strange Courtship Customs of the Formerly Married". McCalls, September 1966, p. 94.
- B-11 "Love is More than Luck", p. 33.
- B-12 Ibid., p. 98.
- B-13 Ibid., p. 138 f.
- B-14 Ibid., p. 177.
- B-15 Ibid., p. 185.

Appendix C

- C-1 From "This U.S.A.", by Ben J. Wattenberg, in collaboration with Richard M. Scammon, p. 36. Copyright 1965 by Ben J. Wattenberg. Reprinted by permission of Doubleday & Company, Inc.
- C-2 *Despert*, p. 125.
- C-3 See page 26 of this brief for fuller quotation.

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First Session—Twenty-seventh Parliament
1966

PROCEEDINGS OF
THE SPECIAL JOINT COMMITTEE OF THE SENATE
AND HOUSE OF COMMONS ON

DIVORCE

No. 9

TUESDAY, NOVEMBER 29, 1966

Joint Chairmen

The Honourable A. W. Roebuck

and

Mr. A. J. P. Cameron, M.P.

WITNESSES:

James C. MacDonald and Lee K. Ferrier, *Barristers & Solicitors. The Canadian Committee on the Status of Women*: Mrs. W. H. Gilleland, Chairman; Mrs. J. F. Flaherty, Press Secretary; Mrs. R. S. W. Campbell, Secretary.

APPENDICES:

- 21.—Brief submitted by The Canadian Committee on the Status of Women, Don Mills, Ont.
- 22.—Brief submitted by James C. MacDonald and Lee K. Ferrier, Barristers & Solicitors, Toronto, Ont.

ROGER DUHAMEL, F.R.S.C.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1966

MEMBERS OF THE
SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS
ON DIVORCE
FOR THE SENATE

Hon. A. W. Roebuck, Joint Chairman

The Honourable Senators

Aseltine	Connolly (<i>Halifax North</i>)	Flynn
Baird	Croll	Gershaw
Belisle	Denis	Haig
Burchill	Fergusson	Roebuck—(12).

FOR THE HOUSE OF COMMONS

Mr. A. J. P. Cameron (*High Park*), Joint Chairman

Members of the House of Commons

Aiken	Forest	McQuaid
Baldwin	Goyer	Otto
Brewin	Honey	Peters
Cameron (<i>High Park</i>)	Laflamme	Ryan
Cantin	Langlois (<i>Mégantic</i>)	Stanbury
Choquette	MacEwan	Trudeau
Chrétien	Mandziuk	Wahn
Fairweather	McCleave	Woolliams—(24).

(Quorum 7)

ORDERS OF REFERENCE

Extracts from the Votes and Proceedings of the House of Commons:
March 15, 1966:

"On motion of Mr. McIlraith, seconded by Mr. Hellyer, it was resolved—that a Special Joint Committee of the Senate and the House of Commons be appointed to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either House;

That 24 Members of the House of Commons, to be designated by the House at a later date, be members of the Special Joint Committee, and that Standing Order 67(1) of the House of Commons be suspended in relation thereto;

That the Committee have power to engage the services of such technical, clerical and other personnel as may be necessary for the purpose of the inquiry;

That the Committee have the power to send for persons, papers and records, to examine witnesses, to report from time to time, and to print such papers and evidence from day to day as may be ordered by the Committee, and that Standing Order 66 be suspended in relation thereto; and

That a Message be sent to the Senate requesting Their Honours to unite with this House for the above purpose, and to select, if the Senate deems it so advisable, some of its Members to act on the proposed Special Joint Committee."

"By unanimous consent, on motion of Mr. McIlraith, seconded by Mr. Hellyer, it was ordered—That the order of the House of Monday, February 21, 1966 referring the subject-matter of the following bills to the Standing Committee on Justice and Legal Affairs, namely:—

Bill C-16, An Act to provide in Canada for the Dissolution of Marriage (Additional Grounds for Divorce).

Bill C-19, An Act to provide in Canada for the Dissolution and the Annulment of Marriage.

Bill C-41, An Act to amend the British North America Acts, 1867 to 1965, (Provincial Marriage and Divorce Laws).

Bill C-44, An Act to provide in Canada for the Dissolution of Marriage.

Bill C-55, An Act to provide in Canada for the Dissolution of Marriage.

Bill C-58, An Act respecting Marriage and Divorce.

Bill C-79, An Act to amend the Dissolution and Annulment of Marriages Act (Additional Grounds for Divorce).

be discharged, and that the subject-matter of the same bills be referred to the Joint Committee of the Senate and the House of Commons on Divorce".

March 16, 1966:

"By unanimous consent, on motion of Mr. Stewart, seconded by Mr. Byrne, it was ordered—That the subject-matter of Bill C-133, An Act to extend the grounds upon which courts now have jurisdiction to grant divorces a *vinculo matrimonii* may grant such relief, be referred to the Special Joint Committee on Divorce".

"By unanimous consent, on motion of Mr. Stewart, seconded by Mr. Byrne, it was ordered—That the subject-matter of Notice of Motion No. 11 be referred to the Special Joint Committee on Divorce."

March 22, 1966:

"On motion of Mr. Pilon, seconded by Mr. McNulty, it was ordered—That a Message be sent to the Senate to acquaint Their Honours that this House will unite with them in the formation of a Joint Committee of both Houses to inquire into and report upon divorce in Canada, and that the Members to serve on the said Committee, on the part of this House, will be as follows: Messrs. Aiken, Baldwin, Brewin, Cameron (*High Park*), Cantin, Choquette, Chrétien, Fairweather, Forest, Goyer, Honey, Laflamme, Langlois (*Mégantic*), MacEwan, Mandziuk, McCleave, McQuaid, Otto, Peters, Ryan, Stanbury, Trudeau, Wahn and Woolliams."

LÉON-J. RAYMOND,
Clerk of the House of Commons.

Extracts from the Minutes of the Proceedings of the Senate:

March 23, 1966:

"Pursuant to the Order of the Day, the Senate proceeded to the consideration of the Message from the House of Commons requesting the appointment of a Special Joint Committee of the Senate and House of Commons on Divorce.

The Honourable Senator Connolly, P.C., moved, seconded by the Honourable Senator Roebuck:

That the Senate do unite with the House of Commons in the appointment of a Special Joint Committee of both Houses of Parliament to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either House;

That twelve Members of the Senate, to be designated at a later date, act on behalf of the Senate as members of the said Special Joint Committee;

That the Committee have power to engage the services of such technical, clerical and other personnel as may be necessary for the purpose of the inquiry;

That the Committee have the power to send for persons, papers and records, to examine witnesses, to report from time to time, and to print such papers and evidence from day to day as may be ordered by the Committee, and to sit during sittings and adjournments of the Senate; and

That a Message be sent to the House of Commons to inform that House accordingly.

After debate, and—

The question being put on the motion, it was—

Resolved in the affirmative."

March 29, 1966:

"With leave of the Senate,

The Honourable Senator Beaubien (*Provencher*) moved, seconded by the Honourable Senator Inman:

That the following Senators be appointed to act on behalf of the Senate on the Special Joint Committee of the Senate and House of Commons to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, namely, the Honourable Senators Aseltine, Baird, Belisle, Bourget, Burchill, Connolly (*Halifax North*), Croll, Fergusson, Flynn, Gershaw, Haig, and Roebuck; and

That a Message be sent to the House of Commons to inform that House accordingly.

The question being put on the motion, it was—
Resolved in the affirmative.”

May 10, 1966:

“Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Roebuck, seconded by the Honourable Senator Croll, for the second reading of the Bill S-19, intituled; “An Act to extend the grounds upon which courts now having jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief”.

The question being put on the motion—

In amendment, the Honourable Senator Connolly, C.P., moved, seconded by the Honourable Senator Hugessen, that the Bill be not now read the second time, but that the subject-matter be referred to the Special Joint Committee on Divorce.

After debate, and—

The question being put on the motion, it was—
Resolved in the affirmative.”

J. F. MACNEILL,
Clerk of the Senate

MINUTES OF PROCEEDINGS

TUESDAY, November 29, 1966.

Pursuant to adjournment and notice the Special Joint Committee of the Senate and the House of Commons on Divorce met this day at 3:30 p.m.

Present: For the Senate: The Honourable Senators Roebuck (*Joint Chairman*), Aseltine, Baird, Belisle, Burchill, Denis, Fergusson, Flynn and Gershaw—9

For the House of Commons: Messrs: Cameron (*High Park*) (*Joint Chairman*), Aiken, Fairweather, Mandziuk, McCleave and Ryan—6

In attendance: Dr. Peter J. King, Special Assistant.

The following witnesses were heard:

James C. MacDonald and Lee K. Ferrier, Barristers & Solicitors.

The Canadian Committee on the Status of Women:

Mrs. W. H. Gilleland, Chairman,

Mrs. J. Flaherty, Press Secretary,

Mrs. R. S. W. Campbell, Secretary.

Briefs submitted by the following are printed as Appendices:

21.—The Canadian Committee on the Status of Women.

22.—MacDonald & Ferrier, Barristers & Solicitors, Toronto, Ontario.

At 6:03 p.m. the Committee adjourned until Tuesday next, December 6, 1966 at 3:30 p.m.

Attest.

Patrick J. Savoie,
Clerk of the Committee.

THE SENATE

SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS ON DIVORCE

EVIDENCE

OTTAWA, Tuesday, November 29, 1966

The Special Joint Committee of the Senate and the House of Commons on Divorce met this day at 3.30 p.m.

Senator Arthur A. Roebuck and Mr. A. J. P. Cameron (High Park) Co-Chairmen.

Co-Chairman Senator ROEBUCK: Honourable senators and members of the House of Commons, we are ready to commence. I see a fairly full quorum for which I thank the members who are here.

We have some very fine and distinguished witnesses before us today but before I call on them I would like to read a letter I have received from the Attorney General of Ontario, the Hon. A. W. Wishart. I will omit the first paragraph.

I now inform you that immediately upon receipt of your letter I referred it to senior officials in my Department, in order that the information and views which you request might be collated and prepared for presentation to your committee. This matter is in progress and I should shortly be able to furnish you with the material, which I trust will be helpful to your Committee in its deliberations.

I appreciate your kind invitation to appear before the Committee. It may be possible for me to do so and I shall discuss this matter with you when I am in touch with you again in the near future.

I replied saying we would welcome his personal appearance, and I hope he will deal very fully with the series of questions regarding which, I indicated to him, we would like information and opinions.

Now, honourable senators and members of the House of Commons, we have representatives from the Canadian Committee on the Status of Women. One of these ladies, I believe, lives in Ottawa, and the others are from Toronto.

I understand that the first speaker will be Mrs. W. H. Gilleland, and I would like to identify her for the purposes of the record largely, but also that we may all know something about the positions she has occupied in the past.

Mrs. W. H. Gilleland, Chairman of the Committee, has the degree of M.A. (Queen's) in History and English, specializing in Canadian Constitutional History, and has been a teacher in these subjects. Sometime in 1960 she was appointed member of the Historical and Advisory Committee of the National Capital Commission. She has been President of the University Women's Club of Ottawa, 1950-52, Founder President of Elizabeth Fry Society of Ottawa, Vice President of Canadian Penal Association. She was a member of the Board of Governors, Canadian Welfare, term 1958-60. She has been a member of Speakers' Bureau, Canadian Committee on the Status of Women, and currently chairman of that organization.

Members of the committee, I give you Mrs. Gilleland.

Mrs. W. H. Gilleland, Chairman, Canadian Committee on the Status of Women:

Honourable chairman and members of the Special Joint Committee of the Senate and House of Commons, I thank you very much for this opportunity of speaking to our brief, and particularly I wish to say how much I appreciate your having made available to us your proceedings up to a couple of weeks ago, which gave us a most comprehensive account of the divorce law of Canada, including the Quebec law, and the British law as of 1965, as outlined by Mr. G. B. R. Whitehead in the most recent copy of the proceedings which I have.

We find it most encouraging, since we sent in our submission quite a while ago, to find that the climate of public opinion seems to be very liberal, well in advance of what was expected of it: Indeed, public opinion is often puzzlingly surprising.

We are encouraged to find that some of the ideas we thought were rather daring as well as original are in fact neither. We had felt that the law in Canada regarding condonation and collusion was rather ridiculous, and then we learned from Mr. Whitehead's submission that the British law of 1965 is making some sense out of these two terms.

We are going to speak to some of the points of our brief, and the members of our committee will speak respectively on one topic or another.

To my immediate right is Mrs. J. Flaherty of Ottawa, who is currently President of Elizabeth Fry Society of Ottawa and has been associated with the National Executive of both the National Council of Women and the Canadian Federation of University Women. The next member of our group here is Mrs. Campbell of Toronto, who is so surrounded by law in her house—by her husband and by her brother, called to the Supreme Court of Manitoba a week ago today—that she should have absorbed some ideas after the particular kind of life she has led.

Since we represent the Canadian Committee on the Status of Women, we are obligated to spend most of our time speaking from the point of view of women; but this does not mean that we as women, possessed of husbands, are not well aware of the other side of the story.

We are however strongly of the opinion that, whatever the husband suffers, under the present divorce law there are peculiar aspects of the system which are discriminatory as far as women are concerned, and discriminatory in a way that we find exceedingly unfair, since in our opinion it violates the principle of the marriage partnership, which is that each suffers with the other, or benefits as the case may be.

Under the divorce law, however, the status that is accorded the wife by her husband and by society is voided by the qualification of domicile for a woman suing for divorce.

I will ask Mrs. Flaherty to speak to the point we make in paragraph 2, beginning at the bottom of the page. My colleagues have asked me, Mr. Chairman, to find out whether, since we are speaking to some points only, the brief should be read into the record.

Co-Chairman Senator ROEBUCK: It is not a long brief. There are some briefs that are presented which cannot be read for the reason that time does not permit. Read what you think will be of interest to us.

Mrs. J. Frank Flaherty, Elizabeth Fry Society, Ottawa: Paragraph 2 reads:

2. To date our major submissions have concerned the rights of women in various fields of taxation. However, the correspondence received from a large number of individuals across the country on the subject of taxes revealed discrimination and injustices in the law on divorce. As an example, under the Divorce Jurisdiction Act (R.S.C. 1952 c.

84) a married woman who has been deserted by, and has been living separate and apart from her husband for a period of two years or more, may sue for divorce only in the province in which, immediately prior to such desertion, her husband was domiciled regardless of where the wife is now domiciled. We recognize that this rule is an improvement over the previous one which required the wife to sue for divorce only in the province in which the husband was domiciled at the time of the petition. Nevertheless, the present statute may still impose hardship on the wife.

Such a married woman who has been deserted is presumably independent, supporting herself and a number of children in a new environment, free from the painful associations of her married life. She may be living far from her home and yet if she is to bring suit for divorce she must sue in the province in which her husband was domiciled at the time of the desertion.

Now, Canadians are a mobile nation, and a woman should not be tied down in the matter of domicile but should be able to sue for divorce, whatever the grounds, where she herself is living.

The universal declaration of human rights establishes the principle of the equality of spouses. A couple may have been living in the Maritimes and the husband deserts his wife and ends up in Vancouver. If she wishes to bring suit for divorce she must file her petition in the Maritimes, and this creates a heavy financial burden which she cannot assume. She might not be able to make the necessary arrangements for an indefinite period. The husband's domicile moves with him, no matter how mobile he may be.

We repeat that the law should recognize, as domicile for the purpose of filing suit for divorce, the place in which the wife now makes her home.

Mrs. GILLELAND: I refer you now, Mr. Chairman and members of the committee, to the bottom of page 3, the paragraph dealing with background, under the heading "Religion". This has reference to those whose religious principles are against divorce in any form.

BACKGROUND

RELIGION

4. We submit that many of the aspects of the present divorce law are based on the rural Christian ethic of an agricultural society which is not generally valid in today's predominantly urban, secular, industrialized society. Increasing numbers of people now take the view that governments should not legislate morality. Whether or not this view is valid, we believe that those whose religious principles are against divorce in any form should no longer be able to impose restrictions on the personal lives of those whose principles differ in this respect. This is particularly true in a pluralistic democracy where there are many different systems of morality.

In this respect we are greatly impressed by the brief submitted by the Seventh Day Adventist Church, whose representative substantiated in that submission this particular point of view that we are expressing here. His submission seems to us a particularly effective one in view of the fact that his liberal views were in no way, in his opinion, in conflict with the views of his Church, which is absolutely against divorce.

Paragraphs 5 and 6 go together, and there are some points here that I would ask Mrs. Campbell to discuss.

Co-Chairman Senator ROEBUCK: Please read them.

Mrs. Dorothy Campbell, The Canadian Committee on the Status of Women:**CHANGING MORES**

5. Marriage is a complex association of personal, social and legal factors. On the personal side, marriage at its best provides love, both spiritual and sexual, economic advantages to both parties, and status. Society's basic interest in the preservation of marriage is the very preservation of society itself through the bearing and rearing of children and the transmission of the culture of the society. One of the most important aspects of our society's culture is its institution of law. It is imperative that we recognize the necessary relationship between law and social change. Therefore, the legislation which may be passed as the result of your committee's work must not only remedy the deficiencies of the present divorce law, but make the remedy fit into a society in which the roles of husband and wife are greatly changing, one in which the traditional religious and moral patterns of thought are frequently rejected, and in which the concept of marriage "until death do us part" is no longer universally held.

WIFES CHANGING ROLE

6. Already, a wife's role has changed greatly. Our grandmothers had a limited education, married early, bore a greater number of children, raised them by tireless labour, and usually died early. They believed, and society insisted, that marriage was for life and for the main purpose of raising children. Today, women have more education, more employment opportunities, fewer children, more leisure, and a longer life span. Therefore, the divorce law based on the agricultural society of our grandmothers is not only an anomaly but a cruelty to many modern women.

As we say in these paragraphs, the role of the wife today is vastly different from that of her grandmother, who was regarded as a chattel, whose opinions were regarded as unimportant, if she was allowed to have opinions.

Today young people come to marriage having had equal freedom and equal opportunities to be educated, and marriage is contracted and solemnized as a partnership. Partnership equality of marriage is recognized by society, by the Church, by business but not by the law.

It used to be that a girl was given a liberal education and stayed in her father's home until she married, when she went to the home of her husband. Today, with much more education, married women are in the labour force, in the business world, and they have a great deal of responsibility. Today, when a woman marries she enters into a personal and social partnership. She does not expect to be demoted in status; she expects to be treated in fact, by the law, as she is treated by her husband.

The name of our organization, the Canadian Committee on the Status of Women, would indicate our bias. We are concerned with the status of women as they are regarded by the law, and that status ought to be the status of equality in the partnership of marriage.

The partnership of marriage should be recognized and women should have equal opportunities in the filing of suit for divorce; but the law does not recognize the equality of the partnership of marriage. The anomaly is that the real status of women today bears no relation to the status of women when these laws were made.

The content of the laws made today should recognize the status of women as it exists in fact, so that women should not be penalized or held in less regard by the law than is the other partner of the marriage.

Mrs. GILLELAND: I would like to make a comment. As I turned to my file not more than thirty minutes ago I came across a copy of the *Debates of the Senate* March 24, 1964. The speaker was Senator Fergusson, and in the course of her remarks she had this to say, which is apropos of the subject we are discussing this afternoon:

On the other hand, when the rights of married women to an independent domicile was discussed, I had little to say because, as you know married women in Canada are not entitled to an independent domicile. There is an exception under the provisions of the Divorce Jurisdiction Act of 1930 which permits a woman who has been deserted by her husband for two years to bring a divorce action against him in the province where she was deserted, even though he may no longer be domiciled in that province.

In other words, in the matter of domicile, women do not have equal rights with men.

The next paragraphs are 7 and 8:

RECOMMENDATIONS

7. Although it is apparent to most people in our society that our divorce laws are outmoded, the basis for reforming them is still not easily arrived at. Should we retain the traditional matrimonial offences such as adultery, cruelty, desertion? Or should we use the argument expressed by Mr. Douglas F. Fitch in his article "As grounds for Divorce, Let's Abolish Matrimonial Offences" (*Canadian Bar Journal*, April 1966) where he advocates permanent marriage breakdown as a criterion for granting divorce? Perhaps a combination of the two would more aptly reflect public opinion.

8. This Committee believes that the traditional matrimonial offences always brand one marriage partner as the guilty party, although in most cases it is certain that both partners have contributed to the marriage breakdown. Yet, it is easier to judge the evidence of a matrimonial offence than it is to determine when a permanent marriage breakdown has occurred. We recognize the difficulty of defining with precision the division between a permanent marriage breakdown and divorce by mutual consent. Indeed we do not support the extreme view of divorce by mutual consent. For this reason, we recommend that more research should be carried out in order to identify criteria which could be used as a basis for determining when, in fact, a permanent marriage breakdown has occurred.

We are not making any comment on 7 and 8. We are going to do something upside-down and begin with the last five lines: "For this reason, we recommend that more research should be carried out in order to identify criteria which could be used as a basis for determining when, in fact, a permanent marriage breakdown has occurred." Mrs. Flaherty will identify the resources we think are available.

Mrs. FLAHERTY: We have evidence in judicial separation; secondly we have the records of various welfare and family services; thirdly we have the records of family courts and student research for statistical purposes.

Mrs. GILLELAND: There are three sources that can amplify the statement we make in the last sentence in paragraph 8. Mrs. Campbell will deal with the first part of paragraph 8, which deals with the matter of the guilty party in divorce.

Mrs. CAMPBELL: Our committee believes that although in most cases it is certain that both parties do contribute to the marriage breakdown, yet it is easier to judge the evidence of a matrimonial offence than it is to determine when the breakdown has occurred.

It is our view that the undesirable features of the current law of divorce, which must be proven by adultery, should not be carried over into the new law. The most undesirable feature, we think, is the necessity of naming the innocent party.

The present law not only assesses the guilt of one party, but fails utterly in accurately assessing that guilt. In fact, each divorce fails in this way because not even the wisdom of Solomon could cope with the difficulties involved. Moreover, establishment of the guilt has no constructive value. This runs counter to the ethics of society and is damaging to husband, wife and children.

It is our wish to eliminate guilt as a criterion for the granting of divorce. If we consider the breakdown of marriage as grounds for divorce, and put into proper perspective the ways of establishing proof of breakdown, then we find that adultery is not necessarily proof of the breakdown of marriage.

In some cases it is possible for marriage to survive infidelity; in other cases it is not; but it matters not whether the evidence indicates a simple or a multiple offence, since the social mores will help to establish the force of the proof on the ground of infidelity.

Adultery may be a proper proof of the breakdown of a marriage, but it should not be essential to attach guilt to the other marriage partner, because divorce granted by reason of the breakdown of the marriage, whatever the proof may be, is divorce granted on the proper ground.

Our law at the moment creates the necessity for, and presupposes, a guilty party, a party guilty of adultery. If there is no party guilty of adultery, then in effect one party is often faced with the need to assume guilt in order to solve the problem.

The necessity of this guilt attaching to divorce creates a stigma which goes with the divorced party and seriously affects the future life of that person. So far as the man is concerned, the stigma of divorce could, under certain conditions, jeopardize his career; and for the woman divorce has always carried with it the stigma of failure: she has been unsuccessful as a woman and a person; and this stigma can not only influence the attitude of others towards her, but affect her own esteem for herself.

At best a divorce is going to bring painful feelings of guilt to each party, but it adds unnecessary injury to the assessment of guilt declared by the court. Divorce is rarely easy for children to accept. That it can cause feelings of rejection, blame and loss when one parent is named as the guilty party is an unnecessary cruelty to the children; and a child may continue for years to blame one parent for everything that goes wrong, when he does not understand the situation.

Mrs. GILLELAND: Several people have been pointing out to us in the last few days—since our submission has been kicking around our house—that the wife, who is the person adjudged the non-guilty party in the court, the husband being usually the guilty one in cases of adultery, finds that, though technically she is innocent, this fact does not altogether relieve her of a sense of guilt on her own part, but rather tends to increase it. For the wife knows full well that she is no paragon of virtue: nobody is, man or woman.

I am sure it must be distressful to a woman to have it said that her husband is to blame for everything, and to leave the impression that she is altogether innocent. This court guilt, this legal guilt, increases the sense of personal guilt which the wife feels, and more so when her husband has assumed the guilt of adultery for divorce purposes.

We come to paragraph 9.

9. We are greatly concerned that the recommendations from your committee should be very flexible in any definition of the term "perma-

nent marriage breakdown". What must be taken into consideration is the point of tolerance of the particular individual when she believes her marriage to be past reparation because of a situation—any situation—which is really intolerable to her, and not the court's concept of what the individual ought to tolerate.

Our idea that tolerance is a variable is supported by Mr. Whitehead on page 58, paragraph 8, where he refers to the sort of thing that one group in the community can tolerate as opposed to other groups. He says that ideas as to what conduct is tolerable and what is not differ considerably; and he goes on to give examples, particularly of the southern European father who is master in the house and whose family's acceptance of his conduct would be normal for them, at least up to a point.

That point, however, can be extended too far, because the children are moving into Canadian society faster than he is, or his wife may be getting acquainted with Canadian culture more readily; and so in the particular example that Mr. Whitehead gave there is a limit, and therefore it would be in order for the wife to sue for divorce when the husband's conduct became intolerable.

Mr. Whitehead was showing that there are differences, in the toleration of cruelty or of other insufferable behaviour, as between groups; and this we feel is a substantiation of our ideas of the tolerance that must be accorded to individuals. It is like the threshold of pain, which is suffered by individuals in different degrees.

Next is paragraph 10.

10. To what degree the interpretation of the concept of the permanent marriage breakdown, as grounds for divorce, should be defined, and the degree to which it should be left to the courts, we do not know. The thing we fear is narrowness of definition in the first case and narrowness of interpretation in the second.

We do believe that the breakdown of the marriage partnership is the best measuring stick we have found for establishing grounds for divorce. But we do not know, I may add, how to associate with this the other grounds we have set out in paragraph 3, including incest, drunkenness, and criminal records of certain kinds.

We do not know how that fits in, or can be made to fit in properly, with the major grounds of whether or not the marriage is actually broken down. But we do not think we need to know, and it is not our job to know; that has to be decided by those who are learned in the law.

Co-Chairman Senator ROEBUCK: You would leave it to the judge?

Mrs. GILLELAND: I think so, Mr. Chairman; nor would we undertake to propose a definition of any legal point. Now we said at the beginning we thought that the law respecting collusion and condonation was silly, and we discuss this in paragraph 11.

ANCILLARY PROBLEMS

11. In addition to the basic question of grounds for divorce, there are many ancillary problems, for example:

- (a) Collusion and Condonation: The present laws would seem to demand blameless conduct on the part of the wife if she hopes to win a divorce. Even more absurd is the implicit condemnation of the wife who is aware of adultery on the part of her husband and "condones" it in a practical effort to re-establish a good marital relationship; and there is further absurd condemnation for the wife who "has been guilty of unreasonable delay in presenting or prosecuting" action for

divorce. How, other than by condoning and/or by delaying, could a wife try to save the marriage and avoid the pain of family breakup. Of course, this also applies to the husband. We believe that it should not be considered collusion if the husband and wife make reasonable arrangements before the hearing of the suit, about financial provision for one spouse, guardianship of the children, and division of personal and real property. The law of collusion should only apply where the parties conspire to put forward a false case, or to withhold a just defence, or where one party uses the divorce courts to bribe the other party.

- (b) Domicile: We submit that divorce law should take into account the mobility of twentieth century Canadian society. For example, many men are transferred to branch offices, workmen are relocated to high employment areas, service men are transferred to new posts. A woman should not be tied down to her husband's domicile, but should be able to institute proceedings of divorce in the jurisdiction where she has been residing.
- (c) Uniformity: We believe that the grounds for divorce should be uniform throughout Canada; that is, if Parliament continues to grant divorce, the grounds should be the same for parliamentary and non-parliamentary divorce; and that the rules governing divorce should be the same for all Canadians, men and women, in all provinces.
- (d) Maintenance and Alimony: We recognize that this question may not be within the Federal Government's jurisdiction, as there is some doubt as to whether or not it can be considered ancillary to the right to grant divorce or whether it comes under the province's right of "property and civil rights". We submit that it is inseparable from divorce, and that your committee should make some recommendations to clarify the situation.
- (e) Guardianship of Children: Adequate provision should be made for the welfare of the children of the marriage.
- (f) Cost of Divorce: The cost of divorce should be reduced by simplified divorce proceedings, and by the greater use of legal aid.

There is reference in the foregoing to bribery. Now there may be differences of opinion as to what constitutes a bribe, and Mr. Whitehead dealt with this point also. He pointed out that in the British law on desertion, which requires a three-year period, they have instituted a maximum of three months for cohabitation.

As far as we understand the present situation, if that were adopted it would postpone the whole divorce proceeding, and up to this point at any rate it has not been considered seriously previous to the sitting of this committee. It has never been considered seriously as a way of preventing divorce; because, if you are going to consider the rehabilitation of the marriage, if the parties are to contemplate restoration and the rebuilding of the marriage, it is idle to think that this could be accomplished without a resumption of all the habits of married life—not merely being there and having meals but also sexual intercourse.

It seems to us therefore that the suggestion Mr. Whitehead made in discussing the British law is a very sensible one if the idea is to encourage the parties to get together and avoid a divorce.

Co-Chairman Senator ROEBUCK: You are advocating a delay of some kind?

Mrs. GILLELAND: No. We are advocating that in the case of desertion we should adopt the English 1965 plan of making it possible for those who wish to

use this maximum period of three months to do so, without further extending the three-year period required in respect of desertion.

Co-Chairman Senator ROEBUCK: The English law provides that in cases of desertion if the parties come together for a period of three months, as a sort of trial reconciliation, that time shall not be deducted from the period of desertion when later on one party pleads there has been desertion for a certain length of time. That time is excluded because it was spent in an effort to re-establish themselves.

Mrs. GILLELAND: This is the very thing we think would be useful in Canadian law if desertion is established as a ground for divorce. It would be useful in preventing the kind of divorce that is sought in a hurry. It might help if the parties had an opportunity to take advantage of this interlude.

Co-Chairman Senator ROEBUCK: We will bear that in mind.

Mrs. GILLELAND: There is one other thing and it is apropos of this idea. The scholarly brief presented by the United Church of Canada is one for which we have great admiration, although we saw it only last evening. The fact that that large and powerful body has made the kind of submission it did is bound to influence Canadian opinion.

There are, however, two points on which we would have to say we could not agree. The first occurs on page 8, paragraph 28 of their brief, where they say they would like to have established special marital court procedures to deal with distressed marriages, the primary concern being the preservation of marriage and family life for the welfare of society. For this purpose they say that court procedure should make certain provisions, and they make five suggestions.

We wish we could agree with the first two. The first is means whereby either consort could require the other to participate in conciliatory procedures with a view to avoiding further legal proceedings. In our experience with Elizabeth Fry work, dealing with a multitude of people having marital problems, we are led to the conclusion that you would often fail. We do not see how you could require it. I do not think you could make it compulsory.

Co-Chairman Senator ROEBUCK: You could make it a requirement for the applicant for divorce to attend on a conciliation procedure as a pre-condition of his being heard.

Mrs. GILLELAND: That is true, but I doubt very much whether it would have a beneficial result. In some cases it might, while in others you would not gain anything. However, if you gained anything in a sufficient number of cases it would be worth while. It would not always be of value, but that does not say it would not be advisable for those who would profit by it.

The second point is that an attempt at conciliation be compulsory as a requisite to the obtaining of a separation or divorce.

We are doubtful of the value of this, having had experience with psychiatric services through the Elizabeth Fry Society. When you feel that a girl needs psychiatric service, the first thing needful is that she should have your confidence and you should have hers. Then you delicately persuade her to go to the psychiatrist and you go with her the first day. But to tell her outright "You have to go" is to waste your breath.

We feel that the present law, much as we have condemned it, has one reasonable feature—a time span of six months between the decree nisi and the decree absolute. We are opposed to a delay of three or five years before remarriage can take place as being a frightful infringement of human rights and an indignity to any person, man or woman, whatever sins he or she has committed that have brought about the breakup of marriage and the process of the divorce court.

Co-Chairman Senator ROEBUCK: A long delay invites a common-law union.

Mrs. GILLELAND: Yes; and common-law unions are too common by far now. We should get the best divorce law drawn up now. The cost may result in the continuance of the common-law setups for those who cannot meet that cost, so that the less complicated it is, the better. What law is there that is not complicated? But the less costly the procedures, the more democratic will be the law that we come up with. We cannot be totally democratic, and even the law cannot be perfect.

In conclusion, we suggest that the public in general seems to be ready to accept a radical change in our divorce law. We recognize public acceptance, and this kind of acceptance does not exist for the current law.

If there is radical change, there may not be general enthusiasm for it; but there is evidence of a new kind of tolerance for a difference of opinion, and a marked unwillingness of people to impose upon others the limitations they impose on themselves in the matter of divorce.

We believe there is a solid conviction that the law is archaic and must be revised to meet the needs of the twentieth century. Once upon a time a little girl asked me: How does law begin?

Co-Chairman Senator ROEBUCK: Were you able to answer?

Mrs. GILLELAND: No, I was not. But we discussed it and the decision we came to was that it began in the minds of people.

Co-Chairman Senator ROEBUCK: Does that conclude your brief?

Mrs. GILLELAND: Yes.

Co-Chairman Senator ROEBUCK: Do the other ladies speak to us, or have you given us your message?

Mrs. FLAHERTY: One thing we are concerned with, Mr. Chairman, is No. 7 of the summary of conclusions and recommendations, and that is that the grounds for divorce should be uniform throughout Canada. If Parliament continues to grant divorce, the grounds should be the same for parliamentary and non-parliamentary divorce, and the rules should be the same for all Canadians, men and women, in all the provinces.

Co-Chairman Senator ROEBUCK: Thank you for that suggestion. Mrs. Campbell, have you a final word?

Mrs. CAMPBELL: As regards maintenance and alimony, we recognize that this question may not be in the federal Government's jurisdiction as there is some doubt whether or not it can be considered ancillary to the right to grant divorce, or whether it comes under property and civil rights in the provinces. We are submitting it is inseparable from divorce, and the committee should make some recommendations to clarify the situation.

Mrs. FLAHERTY: We are concerned also with the cost of divorce which should be reduced by simplified divorce proceedings and the greater use of legal aid.

Co-Chairman Senator ROEBUCK: Does legal aid in the provinces extend to divorce?

Mrs. FLAHERTY: The provinces at the moment are reviewing the legal aid provisions and it may be that divorce will in some cases be eligible for legal aid. It is up to the provinces to make the decision and we hope they will consider divorce among the things needing assistance.

Co-Chairman Senator ROEBUCK: Perhaps some members of the committee would like to ask questions.

Senator BELISLE: From your vast experience, Mrs. Gilleland, would you express an opinion as to what is the real evil causing so many divorces? Is it lack of preparation for marriage? Is it, to use a word that is so often heard, a too

liberal social life? Is it a decline in faith on the part of either of the parties. What is it, in your opinion? What is the greatest evil of all?

Mrs. GILLELAND: I have seen and dealt with women in a great many broken marriages in my association with Elizabeth Fry, because some marital problem led them eventually to jail as well as the divorce court. Their criminal offences are different from men's. Many of them have lived in the midst of incest and habitual drunkenness on the part of the husband, and they are involved in it too, but I cannot think of any single common denominator that applies to hundreds of women that I have dealt with.

Senator BELISLE: I am speaking of those over twenty-one.

Mrs. GILLELAND: I certainly would say those would be contributing factors.

Senator BURCHILL: What about the mother working in a highly industrialized job? Many of these people did not have the advantages of such homes as many others come out of, and that may have something to do with it.

Mrs. GILLELAND: Many of the mothers we have encountered in social work find themselves in jail because their husbands had deserted them. I cannot think of an exception to that rule, so my experience is limited to wives who had to work from the sheer necessity of getting bread, butter and milk.

Mrs. FLAHERTY: This would be a good field for research. This kind of thing could be found in the records in regard to judicial separation. Many times does the request for judicial separation occur where both husband and wife are members of the labour force, and in many cases we find the wife actually putting forward more of an effort to be a wife than the husband is in trying to play his part, because she is not taking her responsibility as a matter of course. She is trying to hold on to two jobs, whereas many women can stay at home and play bridge. The woman in the labour force works harder at being a mother and home-maker than the one who can take a job or leave it alone.

Mrs. GILLELAND: And she is subject to the criticism of the next-door neighbour who is not going to work.

Senator GERSHAW: Do you think drug addiction and alcoholism are big factors?

Mrs. GILLELAND: Yes.

Senator GERSHAW: It is a big factor?

Mrs. GILLELAND: Yes. In Ottawa we do not have much drug addiction, but alcoholism is a No. 1 killer. I think it is the thing that comes closest to being the common denominator.

Mrs. FLAHERTY: And this is where tolerance of the individual comes in. Some women could tolerate for years an habitual drunkard or alcoholic, whereas there are some women who could not tolerate him for six months. It seems therefore that degree of tolerance is a factor in determining whether a marriage will break down or not.

Mrs. GILLELAND: A girl I knew well told me—she did not put it this way—that she was now on the way to becoming an alcoholic; and she did become an alcoholic. She said that when her husband deserted her the thing that really burned her up was the fact, not that he took everything out of the house, but that “everything” included her sewing machine. She was very good in jail, and under favourable conditions I do not see how she could have helped being a good home-maker. But she was not salvaged.

Mr. AIKEN: Would you say that, since various people have different degrees of tolerance to cruelty, the definition of cruelty, if we were going to include it, should be taken to the point where it would be a question of fact for the court to determine what was cruelty to that particular woman in a given case?

Mrs. GILLELAND: That is exactly it.

Mrs. FLAHERTY: We have made that point in the brief, and that is why we stress that marriage breakdown should be a ground for divorce. To some, what I would consider to be cruel might not be cruel, whereas if you had the principle of permanent marriage breakdown, where each party had reached the end of his or her tolerance and there was no hope of saving the marriage, and there was absolutely nothing left to save, it could be considered that the marriage had broken down irretrievably. There are certainly differences between women from the point of view of what one can stand and another cannot.

Mrs. GILLELAND: There is another point in relation to tolerance which we were discussing yesterday. To please her husband a woman will tolerate some particular peculiarity for a long time, then suddenly comes the cut-off, though it does not necessarily lead to divorce.

Co-Chairman Senator ROEBUCK: The last straw that breaks the camel's back.

Mrs. GILLELAND: Yes. My husband is a prompt person and I am prompt, so that there is no problem in my being ready when he is ready to go somewhere. One day however, not many years ago after fifteen or twenty years of married life, I was not ready and he was quite surprised, though I must say not angry. But suppose you carried this into a serious area: what would you find? I saw that somebody brought up the question of the approach to the marital act. Now what one party will find acceptable another will not, and is something I would like to apply to that kind of serious incident.

There is a point where one will say: We won't have that sort of thing any longer. She has been going along with it and maybe she is not angry, but she is tired of that particular thing, and persistence in it might lead to divorce.

Senator FERGUSON: Do you consider lack of education, or lack of money or the inability to handle money properly, as being among the causes of the breakup of marriages?

Mrs. GILLELAND: Yes. The misuse of credit can have bad results too. A woman can become depressed from overspending, and if the husband takes a so-called moonlight job to meet the situation they are not likely to have the necessary time for communication. Quite apart from the money, I think this can be exceedingly damaging to communication between the partners. If you have no time you cannot talk.

Co-Chairman Senator ROEBUCK: I believe that Mr. McCleave would like to ask a question.

Mr. MCCLEAVE: I would like to put a very practical example to the ladies. This involves a marriage where there are three children. The husband suddenly leaves the home and is gone for a long time. During his absence he does not support either his wife or his three children, and any effort made to get him to support the children is unsuccessful. At the end of three years he returns, announces that he has read about the marriage breakdown theory, and says he is going to go and see a lawyer and get a divorce. He will sue her. Now what?

Co-Chairman Senator ROEBUCK: Would you give him the divorce?

Mr. MCCLEAVE: This woman has tried to keep the family together, to maintain a respectable home, and this bum, if I can so dignify him, comes and says, "I want to end it; this marriage has broken down".

Senator ASELTINE: Would she not be well rid of him?

Mrs. FLAHERTY: If she wished, she would be able to sue him on grounds of desertion, if desertion were a ground of divorce.

Mrs. GILLELAND: Are you asking whether I would give a divorce on the grounds of marriage breakdown?

Mr. McCLEAVE: On the ground stated in the petition, that the marriage has broken down.

Mrs. GILLELAND: I would rather have her petition, if I had a choice.

Mr. McCLEAVE: No. We had this question presented to us by a group of church people who had thought the problem over carefully and we drove them into this corner—and they were prepared to do away with the adversary system.

Mrs. GILLELAND: How would he know the marriage was broken down?

Co-Chairman Senator ROEBUCK: He knew that because he had broken it up.

Mr. McCLEAVE: I put the problem of the marriage breakdown theory in its most extreme form, I grant that.

Mrs. FLAHERTY: By that time we would have established rules for marriage breakdown and it would have to be proved.

Co-Chairman Senator ROEBUCK: He proved it when he broke it down himself. He says: "I will not live with this woman again. I want a divorce. She does not want a divorce but I want it. The marriage is broken down."

Mrs. GILLELAND: Why doesn't she want it?

Mr. McCLEAVE: She is a respectable woman and has tried to put a proper façade on life and keep up a respectable home.

Mrs. GILLELAND: And if he takes proceedings on the ground of marriage breakdown is that a smear on her, in her opinion?

Mr. McCLEAVE: Madam, I don't know, because we have not passed a marriage breakdown law in Canada that I know of.

Mrs. GILLELAND: What would be her point of view? Does she consider divorce a smear on her respectable façade?

Mr. McCLEAVE: I would think so.

Mrs. FLAHERTY: Our idea of marriage breakdown is that both parties would have to be convinced that the marriage had broken down, and in the example that Mr. McCleave has given us it is the husband who thinks it is at an end. But if the wife is willing to take the man back the marriage is not broken down.

Mr. McCLEAVE: That is not quite so, madam. The group of church people who came here had thought this question through carefully and the argument was that even if one party wished to continue the marriage, the marriage had broken down because the other partner no longer wished it. I wanted to put it to you in the spirit of devil's advocate but also because women are the traditional guardians of morality, and I wished to see your reaction.

There is another question. One program on Sunday night brought out the financial needs involved in divorce and the necessity for broader grounds of divorce. Many people's lives were wrecked because they did not have money to seek their remedies. Your own brief says this is an obvious need and I fully agree; but how are we to achieve it? Divorce is costing \$300 to \$1,000, and one lawyer in Montreal charges that as a minimum. He makes a fat living, earning as much in a few days as members of the Senate earn in a year. But what can we do to provide cheaper divorces in Canada?

Mrs. GILLELAND: I don't know anything about law. I do not know how to make the proceedings shorter or how to ascertain the grounds more quickly.

Mrs. FLAHERTY: I would think that if the grounds were made less complicated the expenses of witnesses and that kind of thing would be cut down; and if legal aid were available to the person seeking divorce this would reduce the cost.

Mrs. GILLELAND: I thought some time back, Mr. Chairman, that this could be achieved by marriage breakdown. When I read the reports of the first two or three proceedings I began to think there was going to be the same old require-

ment of proof via whatever the method might be outside of adultery, and desertion might not be so hard to prove.

Mr. McCLEAVE: Marriage breakdown might be so difficult that you might have people sitting around all day blaming each other. In one American state legal aid is extended to matrimonial cases, but I think that for the most part legal aid tries to get away from it. To me it is compellingly a financial question.

Co-Chairman Senator ROEBUCK: We must go on, but before you leave, ladies, I want to be clear on what your answer was to Mr. McCleave's question. We have to pass upon it, and it is a serious matter. Do you say that in marriage breakdown application must be made and consent given by both parties, or would you allow the court to act on the application of either party, the guilty one included?

Mrs. GILLELAND: I would give that woman the divorce. There are many times when you could not get the consent of both parties because somebody is constitutionally "ornery".

Co-Chairman Senator ROEBUCK: That is the answer of all three of you?

Mrs. FLAHERTY: I would say the court should be the one to determine whether marriage breakdown has occurred.

Co-Chairman Senator ROEBUCK: I want to hear from my Co-Chairman.

Co-Chairman Mr. CAMERON: On behalf of the committee I wish to thank Mrs. Gilleland, Mrs. Campbell and Mrs. Flaherty, a good Irish name, and congratulate them on what they have accomplished in the presentation of the brief we have heard this afternoon, speaking for the Canadian Committee on the Status of Women. It was a well organized and well thought out document, and I assure you, ladies, we are all particularly impressed by the answers you gave when questioned by various members of the committee. On behalf of the committee, through you, Senator Roebuck, I would express appreciation to these ladies.

Co-Chairman Senator ROEBUCK: We have two more witnesses to hear. The first is Mr. Lee K. Ferrier, who is a member of the Ontario Bar and belongs to the Advocates' Society, the Canadian Bar Association, the York County Law Association, and the Lawyers' Club. Mr. Ferrier graduated from McMaster University with a Bachelor of Arts degree in 1959, and from the University of Ottawa with an LL.B. degree in 1962. He articulated with Gordon W. Ford, Q.C., in Toronto, attended the Bar Admission Course at Osgoode, and was called to the Bar in April, 1964. He then continued in association with Mr. Ford, and was joined in practice by Mr. MacDonald under the name of Ford, MacDonald and Ferrier. In July of 1965 he became a partner in MacDonald and Ferrier. He is the contributing editor on the subject of "Infants and Children" now being compiled for the new edition of the Canadian Abridgement. Mr. Ferrier.

Mr. Lee K. Ferrier: Thank you, Mr. Chairman. Our plan was to have Mr. MacDonald speak to the committee at the conclusion of which we would both answer any questions you might wish to ask.

Co-Chairman Senator ROEBUCK: For the record, let me tell you who Mr. MacDonald is. Mr. James C. MacDonald was raised in Vancouver and graduated from the University of British Columbia in 1957. He articulated with Messrs. Clark, Wilson & Company in Vancouver, and was called to the British Columbia Bar in October, 1958. He continued in practice with this firm until 1963, when he became associated with Mr. Ford in Toronto. He was called to the Ontario Bar in February, 1964, practised in association with Ford, MacDonald and Ferrier, and is now a partner in MacDonald and Ferrier. He is Chairman of the Ontario Subcommittee on Family Law in the Canadian Bar Association, is writing a

Master's thesis for the Osgoode Law School on "Matrimonial Desertion and Cruelty," and is the contributing editor for the new Canadian Abridgement on the subject of "Husband and Wife," and "Divorce and Matrimonial Causes".

So Mr. MacDonald is very competent to give us advice on what we should do at the present time. Mr. MacDonald is also an instructor in the subject of Family Law for the Bar Admission Course of the Law Society of Upper Canada, at Osgoode hall.

Mr. James C. MacDonald: Messrs. Chairmen, honourable senators and members of the House of Commons, members of the committee: Mr. Ferrier and I are appearing as individuals and not as representatives of any organization, and that we should be here in our private capacity is a privilege we appreciate. It is hoped that the extension of this privilege will not prove wasteful, and that our printed briefs will be of some assistance to you in reporting to your respective houses.

In this presentation I intend to summarize the printed brief and to make a few short supplementary comments on our second recommendation. The recommendations consist of a general and a particular plea for consideration by Parliament of the theory of Breakdown of Marriage. They are set out on the front page of our brief, and I will read them in a moment. However, before I do, I wish to make one small but important amendment. The word "desertion" at the end of the fourth line in the clause appearing in the second paragraph should be deleted and the word "conduct" put in its place. The recommendations now read:

1. That the Special Joint Committee of the Senate and House of Commons on Divorce give priority in its deliberations to the theory of breakdown of marriage and cause inquiry to be made into the desirability and feasibility of amending the law of divorce in Canada to provide that no marriage shall be dissolved unless it is shown to the satisfaction of a court of competent jurisdiction that the marriage has irretrievably broken down.

2. That in considering the implementation of the theory of breakdown of marriage the said joint committee give attention to the desirability and feasibility of recommending to Parliament that the following be enacted as the sole ground for divorce in Canada:

An application for dissolution of marriage may be made to the court by either spouse if at the date of the application the spouses are living separately by reason of their mutual consent or the conduct of one of them, and the court shall pronounce a decree dissolving the marriage upon such separation being established provided that

- (i) from time to time or continuously within the three years immediately preceding the date of the application the spouses have lived separately as aforesaid for a total period of not less than two years; and,
- (ii) there is no reasonable likelihood of a resumption of cohabitation; and,
- (iii) the making of the decree will not prove unduly harsh or oppressive to the other spouse or to any child of either spouse.

We will deal with the theory first, and then comment on our specific recommendation. The basis for our present law of divorce is the doctrine of matrimonial offence defined in paragraph 4 of our brief. This reads:

4. Under a system of divorce based on matrimonial offence such as we have in our present law, certain acts are held to be fundamentally incompatible with the undertakings entered into by the parties to the marriage. The commission by a spouse of one of these specified acts gives the other spouse the option to have the marriage terminated.

A definition of what is meant by breakdown of marriage is found in paragraph 5, which reads:

5. The doctrine of breakdown of marriage would prescribe that a divorce is granted only where the marriage has broken down. The definition of breakdown is contained in the answer to the question, "Does the evidence before the court reveal such failure in the matrimonial relationship or such circumstances adverse to that relationship, that no reasonable probability remains of the spouses again living together as husband and wife for mutual support?" (Report to His Grace the Archbishop of Canterbury, entitled *Putting Asunder*, S.P.C.K., 1966, prepared by a group under the chairmanship of R. C. Mortimer, D.D., par. 55).

Reference to the two theories and some commentary on the theory of matrimonial offence are found in paragraphs 11 to 23 of our brief.

USE OF THEORIES OF OFFENCE AND BREAKDOWN

11. The doctrines of matrimonial offence and breakdown were viewed by Lord Hodson as posing alternate choices. Speaking in a debate in the House of Lords he stated,

There are only two theories alive on this problem—namely, are we going to act on the matrimonial offence, or are we going to act on the breakdown of marriage theory? That is the fight.

12. Other reformers have considered these theories as not necessarily presenting an either/or proposition and have suggested that they be combined in one divorce system. Adopting this suggestion we now have three possible foundations upon which Parliament can legislate for divorce:

1. Matrimonial offence;
2. Matrimonial offence and breakdown in some combination, and
3. Breakdown.

RETENTION OF MATRIMONIAL OFFENCE THEORY

13. Some of the arguments in favour of retaining the doctrine of matrimonial offence will now be considered. One of the arguments put forward by those who support the doctrine is that it provides a clear and intelligible principle for determining whether or not a marriage should be dissolved. We submit this argument is sound only so long as the grounds can be clearly defined and, more importantly, applied with certainty in any given circumstances. Difficulty soon becomes apparent in this area when such notions as desertion and cruelty are considered. These may be defined with ease, but their application in many cases is subject to the greatest doubt.

14. Another submission sometimes made in support of the doctrine is that it promotes marital security in the sense both spouses know that if their conduct avoids certain offences, the marriage will be secure from dissolution. So long as the grounds can be clearly and intelligibly defined, this may in fact be the case. But even so it is highly doubtful that the law should encourage "secure" marriages at the expense of permitting the partners to believe anything short of a matrimonial offence is fairly within the ambit of normal married life.

15. It is also argued that the doctrine of matrimonial offence is satisfactory because it provides relief where something has been done by a spouse which cuts at the root of the marriage. In answer to this proposition it is submitted that experience shows that the commission of a matrimonial offence in itself does not necessarily prevent the marriage from being, or becoming, a desirable life-long partnership.

16. Adherents of the matrimonial offence system have argued that it operates to deter illicit unions because in that system only an "innocent" spouse can

sue. A spouse who leaves his or her partner to live with a paramour runs the risk that the union can never be regularized because of the refusal of the other spouse to exercise his exclusive right to have the marriage dissolved. But we must ask ourselves, does withholding the blessing of the law really discourage illicit unions?

17. Another argument advanced is that the matrimonial offence system is satisfactory because of its adaptability to the changing views of society. As society redefines what constitutes a grave matrimonial wrong, so may the law evolve, by constituting further "acts" as "offences". A criticism of this argument is that it involves legislation for hard cases, and prevents the application of any consistent principle. Such an approach leads to anomaly, and anomaly is always difficult to justify in the law. If a divorce law is based on relief for hard cases, what limits the choice of case? Why give relief to this hard case and not to that one?

OBJECTIONS TO MATRIMONIAL OFFENCE THEORY

18. Some of the objections to the doctrine of matrimonial offence have been suggested in dealing with the arguments just presented in its favour. Further objections were mentioned before the Morton Commission and were acted upon by the Mortimer Group. The first of these objections is that a marriage may in fact be broken down irretrievably even though no matrimonial offence has occurred. The converse of this, is that it permits divorce in some cases where the marriage might otherwise be salvaged. The commission of a single act of adultery entitles the innocent spouse to a divorce even though in spite of this misconduct, the marriage may be a good one.

19. The system of matrimonial offences most often treats of the symptoms of marital difficulty and not the causes. This means that divorce is given for the wrong reasons, and without the actual state of the marriage being considered.

20. A system of matrimonial offences rewards a spouse (e.g. a defendant who wants a divorce) for immoral conduct. Further, it penalizes the spouse who refuses on moral grounds to commit a matrimonial offence or perjury.

21. The doctrine makes divorce easy.

22. The doctrine does not encourage reconciliation, but in fact discourages it. Spouses are often ill-advised to attempt reconciliation because in so doing they may condone offences and forever lose their right to divorce.

23. Relief based on matrimonial offence leads to a false evaluation of marriage as an institution, and brings it into disrepute. It implies that any act however reprehensible which falls short of being a matrimonial offence is not "wrong". It has also been said, and we respectfully agree, that the concentration of judicial attention on offences, evokes a false sense of values, by giving importance to acts, the significance of which varies widely with each marriage. Conversely, importance is not given to acts which may well be the cause of marital difficulty. This false standard of marriage and misplaced emphasis has put divorce out of touch with the public's needs. The public today would say that in reality and from a moral standpoint, an offence does not make a case for dissolution. What does, is the failure of the relationship between the spouses.

Mr. McCLEAVE: I don't think you should use the word defendant there.

Mr. MACDONALD: Yes, I think so. Is there an objection to it?

Mr. McCLEAVE: No, but I thought divorce was based actually on a petition.

Mr. MACDONALD: Not in Ontario. In Ontario the person who brings a divorce action is the plaintiff and the person named is named as defendant, and the person named with him or her is also called a defendant.

Co-Chairman Senator ROEBUCK: It is an ordinary writ.

Senator FERGUSON: It is not like that in the Maritime Provinces.

Mr. MACDONALD: No. Here, defendant is interchangeable with "respondent".

Senator ASELTINE: In Saskatchewan they are named as defendant—and in Alberta, British Columbia and Manitoba.

Mr. MACDONALD: I am no longer reading from the brief but going back to the commentary. I will return to the brief in a moment. To comment on the possibility of having breakdown introduced into the law as one ground, we would refer to the last part of paragraph 27 of the brief and read selected parts to paragraph 39.

In its convention at Winnipeg this summer the Canadian Bar Association on the 2nd of September, passed a resolution which recommended that the law of divorce be changed by extending the grounds to occupy the same position enjoyed in England, and to go beyond it by adding one other ground and the following:

4. Voluntary separation of the husband and wife for a period of three years preceding the commencement of proceedings provided that the court shall be satisfied that:

- (i) There is no reasonable likelihood of a resumption of cohabitation, and
- (ii) The issue of a decree will not prove unduly harsh or oppressive to the defendant spouse.

28. Separation is not a matrimonial offence, and is based on the breakdown principle. It is not a matrimonial offence because the separation contemplated is a voluntary separation by mutual consent. There is no conduct which one can blame against the other. There is no guilty or innocent party. Both might be guilty or both might be innocent, and either of them may take the initiative in bringing the divorce action.

29. Support for the position taken by the Bar Association can be found in the views of some of the members who sat on the Morton Commission (1951-55). Nine of the nineteen members were in favour of introducing a similar ground into the law of England. They disagreed among themselves (5:4) only on whether the marriage should be dissolved in such a situation despite the opposition by an unoffending spouse. All nine would go as far as adding the following as a ground for dissolution:

An application for dissolution of marriage may be made to the court by either spouse on the ground that the spouses have lived separately for a period of not less than seven years immediately preceding the application, and the court shall pronounce a decree dissolving the marriage where this ground is established, provided that the other spouse does not object.

30. Four of these nine members advocated a wider proposal which would, in some circumstances, permit divorce despite the objection of the unoffending respondent. This would be accomplished by retaining the suggested wording of the main clause and changing the proviso to read:

...provided that, if the other spouse objects to the dissolution, the applicant must first satisfy the court that the separation was in part due to unreasonable conduct of the other spouse.

31. Lord Walker, one of the commissioners, was in favour of the breakdown doctrine, but not in either of these forms. He approved of its application only if it were made the sole basis for divorce. He defined a broken marriage (and thus the "breakdown" situation), as one where the facts and circumstances affecting the lives of the parties adversely to one another are such as to make it improbable that an ordinary husband and wife would ever resume cohabitation. Con-

forming to this definition he held the view that no marriage ought to be dissolved where there is hope of reconciliation. This end could be achieved only by using the breakdown principle. His opposition to introducing the principle as a ground in a system of matrimonial offences appears to rest upon the arguments:

1. That marriage cannot be said to be broken down merely because the spouses have consented to lead separate lives, and
2. That divorce, in order to preserve the institution of marriage as a life-long union, should proceed from one general principle.

32. Where the parties are living apart it cannot be said that the marriage has broken down until the prospects of reconciliation are explored. Whether reconciliation is possible would depend on the reasons for the separation and if reconciliation has not been attempted, the reasons why. A long period of separation is evidence of breakdown deserving of great weight, but is not conclusive proof, or is not satisfactory proof.

33. Lord Walker's other objection appears to be that the principle of offence and the principle of breakdown are two mutually inconsistent logical systems. In practice when you use them together you are really legislating from the point of view of relieving individual cases of hardship and then going back to justify this relief on whichever of the two theories seems to fit. To re-establish the institution of marriage in its true significance as a life-long cohabitation in the home for the family, you must proceed from a general principle and not from individual cases. You apply one principle or the other, and do it consistently. If you proceed from thinking in terms of matrimonial offence you apply that doctrine in all its rigor without watering it down with categories which do not have the ingredients of an offence. Similarly, if you start with breakdown you are premising your solution on a particular meaning of marriage, and must act accordingly. You are saying that marriage means actual (or where there is a separation, "probable") cohabitation for life and your legislation is arrived at by protecting this definition. If the marriage is an "empty tie" it is dissolved. If it is not, then it is maintained. If there is doubt, then the parties are encouraged to seek counselling and the proceedings are adjourned until the results are known.

Co-Chairman Senator ROEBUCK: That is what you advocate?

Mr. MACDONALD: We advocate part of this. This printed brief goes on to quote Lord Walker. I will not take time to read the quotation, although I think it is doing him an injustice not to read it.

I would like to go on to 12 and start reading from paragraph 35:

35. In paragraph 69 of its report the Mortimer Group summarizes the reasons why breakdown must not be introduced into the law as a "ground". The reasons are:

- (a) The mutual incompatibility of the two principles would be glaringly obvious;
- (b) The superficiality inseparable from verbally formulated "grounds" would tend to render the principle of breakdown inoperative, and;
- (c) The addition of a new "ground" embodying the principle of breakdown would make divorce easier to get without really improving the law.

36. In explaining the incompatibility of the two principles the group stated: The existing law is almost entirely based on the assumption that divorce ought to be seen as just relief for an innocent spouse against whom an offence has been committed by the other spouse. If then there were inserted into this law an additional clause enabling a guilty spouse to petition successfully against the will of an innocent, the whole context would proclaim the addition unjust. (page 57)

37. The second reason stated by the Mortimer Group follows from the approach that offences as we know them are often at best merely "symptoms" or "sequels" to breakdown and not the cause of breakdown. On this point the group said:

One of our reasons for recommending the principle of breakdown is that it would enable the courts to get to grips with the realities of the matrimonial relationship instead of having to concentrate on superficialities. But if the principle were introduced into the law in the shape of yet another verbally formulated "ground" (such as the Australian "ground of separation"), the advantage hoped for would be lost. There would inevitably be a tendency simply to measure the circumstances revealed by the evidence against the verbal formula, and, if they appeared to fit it and no bar applied, to grant a decree without any genuine trial of the issue of breakdown. In other words, it is likely that the attitudes and procedures appropriate to the trial of matrimonial-offence cases would be extended to cases turning on the new "ground". There is some evidence of this in Sir Stanley Burbury's comments on the Australian law. Our own view is that trial of the issue of breakdown would require new attitudes and procedures, and that it is highly unlikely that these would be duly developed by the Courts if the principle of breakdown did not pervade the whole divorce law. It may be added that the mere addition of a new "ground" would do nothing to remedy the particular aspect of superficiality noted by Sir Garfield Barwick, namely, the artificial definition, which is implicit in the verbal formulation of "grounds", of "the area of conduct which will remain innocent in a matrimonial sense". If on the other hand the whole law were to be based on the doctrine of breakdown, this artificial delimitation would disappear. (page 58)

38. The third reason mentioned is that embodying breakdown as a ground would make divorce too easy;

Introduction of the principle of breakdown in the form of a new verbally formulated "ground" would not reform the law: it would simply make the existing law open-ended and provide a last resort for petitioners who found they could not succeed on any other "ground"... The implicit advice of a mixed divorce law to people wanting to rid themselves of marriage might well become, "When no other ground offers, try breakdown of marriage". (page 59)

39. The conclusion of the group on this point is stated as follows:

In our opinion, therefore, the principle of breakdown ought on no account to be introduced into the existing law in the form of an additional "ground". Failing the complete substitution of principle which we recommend, it would be better to keep the law based firmly on the matrimonial offence, and to consider how its administration could be improved, than to inject into it a small but virulent dose of incompatible principle. (pages 59-60)

To work out the application of the breakdown principle requires a new procedural approach. Simply put, the approach is to depart somewhat from the accusatorial method of determining facts which is part of our adversary system and adopt some of the procedures familiar to a judicial inquiry. Some aspects of this change are considered in paragraphs 40 to 48 of our brief. We do not intend to read them all at this time, but do wish to call your attention particularly to paragraphs 44, 47 and 48.

44. It is recognized that it would be unpalatable to turn judges into inquisitors. To appraise the court of the relevant facts it must then in some cases

at least, have assistance. One idea is to employ "forensic social workers" as officers of the court.

The officers could, when required to do so, verify attempts at reconciliation, test the reliability of assertions made to the court, and investigate any other matters on which the court wished to be informed, and could report on the circumstances of children of the family. They might also supervise the working of arrangements made for custody and maintenance. (page 70)

47. It might be argued that the procedural change is so radical that it would upset the whole of our court system. The advocates of breakdown do not underestimate the effect of this change. The Mortimer Group recognized "that reform of the courts and their procedure is apt to be a much lengthier undertaking than amendment of the substantive law...". However, it is submitted that the change is not as radical as it might first seem. We mention elsewhere in our brief that today, everytime there is a suspicion of collusion or connivance an inquiry of sorts is held. In Ontario this through the "forensic" offices of the Queen's Proctor may be quite extensive. Another instance where the courts in matrimonial causes often conduct an investigation more in the nature of an inquiry than that of a disinterested judicial officer presiding over a contest, in where it is necessary to consider whether the court's discretion should be exercised in favour of a Plaintiff who has also committed a matrimonial offence. It is interesting to note that in conducting this inquiry one of the main questions to be determined is whether the marriage has broken down. To use a recent example Mr. Justice Tucker of the Saskatchewan Queen's Bench appeared to have no difficulty in making a finding on this question. In *Deptuc v. Deptuc* (1966), 56 D.L.R. (2d) 634, he held that a decree should be granted dissolving the marriage because it had hopelessly broken down, and that to maintain it would be against public policy, the interest of the parties, and the child of the marriage. That the Courts can where necessary conduct an inquiry is again illustrated in *Spoor v. Spoor* (1966) 3 All. E.R. 120 in the Probate Divorce and Admiralty Division before the Registrar. In this case it was held that proceedings under Sec. 17 of Married Women's Property Act 1882 were in the nature of an inquiry into a claim, and were not an adjudication on a cause of action. In the recent Canadian case of *Re Bailey* (1966) 6 D.L.R. (2d) 140 in the British Columbia Supreme Court before Mr. Justice Ruttan, it was held that the case could not be decided in terms of onus of proof because the matter before the Court was initiated by the administrator of the estate and the proceeding was not a trial. It was an inquiry by the Court to determine which of the heirs was entitled to succeed. It was not a contest between parties. These examples show that a Court proceeding need not necessarily be a contest such as comes to mind when we think of the adversary system.

48. The idea of "forensic social workers", should not seem too unusual—at least to Ontario lawyers. They are quite familiar with this sort of officer every time there is a divorce with children of the marriage under the age of sixteen. In these situations, an investigation is made and a report filed with the Court on behalf of the Official Guardian. An example of this sort of worker outside the area of matrimonial law is the probation officer who makes the pre-sentence report given to the Court in a criminal case.

Closely allied with the question of procedure is the notion that breakdown may in fact be a question which by its very nature is incapable of being tried. On this point we would like to read paragraph 59.

TRIABLE ISSUE

59. The objection is sometimes made that the question of whether or not a marriage has broken down is a question which does not present the Court with

an issue capable of being tried. It is admitted that to explore the question adequately the procedure of the Court should be enlarged in the way dealt with above. But, the objectors will claim, the Court is still faced with deciding something which is impossible to determine. It is submitted that this is not so. Sometimes no doubt, the question will be a very difficult one, but most times not. On this point, it might be helpful to look at a concept in the law which we already have, and which in some respects brings with it the same difficulties. We bring to mind the concept of negligence which now pervades our law. Does this concept not on occasion present a question which is "impossible", to try? But we get along with it, and do so with a feeling that justice is being done. Turning back to matrimonial law, we submit the question is no more difficult than deciding in a cruelty case whether the defendant spouse will continue a course of violent, or dangerous conduct; and whether if continued, the other spouse would suffer permanent injury. It is further submitted that breakdown is no more difficult of trial than making a decision in the following situation. A husband and wife have been quarrelling continuously for two years. The husband finally leaves. The wife then sues for alimony on the basis of desertion. The husband offers to return and the wife refuses to receive him back. In the action the Court is put in a position where it must decide, (1) whether the offer to return is genuine, (2) if genuine, whether the wife has just cause for refusing the offer, and (3) whether the wife (in Ontario, at least) by her conduct has disentitled herself to alimony on the basis that she could not sue for restitution of conjugal rights.

As a footnote we might add that the question of breakdown is surely more easily tried than the question arising in a custody case. Here the courts grapple with deciding which of at least two homes best suits the welfare of the child. Often we are tempted to say that deciding such a matter is impossible. But never, after a moment's reflection, do we suggest that the decision should be avoided because of this difficulty. We agree that the question of what is best for the welfare of the child presents the relevant issue to the courts. The public would be indignant if we went back to saying that the question should be decided according to some arbitrary and rigid rule of law which said that the father, or, perhaps, the mother had an absolute right to the child, and the other parent had none; or according to an arbitrary standard of conduct which held, for example, that proof of adultery automatically declared the defaulting parent unfit. The public conscience says, "No", to simplifying the treatment of custody, and demands that we put the right question regardless of its difficulty.

Co-Chairman Senator ROEBUCK: In the interest of the children?

Mr. MACDONALD: Yes. Two criticisms of the breakdown hypothesis are frequently raised. The first concerns whether or not breakdown is a doorway to divorce by consent; and the second concerns whether it is fair and just to allow divorce at the instance of the spouse who caused the failure, particularly where the other spouse is blameless and objects to the divorce.

In our view the answer to the first is that in a system based on breakdown there would be no more divorce by consent than there is under the alternate system of offences. Some form of consent may be present in both systems, but in both systems something more than consent is required.

In the system of offences the requirement is proof of a bona fide offence which, if properly brought before the courts, is not vitiated by consent. An example of this is where the husband, say, is living in adultery and invites his wife to sue him for divorce. Upon her acceptance of this invitation he agrees to facilitate proof of her case. This is a legal arrangement and one which on any ordinary interpretation contains elements of consent. The consensual part lies in the fact that both parties want the divorce. The further requirement is the offence.

This is an objective fact and, what is most important, we note it must be established not merely to the satisfaction of the parties, but to the public at large through the courts.

In the same way breakdown may involve consent, but when it does the consent in itself will not be sufficient. The objective fact of separation and a positive finding that it is permanent will also be necessary.

Reference to these points, which I will not take time to read, is found in paragraphs 50 to 52 of our brief. The other objective which we mentioned a moment ago is answered in paragraphs 53 to 56.

AGAINST WILL OF UNOFFENDING SPOUSE

53. One of the points dealt with by the Mortimer Group was the objection that the breakdown theory would permit divorce at the suit of a culpable party against the will of an unoffending spouse. In order to see this objection in its proper context one must pre-suppose that all substance has gone out of the marriage—there is no longer any married life—and the spouses are left with only its legal form. It is the spouse who is morally in the wrong who initiates the Court proceedings to dissolve the tie. The other spouse has at all times led a praise-worthy life and out of strong feelings of what is right opposes the proceedings. Should the marriage be dissolved? These imaginary but possible circumstances give rise to three considerations:

1. Deprivation of status;
2. The result that a person may “take advantage of his own wrong”, and;
3. Economic deprivation.

54. We have referred firstly to the deprivation of marriage status. One of the premises of the breakdown theory is that it is not in the public interest to maintain an empty marriage tie, and its proponents generally advocate that where this finding is arrived at after a thorough Court investigation the marriage should be dissolved despite the scruples of the respondent. There will always be hurt to the family where there is divorce no matter what system is employed; all hurt to spouses or children cannot be avoided. To refuse divorce because of individual hurt must be balanced against the desirability of dissolving marriages which do not exist in life. However, there is also another public interest to serve and that is the public sense of justice or the prevention of a general feeling of outrage. In some cases to dissolve a marriage against the wishes of a praise-worthy spouse would be to ignore this interest. Therefore, it is necessary, in the view of the Mortimer Group, to allow the Court a discretion to refuse a divorce where the Plaintiff has acted with gross misconduct. To do otherwise would shake the public confidence in the administration of justice and cast doubt on society's concern for the institution of marriage.

55. The maxim which prescribes that a person cannot take advantage of his own wrong is really a meaningless question when posed within the terms of reference of the breakdown theory. A spouse who commences an action to have the marriage dissolved is asking for a declaration that the marriage is finished. The spouse is not asking for a judgment on relative conduct of the spouses, but for the Court's opinion on whether or not there is any hope for the marriage; and if not, that the marriage be declared dead. The situation is somewhat analogous to nullity suits where the only question is the validity of marriage and where no conduct on the part of the Plaintiff can act as a bar. If the marriage is a nullity the good or bad conduct of the Plaintiff has no relevance. The Courts simply are not concerned with him. They are concerned with the marriage. In the same sense in a breakdown situation (except with respect to the right to exercise the discretion mentioned above), the Courts are not concerned with the rightness or

wrongness of the Plaintiff's conduct or either party's; they are only concerned with the life or death of the marriage. The Court's judgment is a judgment on the marriage and as in a nullity suit, a judgment against the marriage does not carry with it an evaluation of good or bad conduct. A party does not leave the court room thinking he or she is "guilty", or "innocent".

56. Whether or not justice has been done depends on whether or not members of the family unit have unfairly suffered economic deprivation. Divorce in the circumstances we are imagining is not unjust provided the applicant spouse has not acted with gross misconduct and the unoffending respondent and the children are not worse off economically. The Court would be empowered and required to make a full inquiry into how dissolution of the marriage would affect the family members financially. To meet the requirements of justice the Mortimer Group states the Courts should have the power, not only to make orders for maintenance against either spouse, but also to award members of the family shares in pension benefits, insurance, and other emoluments that are now part of our financial life. It, of course, would also have the power to withhold any decree of dissolution until provision has been made for the dependent spouse and children. To simplify this process it might be practicable to introduce through the legislature some form of community of property.

The second of our recommendations set out on the front page of our brief suggests a way in which the principle of breakdown of marriage could be, and in our respectful submission should be, made the law in Canada. Before commenting briefly on some of the characteristics of this specific recommendation, I wish to mention what, in our view, is the most valid challenge to an acceptance of any proposal based on the breakdown principle.

It goes back to the procedure. Mr. Justice Scarman speaking to an English audience in the address referred to in paragraph 8 of the printed brief, stated the problem this way.

If one accepts that divorce should not be available by administrative process, there is a danger that one will move to the extreme opposite view that every family life which has broken down should be subjected to full investigation, that the court must, in the interest of justice to the spouses and society, carry out a complete post mortem. Put simply, there are just not enough lawyers in our community to give effect to such counsel of perfection. Complaints of expense and delay are common enough already. A full inquisitorial attack on every married life brought before the court in divorce proceedings would add immeasurably to both and would, in the end, bring into disrepute this very thing it wishes to preserve, namely, divorce by judicial process.

The newspaper editorial annexed as Schedule "B" to the proceedings of this committee on the 8th November commented on the Mortimer Report and had this to say:

This is a bold and generous concept. Nevertheless, it may entail practical drawbacks. One immediate problem which the proposal presents is the possibility that divorce litigation will become more complex. The court applying the standard of a "breakdown" in marriage would resemble, say its advocates, a "coroner's inquest—a judicial inquiry—pleadings would need to be considerably expanded". Many divorces are already held up because the courts are clogged and proceedings are cumbersome."

The possibility of an increase in expense, and of further delay, gives us much concern. But such consequence must be measured, first of all in terms of how much expense, and how much delay we are talking about. The consequences must be evaluated in terms of what the public wants our judicial process to do.

We believe the public wants the judicial process to preserve and protect family life by, among other things, preventing unnecessary divorce. We are also optimistic that when the extent of the probable expense and delay is known, it will be seen as no more than a fair price for the desirable objectives attained.

Let me now turn to our specific recommendation. Of prime importance is the feature that the ground we have set out is intended to work as the sole and exclusive ground for divorce. It is not to be merely another item in a list of grounds. If this recommendation is adopted, there would be no divorce unless facts of the case met the conditions specified in the recommendation.

In passing we might also point out that the use of the word "application" is deliberate. This description was chosen instead of any such word as "petition," "suit," "action," or "proceeding," because of the wish to avoid connotations of guilt or innocence which are usually associated with "petitioner," "respondent," "co-respondent," "plaintiff," "defendant," and "co-defendant".

The application can be made by either spouse where a separation of the specified type has occurred. This means that the spouse who has caused the separation, or is morally in the wrong, has the same right to bring the application as the blameless spouse.

You will notice that one of the conditions of granting dissolution is that at the date of the application, and for a period of two years before it, the spouses must be "living separately by reason of their mutual consent or the conduct of one of them". The separation which we have in mind is that which is brought about by the actions of one or both of the spouses. It is not meant to include the case where there is separation by compulsion.

A compulsory separation would be one brought about by some external command or necessity, such as, for instance, a spouse in the armed forces going overseas under orders of his superior; or a more unfortunate spouse taking treatment for chronic illness in a hospital; or serving a prison sentence. This sort of case, where the separation is not primarily due to the actions of one or both of the parties, would not fulfil the specified requirements. However, it would be possible for a compulsory separation to turn into the kind required if, by forming the *animus deserendi*, one of the spouses brought about a state of desertion. The separation would no longer be due to external command, or necessity, but would be caused by this action or conduct of the spouses.

An act of madness which drives the other spouse away, and makes continued cohabitation dangerous or "intolerable" would qualify as conduct bringing about the required kind of separation. The husband's act of chasing his wife with a butcher knife would not be excused on the ground of insanity. Insane or not, it is his conduct which ends the cohabitation. It is not his madness.

But take another case where instead of sudden violence there is a gradual deterioration of mind while undergoing treatment in an institution. The required kind of separation would not occur in this case until the other spouse decided he or she had had enough; and the period of separation would not start to run until this moment in time when the *animus deserendi* is thus formulated.

The period of two years need not be continuous. It may be made up of several lapses occurring within the three years immediately prior to the date of the application. This provision is made to encourage the spouses to actively seek a reconciliation. It is designed so that a spouse living away from his or her partner and going through the agony of deciding the future can try again without jeopardizing, or seriously delaying, the alternative of divorce—should resort to this remedy finally become necessary.

Our specific recommendation also lays down the condition that before dissolving the marriage the court must find there is no reasonable likelihood of a resumption of cohabitation. This is to say that the court must find the marriage

has irretrievably broken down. The fact of separation by itself does not establish the breakdown, and any presumption that it does, we have seen from the brief, is contrary to all the theory stands for.

The events and happenings leading up to the separation, the attempts at reconciliation, and the present attitudes of both spouses, to a continuation of the marriage must also be reviewed and assessed. Only then would the court be in a position to decide whether the marriage had broken down.

The last condition is that the making of a decree will not be "unduly harsh or oppressive to the other spouse or to any child of either spouse". You will note that this phrase is wide enough to cover not only children of the marriage, but step-children whose security might also be affected.

It is expected that where the court has made the finding discussed so far, it will be satisfied that the family life has come to a permanent end. In such cases, it is submitted, there would seldom be material upon which the court could proceed to find the dissolution of the marriage harsh or oppressive to anyone. The individual loss of marital status would in many cases be welcomed as a freedom to enter at some future time into a better marriage. In other cases, where further marriage is not planned, loss of the status must be accepted as being a concession to the public interest which demands the severing of an empty tie.

However, it would be harsh or oppressive to spouse or children if the disappearance of the marriage took with it some economic right which would otherwise be enjoyed. This would be one of the few times when the courts would refuse the decree. Unless the economic right of the dependent spouse and the children could be protected in some other way, it is submitted that it would be a proper exercise of the given discretion to refuse a divorce decree. Another time when the decree might be refused on the ground of its being harsh or oppressive not to do so, is when the applicant has behaved with gross misconduct.

No discussion of divorce can be near complete without some reference to the lesser remedies and incidental relief of judicial separation, alimony, and maintenance. No attempt will be made in this submission to suggest what should be the law in this area. It is a large problem raising not only questions of how to achieve much needed reform, but also the additional thorny question of whether competence to legislate in this field belongs to Parliament or to the provincial Legislatures.

We have planned not to go into these remedies, but we do wish to make a distinction of some importance which relates to them. Since 1857, when divorce as we know it was first enacted in England, we have thought of the basis of divorce, and the basis of the lesser remedies, in the same conceptual terms.

All along, the offence theory has been used to support both sets of remedy. There is no obvious necessity for having them rest on the same premises, and when the premise of divorce is changed to breakdown there is much good reason for thinking of our remedies in different ways.

The remedies of judicial separation, alimony and maintenance can still be decided, and probably should be decided, at least in part, on the basis of the matrimonial offence theory. In fact, the tests of breakdown are not suitable for deciding the right to live separate from, and the right to be maintained by, the other spouse. The matrimonial offence is still the appropriate basis for this relief, although there should be some important modifications, particularly with respect to the making of financial provision.

The Mortimer group have the opinion that such provision should be based only in part on conduct, with other considerations being the financial needs of the dependant and his or her means. Presumably these last considerations would be relevant to the question of liability, and not just quantum or amount, as they are now.

We cannot digress further into this, but must return to the subject of our brief. In making our proposal that breakdown should be the sole basis for divorce, we recognize that such a step is in advance of what has been done in other parts of the Commonwealth and in the United States. These countries whose laws we generally respect and look to for precedent have not ventured so far. Is there any reason why Canada should go on alone? One point to bear in mind is that Canada is closer to the fork in the road, and has only a few steps back to 1857, when divorce was first predicated on offence theory. The other countries have journeyed on, by multiplying grounds, and may now find themselves committed in this direction and too far away to return to the junction. They may want to go back but cannot. This should make us extremely wary of following the same route.

The press reports on a general dissatisfaction with a list of grounds, which we see coming from the United States and England, substantiate the need for caution.

The other aspect is that the possibility of a more desirable alternative has only recently become a part of public awareness. Until now we had not fully realized that this alternative way to reform did in fact exist. It is a way which is attractive. It dispenses with the fiction of fault and bears the stamp of honesty. It recognizes the reality of divorce and at the same time pays respectful homage to the reality of marriage. It produces a good defensible reason for dissolving what we all regard as something which should be indissoluble. How can this be done with decency except by enacting that a marriage will be dissolved only when it ceases, by accepted standards, to be a marriage?

Thank you, Messrs. Chairmen, and members of the committee.

Co-Chairman Senator ROEBUCK: Mr. McCleave, have you got a question in your mind?

Mr. McCLEAVE: It has been answered in different ways—yes, no, or maybe—depending on whether there was undue harshness to the children. Do I anticipate a variety of answers, Mr. MacDonald?

Mr. MACDONALD: In general the answer would be: Yes, the marriage will be resolved, but we do recognize the case of, say, where a husband engineers a breakdown deliberately for the purpose of using that breakdown for a divorce. Suppose a husband finds out about the breakdown principle. He goes home, blackens his wife's eye, assaults her brutally, leaves her, and he does this just so that he can divorce her. We say there should be discretion in the court to prevent that.

Mr. McCLEAVE: What about desertion by the husband? That is a common thing and in a certain sense it is just as deliberate as blackening her eye, except that the deliberation extends over a longer period of time.

Mr. MACDONALD: Yes. Then you can deduce from that situation that there is no hope that the two spouses will get together again, that there is no hope of cohabitation, that the marriage has disappeared completely; and if the husband had made financial provision for his family—

Mr. McCLEAVE: This one I am thinking of had not made such provision.

Mr. MACDONALD: I am sorry, I did not hear that.

Mr. McCLEAVE: In the example I have given, he had done nothing decent since he left his wife.

Mr. FERRIER: Then the dissolution will not be granted until he does.

Mr. MACDONALD: If the court could order him to make financial provision for his family the marriage would be dissolved, because the marriage in those circumstances serves no purpose whatsoever.

Senator FLYNN: In what legal system has this breakdown theory been experimented with?

Mr. MACDONALD: The answer to that is that there is no legal system that implies breakdown in its pure sense. The Mortimer group does make reference to Hungary as being closest to their conception of marriage breakdown as the sole basis for divorce.

Senator FLYNN: It would be quite an innovation, would it not?

Mr. MACDONALD: It would be a radical change, yes.

Co-Chairman Senator ROEBUCK: We have seen some philanderers who had a peculiar fascination for women and had one wife after the other. I am wondering whether, if marriage breakdown, depending on desertion for a specified length of time, were adopted, you might not have some chap having a series of wives. He might marry one, desert her for a certain length of time, then divorce her and get another. You might have someone who had as many wives as—

Mr. FERRIER: Solomon?

Co-Chairman Senator ROEBUCK: Well, it would depend on the length of time required.

Mr. MACDONALD: I would respectfully point out, Mr. Chairman, that the present law serves the philanderer better than this law would. Under the present law, the wife would have no interest in keeping him tied to her. It is unlikely she would take the position: "As a good citizen of this country I must protect other women from marrying this man and therefore I will not divorce him". What happens when she discovers he is not a good husband? She gets evidence of adultery and sues him and thus enables him immediately to marry again. It would take about two years.

Co-Chairman Senator ROEBUCK: I am afraid we shall have to adjourn. It is six o'clock. I should like to hear from my Co-Chairman.

Co-Chairman Mr. CAMERON: It is not necessary to say much except to thank both Mr. MacDonald and Mr. Ferrier heartily for their presentation today. We shall have an opportunity to read the record. The presentation has been made in a lucid and comprehensive manner and we thank both these gentlemen.

The committee adjourned.

APPENDIX "21"

SUBMISSION

of the

CANADIAN COMMITTEE ON THE STATUS OF WOMEN

to the

SPECIAL JOINT COMMITTEE OF THE SENATE AND
HOUSE OF COMMONS ON DIVORCE

November 29, 1966

Summary of Conclusions and Recommendations:

1. Canada's present divorce law bears little relation to the greatly changed roles of wife, husband and family.

2. Permanent breakdown of a marriage should be the criterion for grounds for divorce.

3. In judging whether or not a complete marriage breakdown has occurred and taking into account the overall situation, specific matrimonial offences may be considered by the Court as contributing causes: adultery, desertion, cruelty, unnatural sexual offences, sodomy and bestiality, impotence, frigidity, incest, insanity, incarceration, habitual drunkenness and drug addiction.

Any one or any combination of these offences could contribute to proof of the permanent breakdown of a marriage.

4. The proof of the breakdown should be judged at least as much on the tolerance of the Petitioner as on the Court's concept of what the individual should be expected to tolerate.

5. Permanent marriage breakdown does not necessarily imply a "guilty" party and divorce should not require that one of the marriage partners be so named.

6. A wife should be able to institute divorce proceedings in the jurisdiction where she is residing. Otherwise, the law of domicile remains discriminatory.

7. Grounds for divorce should be uniform throughout Canada.

8. Divorce should not be dependent upon the financial resources of the Petitioner.

Identification

TAXATION

1. The Canadian Committee on the Status of Women was established in 1953 under the Chairmanship of the late Mrs. G. D. Finlayson of Ottawa. Attention was first concentrated on making husbands and wives aware of the disabilities which widows suffered under the old Dominion Succession Duty Act. To accomplish this, the Committee compiled basic information which was widely distributed in the belief that an informed public opinion would compel governments to amend existing outmoded legislation. The overwhelming response to this educational material from individual women across Canada and from national organizations, both women's and men's, encouraged us to take further steps: we made a number of written and oral submissions to the Federal Government urging changes in the succession duty legislation; in 1958 we were invited to make a submission to the Senate Committee on Banking and Commerce; in 1963 we presented a brief to the Royal Commission on Taxation; and

on various occasions we have had opportunities to argue our views before the Ministers of Finance and National Revenue. We have recently participated in the preparation and submission of material regarding the establishment of a Royal Commission on the Status of Women in Canada, and in the National Consultation on Human Rights sponsored by the Canadian Citizenship Council.

DIVORCE

2. To date our major submissions have concerned the rights of women in various fields of taxation. However, the correspondence received from a large number of individuals across the country on the subject of taxes revealed discrimination and injustices in the law on divorce. As an example under the Divorce Jurisdiction Act (R.S.C. 1952 c.84) a married woman who has been deserted by and has been living separate and apart from her husband for a period of two years or more may sue for divorce only in the province in which, immediately prior to such desertion, her husband was domiciled, regardless of where the wife is now domiciled. We recognize that this rule is an improvement over the previous one which required the wife to sue for divorce only in the province in which the husband was domiciled at the time of the petition. Nevertheless, the present statute may still impose hardship on the wife.

3. Other indications of hardship from divorce laws came to light because three of our members were, for many years, involved, through the Elizabeth Fry Society, with women prisoners. The most frequent cause of their troubles with the law could be traced to marital problems. We found that, on economic grounds, divorce was a solution which never entered the prisoner's mind, though "common-law relationships" occurred fairly frequently. Further, even if a divorce could have been financed, in a situation where the marriage breakdown was complete, grounds which seemed logical to us were not legally valid. There is a whole world of men and women hidden away in our sub culture whose problems seldom reach the eyes of legislators and whose needs include simple inexpensive divorce.

Background

RELIGION

4. We submit that many of the aspects of the present divorce law are based on the rural Christian ethic of an agricultural society which is not generally valid in today's predominantly urban, secular, industrialized society. Increasing numbers of people now take the view that governments should not legislate morality. Whether or not this view is valid, we believe that those whose religious principles are against divorce in any form should no longer be able to impose restrictions on the personal lives of those whose principles differ in this respect. This is particularly true in a pluralistic democracy where there are many different systems of morality.

CHANGING MORES

5. Marriage is a complex association of personal, social and legal factors. On the personal side, marriage at its best provides love, both spiritual and sexual, economic advantages to both parties, and status. Society's basic interest in the preservation of marriage is the very preservation of society itself through the bearing and rearing of children and the transmission of the culture of the society. One of the most important aspects of our society's culture is its institution of law. It is imperative that we recognize the necessary relationship between law and social change. Therefore, the legislation which may be passed as the result of your Committee's work must not only remedy the deficiencies of the present divorce law, but make the remedy fit into a society in which the roles of husband and wife are greatly changing, one in which the traditional religious

and moral patterns of thought are frequently rejected, and in which the concept of marriage "until death do us part" is no longer universally held.

WIFE'S CHANGING ROLE

6. Already, a wife's role has changed greatly. Our grandmothers had a limited education, married early, bore a greater number of children, raised them by tireless labour, and usually died early. They believed, and society insisted, that marriage was for life and for the main purpose of raising children. Today, women have more education, more employment opportunities, fewer children, more leisure, and a longer life span. Therefore, a divorce law based on the agricultural society of our grandmothers is not only an anomaly but a cruelty to many modern women.

Recommendations

7. Although it is apparent to most people in our society that our divorce laws are outmoded, the basis for reforming them is still not easily arrived at. Should we retain the traditional matrimonial offences such as adultery, cruelty, desertion? Or should we use the argument expressed by Mr. Douglas F. Fitch in his article "As Grounds For Divorce, Let's Abolish Matrimonial Offences" (Canadian Bar Journal, April 1966) where he advocates permanent marriage breakdown as a criterion for granting divorce? Perhaps a combination of the two would more aptly reflect public opinion.

8. This Committee believes that the traditional matrimonial offences always brand one marriage partner as the guilty party, although in most cases it is certain that both partners have contributed to the marriage breakdown. Yet, it is easier to judge the evidence of a matrimonial offence than it is to determine when a permanent marriage breakdown has occurred. We recognize the difficulty of defining with precision the division between a permanent marriage breakdown and divorce by mutual consent. Indeed, we do not support the extreme view of divorce by mutual consent. For this reason, we recommend that more research should be carried out in order to identify which could be used as a basis for determining when, in fact, a permanent marriage breakdown has occurred.

9. We are greatly concerned that the recommendations from your Committee should be very flexible in any definition of the term "permanent marriage breakdown". What must be taken into consideration is the point of tolerance of the particular individual when she believes her marriage to be past reparation because of a situation—any situation—which is really intolerable to her, and not the Court's concept of what the individual ought to tolerate.

10. To what degree the interpretation of the concept of the permanent marriage breakdown, as grounds for divorce, should be defined, and the degree to which it should be left to the courts, we do not know. The thing we fear is narrowness of definition in the first case and narrowness of interpretation in the second.

ANCILLARY PROBLEMS

11. In addition to the basic question of grounds for divorce, there are many ancillary problems, for example:

- (a) *Collusion and Condonation*: The present laws would seem to demand blameless conduct on the part of the wife if she hopes to win a divorce. Even more absurd is the implicit condemnation of the wife who is aware of adultery on the part of her husband and "condones" it in a practical effort to re-establish a good marital relationship; and there is further absurd condemnation for the wife who "has been guilty of unreasonable delay in presenting or prosecuting" action for

divorce. How, other than by condoning and/or by delaying, could a wife try to save the marriage and avoid the pain of family breakup. Of course, this also applies to the husband. We believe that it should not be considered collusion if the husband and wife make reasonable arrangements before the hearing of the suit, about financial provision for one spouse, guardianship of the children, and division of personal and real property. The law of collusion should only apply where the parties conspire to put forward a false case, or to withhold a just defence, or where one party uses the divorce courts to bribe the other party.

- (b) *Domicile*: We submit that divorce law should take into account the mobility of twentieth century Canadian society. For example, many men are transferred to branch offices, workmen are relocated to high employment areas, servicemen are transferred to new posts. A woman should not be tied down to her husband's domicile, but should be able to institute proceedings of divorce in the jurisdiction where she has been residing.
- (c) *Uniformity*: We believe that the grounds for divorce should be uniform throughout Canada; that is, if Parliament continues to grant divorce, the grounds should be the same for parliamentary and non-parliamentary divorce; and that the rules governing divorce should be the same for all Canadians, men and women, in all provinces.
- (d) *Maintenance and Alimony*: We recognize that this question may not be within the Federal Government's jurisdiction, as there is some doubt as to whether or not it can be considered ancillary to the right to grant divorce or whether it comes under the province's rights of "property and civil rights". We submit that it is inseparable from divorce, and that your Committee should make some recommendations to clarify the situation.
- (e) *Guardianship of Children*: Adequate provision should be made for the welfare of the children of the marriage.
- (f) *Cost of Divorce*: The cost of divorce should be reduced by simplified divorce proceedings, and by the greater use of legal aid.

Respectfully submitted on behalf of:

THE CANADIAN COMMITTEE ON THE STATUS OF WOMEN
(Sgd.) "Mary R. Gilleland"

Mrs. W. H. Gilleland, Chairman,
701 Don Mills Road, Apt. 1004,
Don Mills, Ontario.

APPENDIX "22"

BRIEF

SUBMITTED TO THE SPECIAL JOINT COMMITTEE OF
THE SENATE AND HOUSE OF COMMONS ON DIVORCE.

by James C. MacDonald and Lee K. Ferrier, Barristers & Solicitors,
100 Adelaide Street West, Toronto 1, Ontario.

RECOMMENDATIONS

1. That the Special Joint Committee of the Senate and House of Commons on Divorce give priority in its deliberations to the theory of Breakdown of Marriage and cause inquiry to be made into the desirability and feasibility of amending the law of divorce in Canada to provide that no marriage shall be dissolved unless it is shown to the satisfaction of a Court of competent jurisdiction that the marriage has irretrievably broken down.

2. That in considering the implementation of the theory of Breakdown of Marriage the said Joint Committee give attention to the desirability and feasibility of recommending to Parliament that the following be enacted as the sole ground for divorce in Canada:

An application for dissolution of marriage may be made to the Court by either spouse if at the date of the application the spouses are living separately by reason of their mutual consent or the conduct of one of them, and the Court shall pronounce a decree dissolving the marriage upon such separation being established provided that

- (i) from time to time or continuously within the three years immediately preceding the date of the application the spouses have lived separately as aforesaid for a total period of not less than two years; and,
- (ii) there is no reasonable likelihood of a resumption of cohabitation; and,
- (iii) the making of the decree will not prove unduly harsh or oppressive to the other spouse or to any child of either spouse.

These recommendations and the following brief offered in support of them are respectfully submitted this 29th day of November, 1966, by James C. MacDonald, and Lee K. Ferrier, Barristers & Solicitors, 100 Adelaide Street West, Toronto 1, Ontario.

BREAKDOWN OF MARRIAGE

1. Society believes in marriage as a "union for life", or "the life-long cohabitation in the home for the family", but accepts the need for divorce. There are four possible bases for divorce: unilateral declaration, divorce by consent, the doctrine of matrimonial offense, and the doctrine of breakdown of marriage.

Definitions:

2. A theory of divorce based on unilateral declaration provides simply that either party to the marriage may terminate the legal bond by so declaring. Certain procedural requirements are usually attached, for example, the filing in a public office of certain documents, and the obtaining of the signature of a named official. Upon such declaration being made, and the procedural requirements being complied with, the marriage no longer exists at law. There has been no intervening examination by the state of the facts giving rise to the necessity for the divorce.

3. Divorce on consent is achieved in the same manner as divorce by unilateral declaration, except that both parties to the marriage must consent to its dissolution. There is no examination into the conduct of the parties or the marriage. Any investigation which is ordered is simply directed to determining that the consent has not been gained by coercion or duress.

4. Under a system of divorce based on matrimonial offence such as we have in our present law, certain acts are held to be fundamentally incompatible with the undertakings entered into by the parties to the marriage. The commission by a spouse of one of these specified acts gives the other spouse the option to have the marriage terminated.

5. The doctrine of breakdown of marriage would prescribe that a divorce is granted only where the marriage has broken down. The definition of breakdown is contained in the answer to the question, "Does the evidence before the Court reveal such failure in the matrimonial relationship or such circumstances adverse to that relationship, that no reasonable probability remains of the spouses again living together as husband and wife for mutual support?" (Report to the Archbishop of Canterbury, S.P.C.K., 1966, prepared by a group under the chairmanship of R.C. Mortimer, D.D., par. 55).

Objections to Unilateral Divorce:

6. Divorce by unilateral declaration can be dismissed out of hand as not presenting a real possibility in Canada.

Objections to Divorce by Consent:

7. Divorce by consent cannot be dealt with so easily. Henry L. Cartwright in the preface to the third edition of the text, *The Law and Practice of Divorce in Canada*, (1962), argues forcefully in its favour. "The late W. Kent Power, Q.C., was one who took the view that marriage is a contract like any other that should be dissoluble upon the agreement of the parties." (Douglas F. Fitch, *Let's Abolish Matrimonial Offences*, 9 C.B.J. 78 at 81 (note 13)). This article also refers to the view of Sir Jocelyn Simon, President of the Probate, Divorce and Admiralty Division of the English High Court of Justice, which was expressed in September, 1965. His Lordship was of the opinion that divorce by consent should be allowed, but its application restricted to couples without infant children.

8. The main objection to granting divorce on this basis is that marriage is reduced to a private contract from which the interest of the community is excluded. The community in this system has no function—it has no part to play in the termination of the legal bond, other than to administer the procedural requirements to give the dissolution recognition in law. That the community has some greater function to be exercised through its judiciary is approved by Mr. Justice Scarman in a public lecture given at the University of Bristol in March, 1966:

I would think that anyone who reflects upon the problem, and who accepts the objectives of the law to which I have earlier referred, would conclude that divorce by judicial process, should not be abolished but strengthened. Society's interest in the preservation of family life and, when it is fragmented by breakdown, in the binding up of the wounds inflicted upon spouses and children, requires that the tie of marriage should be lawfully dissolved only when these interests are properly safeguarded. Spouses, their judgment distorted by marital unhappiness, cannot, however good their intentions, be relied upon to put first the objectives that society must seek to achieve in its regulation of family life. It might, however, be said that society's interest could be adequately, and far more cheaply, safeguarded by divorce being made the subject of administrative, not

judicial decision—for example, available in some sort of register office on application of one spouse in certain defined circumstances, or upon the filing of a consent. The objection, as I see it, to divorce by administrative process, is that there could be no assurance either to the public that its interests were being safeguarded or to the spouses that justice was being done in their case. Spouses are not always agreed in wanting divorce, yet often the relief should be available notwithstanding the opposition of one. And when spouses are agreed, their agreement is no guarantee that the interests of society will be observed. Justice to the spouses and to the interests of society requires, I suggest, that divorce be available only by judicial decision so that all may appreciate that the various conflicting interests that are bound to arise and need adjusting are being properly and responsibly assessed and met.

9. Another objection to divorce by consent is succinctly stated by Lord Walker: "I agree with those who think that to permit divorce by consent would be to destroy the concept of marriage as a life-long union." (Report of Royal Commission on Marriage and Divorce, 1951-55, (Cmd. 9678), under chairmanship of Lord Morton, page 340).

10. We submit that the majority of Canadians would agree that the state has some interest in maintaining the institution of marriage, and that they would react, in the company of Lord Walker, against divorce by consent.

Use of Theories of Offence and Breakdown:

11. The remaining doctrines of matrimonial offence and breakdown were viewed by Lord Hodson as posing alternate choices. Speaking in a debate before the House of Lords he stated,

There are only two theories alive on this problem—namely, are we going to act on the matrimonial offence, or are we going to act on the breakdown of marriage theory? That is the fight.

12. Other reformers have considered these theories as not necessarily presenting an either/or proposition and have suggested that they be combined in one divorce system. With this suggestion we now have three possible foundations upon which Parliament can legislate for divorce:

1. Matrimonial offence;
2. Matrimonial offence and breakdown in some combination, and;
3. Breakdown.

Retention of Matrimonial Offence Theory:

13. Some of the arguments in favour of retaining the doctrine of matrimonial offence will now be considered. One of the arguments put forward by those who support the doctrine is that it provides a clear and intelligible principle for determining whether or not a marriage should be dissolved. We submit this argument is sound only so long as the grounds can be clearly defined and, more importantly, applied with certainty in any given circumstances. Difficulty soon becomes apparent in this area when such notions as desertion and cruelty are considered. These may be defined with ease, but their application in many cases is subject to the greatest doubt.

14. Another submission sometimes made in support of the doctrine is that it promotes marital security in the sense both spouses know that if their conduct avoids certain offences, the marriage will be secure from dissolution. So long as the grounds can be clearly and intelligibly defined, this may in fact be the case. But it is highly doubtful that it is desirable to have the law encourage "secure" marriages at the expense of permitting the partners to believe anything short of a matrimonial offence is fairly within the ambit of normal married life.

15. It is also argued that the doctrine of matrimonial offence is satisfactory because it provides relief where something has been done by a spouse which cuts at the root of the marriage. It is submitted that the commission of a matrimonial offence in itself does not necessarily prevent the marriage from being or becoming a desirable life-long partnership.

16. Adherents of the matrimonial offence system have argued that it operates to deter illicit unions because in that system only an "innocent" spouse can sue. A spouse who leaves his or her partner to live with a paramour runs the risk that the union can never be regularized because of the refusal of the other spouse to exercise his exclusive right to have the marriage dissolved. But we must ask ourselves, does withholding the blessing of the law really discourage illicit unions?

17. Another argument advanced is that the matrimonial offence system is satisfactory because of its adaptability to the changing views of society. As society redefines what constitutes a grave matrimonial wrong, so may the law evolve, by constituting further "acts" as "offences". This necessarily involves legislation for hard cases, and prevents the application of any consistent principle. This leads to anomaly, and anomaly is always difficult to justify in the law. If a divorce law is based on relief for hard cases, what limits the choice of case? Why give relief to this hard case and not to that one?

Objections to Matrimonial Offence Theory:

18. Some of the objections to the doctrine of matrimonial offence have been suggested in dealing with the arguments just presented in its favour. Further objections were mentioned before the Morton Commission and were acted upon by the Mortimer Group. The first of these objections is that a marriage may in fact be broken down irretrievably even though no matrimonial offence has occurred. The converse of this, is that it permits divorce in some cases where the marriage might otherwise be salvaged. The commission of a single act of adultery entitles the innocent spouse to a divorce even though the marriage may be a good one.

19. The system of matrimonial offences most often treats of the symptoms of marital difficulty and not the causes. This means that divorce is given for the wrong reasons, and without the actual state of the marriage being considered.

20. A system of matrimonial offences rewards a spouse (who wants a divorce) for immoral conduct. Further, it penalizes the spouse who refuses on moral grounds to commit a matrimonial offence or perjury.

21. The doctrine makes divorce easy.

22. The doctrine does not encourage reconciliation, but in fact discourages it. Spouses are often ill-advised to attempt reconciliation because in so doing they may condone offences and forever lose their right to divorce.

23. Relief based on matrimonial offence leads to a false evaluation of marriage as an institution, and brings it into disrepute. It implies that any act however reprehensible which falls short of being a matrimonial offence is not "wrong". It has also been said that the concentration of judicial attention on offences, evokes a false sense of values, and gives importance to acts, the significance of which varies widely with each marriage. Conversely it does not give importance to acts which are not recognized as offences, but may well be the cause of difficulty in the marriage. In reality and from a moral standpoint, an offence does not make a case for dissolution. What does, is the failure of the relationship between the spouses.

Adding Breakdown as an Additional Ground:

24. Can these inadequacies in the matrimonial offence system be corrected by adding breakdown as a ground within the system? The next few pages of this brief will deal with the answer to this question.

25. In present day England the grounds for divorce are adultery (and rape, sodomy, and bestiality), cruelty, desertion, and insanity. Of these grounds all those down to the last one are offences. They are species of behaviour which can be analyzed as having elements of wrongful intent and fault (or blameworthiness) roughly analogous to *mens rea* and the criminal act found in the other side of the law. It is meaningful when talking of this behaviour to say of the responsible person that he is "guilty" of something. The other party not having consented to being inflicted with this behaviour is correctly, when we speak in these terms, called "innocent". This form of thinking and these labels are appropriate to a system of offences. But when we are faced with insanity our thinking becomes confused and our terminology less apt. We ask ourselves of the insane spouse: Where is his wrongful intent? Where is his blameworthiness? How, in short, can we say he is "guilty" of anything? His behaviour has none of the ingredients of an offence. A divorce because of this behaviour only becomes understandable when we look at it in the light of being something which totally frustrates the marriage relationship, or makes continued cohabitation impossible. But this is far different from saying that what has happened is that someone has committed an offence, and that this offence justifies him being divorced at the suit of some "wronged" party.

26. Insanity as a reason for granting a divorce must be supported on something other than the matrimonial offence doctrine. Its incorporation in a list of grounds would seem to be a working example of a system which combines an alien principle with the doctrine of matrimonial offence. As such, is it not an argument in favour of the submission that the principle of breakdown can be successfully incorporated into the system of matrimonial offences? A professor of law at Columbia University, Monrad G. Paulsen, although he might not use this example as an argument would probably hold that a combination, and a successful one, is possible. Criticizing the Mortimer Group's Report in an article which appeared in the *New Society* on the 4th of August, 1966, under the title *Divorce Canterbury Style*, he states:

The Mortimer Group vigorously rejects the idea that 'breakdown' should be added to the list of grounds for divorce, principally for the reason that, in the group's view, the principle of matrimonial offences and the principle of breakdown are mutually inconsistent and the incompatibility, the report asserts, would be 'glaringly obvious' creating an unfortunate anomaly. This point is persuasive only if the state chooses one principle as the exclusive one and then adds grounds which are justified on the other principle. But why should an exclusive choice be made? One principle can serve the case of the spouse who has suffered serious offence. The other can serve those spouses in respect of whom no glaring misconduct can be identified, and those who seek divorce against the will of a relatively innocent partner. The legal system frequently chooses different principles to dispose of distinguishable situations.

27. Before attempting to put forward some of the rebuttal arguments against Professor Paulsen's "so what" indictment let's go back to insanity. It might be said about insanity that we are not talking of breakdown of the marriage except in an incidental sense. What we are really talking about is the loss of the person (or personality, if you like). This loss might be compared to death and it is recognized that death of one of the spouses terminates the marriage relationship. Insanity then might be said to be more analogous to the

death of one of the participants than to the death of the relationship created between them. It is only the latter "death" which is contemplated in the breakdown theory; so perhaps we cannot say that in England the matrimonial offence system already has a ground for divorce based on breakdown. What, we then ask ourselves, would be a genuine example of the incorporation of a breakdown principle? The best example is the one closest at hand. In its convention at Winnipeg this summer the Canadian Bar Association on the 2nd of September, passed a resolution which recommended that the law of divorce be changed by extending the grounds to occupy the same position enjoyed in England, and to go beyond it by adding one other ground and the following:

4. Voluntary separation of the husband and wife for a period of three years preceding the commencement of proceedings provided that the Court shall be satisfied that:

- (i) There is no reasonable likelihood of a resumption of cohabitation, and
- (ii) The issue of a decree will not prove unduly harsh or oppressive to the defendant spouse.

28. Separation is not a matrimonial offence, and is based on the breakdown principle. It is not a matrimonial offence because the separation contemplated is a voluntary separation by mutual consent. There is no conduct which one can blame against the other. There is no guilty or innocent party. Both might be guilty or both might be innocent, and either of them may take the initiative in bringing the divorce action.

29. Support for the position taken by the Bar Association can be found in the views of some of the members who sat on the Morton Commission (1951-55). Nine of the nineteen members were in favour of introducing a similar ground into the law of England. They disagreed among themselves (5:4) only on whether the marriage should be dissolved in such a situation despite the opposition by an unoffending spouse. All nine would go as far as adding the following as a ground for dissolution:

An application for dissolution of marriage may be made to the Court by either spouse on the ground that the spouses have lived separately for a period of not less than seven years immediately preceding the application, and the Court shall pronounce a decree dissolving the marriage where this ground is established, provided that the other spouse does not object.

30. Four of these nine members advocated a wider proposal which would, in some circumstances, permit divorce despite the objection of the unoffending respondent. This would be accomplished by retaining the suggested wording of the main clause and changing the proviso to read:

...provided that if the other spouse objects to the dissolution, the applicant must first satisfy the Court that the separation was in part due to unreasonable conduct of the other spouse.

31. Lord Walker, one of the Commissioners, was in favour of the breakdown doctrine, but not in either of these forms. He approved of its application only if it were made the sole basis for divorce. He defined a broken marriage (and thus the "breakdown" situation), as one where the facts and circumstances affecting the lives of the parties adversely to one another are such as to make it improbable that an ordinary husband and wife would ever resume cohabitation. Conforming to this definition he held the view that no marriage ought to be dissolved where there is hope of reconciliation. This end could be achieved only by using

the breakdown principle. His opposition to introducing the principle as a ground in a system of matrimonial offences appears to rest upon the arguments:

1. That marriage cannot be said to be broken down merely because the spouses have consented to lead separate lives, and;

2. That divorce, in order to preserve the institution of marriage as a life-long union, should proceed from one general principle.

32. Where the parties are living apart it cannot be said that the marriage has broken down until the prospects of reconciliation are explored. Whether reconciliation is possible would depend on the reasons for the separation and if reconciliation has not been attempted, the reasons why. A long period of separation is evidence of breakdown deserving of great weight, but is not conclusive proof.

33. Lord Walker's other objection appears to be that the principle of offence and the principle of breakdown are two mutually inconsistent logical systems. In practice when you use them together you are really legislating from the point of view of relieving individual cases of hardship and then going back to justify this relief on whichever of the two theories seems to fit. To re-establish the institution of marriage in its true significance as a life-long cohabitation in the home for the family, you must proceed from a general principle and not from individual cases. You apply one principle or the other, and do it consistently. If you proceed from thinking in terms of matrimonial offence you apply that doctrine in all its rigor without watering it down with categories which do not have the ingredients of an offence. Similarly, if you start with breakdown you are premising your solution on a particular meaning of marriage, and must act accordingly. You are saying that marriage means actual (or where there is a separation, "probable") cohabitation for life and your legislation is arrived at by protecting this definition. If the marriage is an "empty tie" it is dissolved. If it is not, then it is maintained. If there is doubt then the parties are encouraged to seek counselling and the proceedings are adjourned until the results are known: Letting Lord Walker speak for himself we hear these views expressed as follows:

The doctrine of the matrimonial offence allows divorce only at the option of the party innocent of the offences against the party guilty of the offence, whereas the principle of dissolution on breakdown of marriage would allow dissolution at the option of either party. Whether the option is with one party as at present, or is given to both parties, it is possible to figure hard cases that might arise but these (divorce by consent apart) are inherent in any attempted solution of the problem of dissolving an indissoluble union. The commission of a matrimonial offence is often the symptom or sequel of a marriage which had broken down for quite other reasons; and in such cases the party morally responsible for the breakdown is sometimes, under the existing law, permitted to masquerade as the legally innocent party. I do not, however, think the problem can usefully be considered from the point of view of hardship to individuals. Divorce, differing from judicial separation, is a matter in which the public interest ought to be regarded as paramount. In relation to divorce the Memorandum submitted on behalf of the Church of England, in its first paragraph, lays emphasis on the importance of proceeding from some general principle as to the significance of marriage in itself, and as a social institution. I accept that as being the proper principle to follow. The true significance of marriage as I see it is life-long cohabitation in the home for the family. But when the prospect of continuing cohabitation has ceased the true view as to the significance of marriage seems to require that the legal tie should be dissolved. Each empty-tie—as empty ties accumulate—adds increasing harm to the community and

injury to the ideal of marriage. The simplest and I think the best solution is that the law—which will not enforce cohabitation—should favour the dissolution of broken marriages at the suit of either party.

My view accordingly is that the doctrine of the matrimonial offence ought to be abandoned as the basis for divorce and replaced by a provision that marriage should be indissoluble unless, having lived apart for not less than three years, either party shews that the marriage has broken down in the sense I have endeavoured to define...However, should that view not be adopted the need for some principle—even though, as I think, it is not the best principle—requires that the doctrine of matrimonial offence should be adhered to as closely as may be, and without the new grounds of divorce proposed by some of the members...(Morton Commission, page 341)

34. The proposed new grounds which Lord Walker did not wish to see added were the grounds of “separation” suggested by the nine members mentioned above. In paragraphs 23 and 24 of their report the Mortimer Group states:

23. We very soon decided that it would not be an improvement, but the reverse to introduce the principle of breakdown of marriage into the existing law in the shape of an additional ground for divorce; and our objections to any such compromise multiplied and hardened as the time went on. In our opinion it is a very good thing indeed that the Bills which proposed a “ground of separation” failed to reach the statute book.

24. Having rejected the addition of new grounds to the existing law, we saw we should have to face a choice of principle. It seemed to us that Lord Hodson had been undeniably right when he said in the debate already mentioned:

There are only two theories alive on this problem—namely, are we going to act on the matrimonial offence, or are we going to act on the breakdown of marriage theory? That is the fight.

Lord Walker had posed the same alternatives, we noted, at the time of the Morton Commission. He said in his minority statement that either the matrimonial offence ought to be abandoned and the principle of breakdown be substituted, or else the principle of the matrimonial offence ought to be maintained as strictly as possible, without the addition of grounds inconsistent with it. We agreed that this was the choice that had to be made.

35. Later on in its report (paragraph 69) the Mortimer Group summarizes the reasons why breakdown must not be introduced into the law as a “ground”. The reasons are:

- (a) The mutual incompatibility of the two principles would be glaringly obvious;
- (b) The superficiality inseparable from verbally formulated “grounds” would tend to render the principle of breakdown inoperative, and;
- (c) The addition of a new “ground” embodying the principle of breakdown would make divorce easier to get without really improving the law.

36. In explaining the incompatibility of the two principles the Group stated:
The existing law is almost entirely based on the assumption that divorce ought to be seen as just relief for an innocent spouse against whom an offence has been committed by the other spouse. If then there were inserted into this law an additional clause enabling a guilty spouse to petition successfully against the will of an innocent, the whole context would proclaim the addition unjust. (page 57)

37. The second reason stated by the Mortimer Group follows from the approach that offences as we know them are often at best merely "symptoms" or "sequels" to breakdown and not the cause of breakdown. On this point the Group said:

One of our reasons for recommending the principle of breakdown is that it would enable the Courts to get to grips with the realities of the matrimonial relationship instead of having to concentrate on superficialities. But if the principle were introduced into the law in the shape of yet another verbally formulated "ground" (such as the Australian "ground of separation"), the advantage hoped for would be lost. There would inevitably be a tendency simply to measure the circumstances revealed by the evidence against the verbal formula, and, if they appeared to fit it and no bar applied, to grant a decree without any genuine trial of the issue of breakdown. In other words, it is likely that the attitudes and procedures appropriate to the trial of matrimonial-offence cases would be extended to cases turning on the new "ground". There is some evidence of this in Sir Stanley Burbury's comments on the Australian law. Our own view is that trial of the issue of breakdown would require new attitudes and procedures, and that it is highly unlikely that these would be duly developed by the Courts if the principle of breakdown did not pervade the whole divorce law. It may be added that the mere addition of a new "ground" would do nothing to remedy the particular aspect of superficiality noted by Sir Garfield Barwick, namely, the artificial definition, which is implicit in the verbal formulation of "grounds", of "the area of conduct which will remain innocent in a matrimonial sense". If on the other hand the whole law were to be based on the doctrine of breakdown, this artificial delimitation would disappear. (page 58)

38. The third reason mentioned is that embodying breakdown as a ground would make divorce too easy;

Introduction of the principle of breakdown in the form of a new verbally formulated "ground" would not reform the law: it would simply make the existing law open-ended and provide a last resort for petitioners who found they could not succeed on any other "ground"... The implicit advice of a mixed divorce law to people wanting to rid themselves of marriage might well become, "When no other ground offers, try breakdown of marriage". (page 59)

39. The conclusion of the group on this point is stated as follows:

In our opinion, therefore, the principle of breakdown ought on no account to be introduced into the existing law in the form of an additional "ground". Failing the complete substitution of principle which we recommend, it would be better to keep the law based firmly on the matrimonial offence, and to consider how its administration could be improved, than to inject into it a small but virulent dose of incompatible principle. (pages 59-60)

New Procedures:

40. In explaining its second objection to mixing the doctrines of offence and breakdown the Mortimer Group states that the "trial of the issue of breakdown would require new attitudes and procedures...". The question of breakdown cannot be tried without some departure from the adversary system of determining facts. One of the reasons necessitating a departure is that the parties although they may have become adversaries in life, many times are not adversaries in Court. The "dispute" that they (or one of them by legitimate arrangement) bring into Court is a question both of them want decided in the same way. The information given to the Court in evidence is "selected" to accomplish their

joint objective. The whole of the facts may not be heard. The Court really has no contest to referee, and often is only concerned with whether the Court itself is being deceived. The hearing becomes an inquiry by the Court into the conduct of both parties to determine whether the recipe has been followed without employing the deceits of collusion or connivance. It might be interesting to speculate on who are the adversaries in this situation or whether there are any at all. Without following the course of this digression let us simply say that there are no adversaries because there is no *lis inter-parties*. What is going on is simply an inquiry conducted by the Court into determining whether or not a certain state of things exists. An inquiry approach is what the Mortimer Group recommends in place of the adversary system for trying the issue of breakdown. This recommendation, the report makes clear, is required by necessity. The changes in substantive law

must be regarded as conditional upon certain procedural changes; for we believe that to alter the law while leaving the method of its administration just as it now is would be to make divorce easier to obtain without any compensating advantages. What is essential is to render the procedure of the Court appropriate to making inquiry into the condition of the marriage instead of to determining the guilt or innocence of a person against whom the commission of an offence has been alleged. Under a law based on breakdown the trial of a divorce case would become in some respects analogous to a coroner's inquest, in that its object would be judicial inquiry into the alleged fact and causes of the "death" of a marriage relationship. It would have to be made possible for the Court, therefore, to inquire effectively into what attempts at reconciliation had been made, into the feasibility of further attempts, into the acts, events, and circumstances, alleged to have destroyed the marriage, into the truth of statements made (especially in contested cases), and into all matters bearing upon the determination of public interest. (page 67)

41. To give the Courts some of the necessary information the pleadings would be expanded to

cover the salient features of the history of the marriage in question, the reasons alleged for its failure, any attempts made to achieve reconciliation, and all arrangements proposed for the care of any children, for the disposal of property, and for maintenance in general. (page 68)

42. The Court would have the power to require the attendance of both parties on occasion to give evidence about their marriage. The respondent who wanted to remain passive and take no part in the proceedings might be required to file some sort of statement informing the Court of his attitude to the matters pleaded in the petition.

Sometimes it would have to be a full pleading in answer to the petition, sometimes not. It would in no case have the character of a cross-petition as that is understood under the present law, because decrees made on the basis of breakdown would never be "in favour" of one party or the other. (page 69)

43. All questions arising between the parties should be disposed of in one proceeding.

We suggest that the petition and any reply made by the respondent should cover everything the parties wished to raise at any stage of the proceedings, including matters of property, maintenance, and the future of any children of the marriage. (page 69)

44. It is recognized that it would be unpalatable to turn Judges into inquisitors. To appraise the Court of the relevant facts it must then in some cases at least, have assistance. One idea is to employ "forensic social workers" as officers of the Court.

The officers could, when required to do so, verify attempts at reconciliation, test the reliability of assertions made to the Court, and investigate any other matters on which the Court wished to be informed, and could report on the circumstances of children of the family. They might also supervise the working of arrangements made for custody and maintenance. (page 70)

45. This change of procedure is extremely important. Only with this new approach to the problem can the Court be expected to satisfy itself that "there is no reasonable likelihood of a resumption of cohabitation". It is impossible to answer this question in terms of the adversary system, because in many cases the Court could not rely solely on the parties to bring forward all relevant evidence and would have to be prepared to introduce evidence on its own motion.

46. Probably in the short space allowed for this paper the best way to illustrate the difficulty is with the following example. Suppose the changes recommended by the Canadian Bar Association were made law and separation without likelihood of a return to cohabitation were made an additional ground. Suppose further that you are retained by an intended Plaintiff whose spouse has been away the required time, and you also have instructions of an offence of adultery, but for reasons pertaining to difficulties of proof you do not wish to rely solely on this latter ground. To be safe you make use of the two possible grounds offered to you and plead them in the alternative. Now imagine the trial. In order to correctly apply the law to the two grounds the Court proceedings might go something like this. You lead your evidence on the adultery and the best you can do is tender the Plaintiff's evidence of an admission, and show some weak corroboration. The Judge is undecided and wishes to reserve, but wants to hear the rest of the case. You then proceed, and your friend representing the defendant spouse suddenly realizes that the defence has been taken out of his hands by the Judge giving instructions to subpoena his client. Your friend voices his surprise and is told that the Judge is no longer merely an umpire, but has some of the powers analogous to a Commissioner under the Public Inquiries Act; and in order to be satisfied that there is no likelihood of a resumption of cohabitation, His Lordship wants to hear from the mouth of the defendant what attitude he takes to the marriage. In this situation we would have the Court at one moment adjudicating a contest, and in the next being an active participant in an inquiry. No rules would be clear—an impossible situation.

47. It might be argued that the procedural change is so radical that it would upset the whole of our Court system. The advocates of breakdown do not underestimate the effect of this change. The Mortimer Group recognized "that reform of the Courts and their procedure is apt to be a much lengthier undertaking than amendment of the substantive law. . .". However, it is submitted that the change is not as radical as it might first seem. As already mentioned everytime there is a suspicion of collusion or connivance an inquiry of sorts is held. In Ontario this inquiry through the "forensic" offices of the Queen's Proctor may be quite extensive. Another instance where the Courts in matrimonial causes often conduct an investigation more in the nature of an inquiry than that of a disinterested judicial officer presiding over a contest, is where it is necessary to consider whether the Court's discretion should be exercised in favour of a Plaintiff who has also committed a matrimonial offence. It is interesting to note that in conducting this inquiry one of the main questions to be determined is

whether the marriage has broken down. To use a recent example Tucker, J., of the Saskatchewan Queen's Bench appeared to have no difficulty in making a finding on this question. In *Deptuc v. Deptuc* (1966) 56 D.L.R. (2d) 634, he held that a decree should be granted dissolving the marriage because it had hopelessly broken down, and that to maintain it would be against public policy, the interest of the parties, and the child. That the Courts can where necessary conduct an inquiry is again illustrated in *Spoor v. Spoor* (1966) 3 All. E.R. 120 in the Probate Divorce and Admiralty Division before the Registrar. In this case it was held that proceedings under Sec. 17 of the Married Women's Property Act 1882 were in the nature of an inquiry into a claim, and were not an adjudication on a cause of action. In the recent Canadian case of *Re Bailey* (1966) 6 D.L.R. (2) 140 in the British Columbia Supreme Court before Ruttan, J., it was held that the case could not be decided in terms of onus of proof because the matter before the Court was initiated by the administrator of the estate and the proceeding was not a trial. It was an inquiry by the Court to determine which of the heirs was entitled to succeed. It was not a contest between parties. These examples show that a Court proceeding need not necessarily be a contest such as comes to mind when we think of the adversary system.

48. The idea of "forensic social workers", should not seem too unusual—at least to Ontario lawyers. They are quite familiar with this sort of officer every time there is a divorce with children of the marriage under the age of sixteen. In these situations, an investigation is made and a report filed with the Court on behalf of the Official Guardian. An example of this sort of worker outside the area of matrimonial law is the probation officer who makes the pre-sentence report given to the Court in a criminal case.

Breakdown as the Sole Basis for Divorce:

49. The last alternative to be discussed is the suggestion that the doctrine of breakdown be substituted comprehensively in place of the matrimonial offence as the sole basis for divorce. This, as we have seen, is the recommendation made by the Mortimer Group.

Many of the aspects of the breakdown principle have already been referred to in this paper; it is perhaps best now to consider the main objections to the doctrine.

Is Not Divorce by Consent:

50. One of the major objections raised is that breakdown entails divorce by consent. This is clearly not so because the state is not a mere bystander, but through the Courts, exerts its part in the determination of whether or not the marriage is still a viable relationship. If the marriage is found to be an "empty tie" after due inquiry by the Courts, the state "approves" of the termination of the legal bond.

51. It may be said that in reality, parties may obtain a divorce on consent under the breakdown doctrine by simply agreeing to separate for a few years, such separation to be followed by the commencement of a suit for divorce by one of the parties. It is to be noted, however, that under the breakdown theory, this in itself will not be sufficient to obtain a divorce. The applicant will still be required to show that there is no reasonable probability of the parties ever resuming cohabitation as husband and wife. Adultery, cruelty, desertion, separation of the spouses, the wishes of the parties to terminate the marriage, all will be evidence tending to show breakdown, but in themselves may not necessarily result in breakdown being proven. The court will always want to know what attempts if any have been made toward reconciliation, how each party feels about the possibility of reconciliation, what factors contributed to the breakdown, and whether or not the factors can be eliminated to the advantage of the union.

52. It would be possible under breakdown to arrive at a "consensual arrangement" leading to divorce—but no more so than at present where the Defendant legally supplies and admits particulars of adultery.

Against Will of Unoffending Spouse:

53. One of the points dealt with by the Mortimer Group was the objection that the breakdown theory would permit divorce at the suit of a culpable party against the will of an unoffending spouse. In order to see this objection in its proper context one must pre-suppose that all substance has gone out of the marriage—there is no longer any married life—and the spouses are left with only its legal form. It is the spouse who is morally in the wrong who initiates the Court proceedings to dissolve the tie. The other spouse has at all times lead a praiseworthy life and out of strong feelings of what is right opposes the proceedings. Should the marriage be dissolved? These imaginary but possible circumstances give rise to three considerations:

1. Deprivation of status;
2. The result that a person may "take advantage of his own wrong", and;
3. Economic deprivation.

54. We have referred firstly to the deprivation of marriage status. One of the premises of the breakdown theory is that it is not in the public interest to maintain an empty marriage tie, and its proponents generally advocate that where this finding is arrived at after a thorough Court investigation the marriage should be dissolved despite the scruples of the respondent. There will always be hurt to the family where there is divorce no matter what system is employed; all hurt to spouses or children cannot be avoided. To refuse divorce because of individual hurt must be balanced against the desirability of dissolving marriages which do not exist in life. However, there is also another public interest to serve and that is the public sense of justice or the prevention of a general feeling of outrage. In some cases to dissolve a marriage against the wishes of a praiseworthy spouse would be to ignore this interest. Therefore, it is necessary, in the view of the Mortimer Group, to allow the Court a discretion to refuse a divorce where the Plaintiff has acted with gross misconduct. To do otherwise would shake the public confidence in the administration of justice and cast doubt on society's concern for the institution of marriage.

55. The maxim which prescribes that a person cannot take advantage of his own wrong is really a meaningless question when asked within the terms of reference of the breakdown theory. A spouse who commences an action to have the marriage dissolved is asking for a declaration that the marriage is finished. The spouse is not asking for a judgment on relative conduct of the spouses, but for the Court's opinion on whether or not there is any hope for the marriage; and if not, that the marriage be declared dead. The situation is somewhat analogous to nullity suits where the only question is the validity of marriage and where no conduct on the part of the Plaintiff can act as a bar. If the marriage is a nullity the good or bad conduct of the Plaintiff has no relevance. The Courts simply are not concerned with him. They are concerned with the marriage. In the same sense in a breakdown situation (except with respect to the right to exercise the discretion mentioned above), the Courts are not concerned with the rightness or wrongness of the Plaintiff's conduct; they are only concerned with the life or death of the marriage. The Court's judgment is a judgment on the marriage and as in a nullity suit a judgment against the marriage does not carry with it an evaluation of good or bad conduct. A party does not leave the court room thinking he or she is "guilty", or "innocent".

56. Whether or not justice has been done depends on whether or not members of the family unit have unfairly suffered economic deprivation. Divorce in the circumstances we are imagining is not unjust provided the unoffending respondent and the children are not worse off economically. The Court would be empowered and required to make a full inquiry into how dissolution of the marriage would affect the family members financially. To meet the requirements of justice the Court would have the power, not only to make orders for maintenance against either spouse, but also to award members of the family shares in pension benefits, insurance, and other emoluments that are now part of our financial life. It, of course, would also have the power to withhold any decree of dissolution until provision has been made for the dependent spouse and children. To simplify this process it might be practicable to introduce through the legislature some form of community of property.

Is Not Easy Divorce:

57. A further objection is that breakdown would make divorce too easy. There may or may not be an increase in the number of divorces per unit of population; of this we can make no prediction. However, what we can be assured of is that on the basis of breakdown there would likely be fewer potentially good marriages dissolved than under a system where the possibility of reconciliation is not explored.

Threat to Marital Security:

58. It has also been suggested that breakdown would threaten the "security of wives and mothers". It is said that under breakdown a spouse would never know whether he was secure in his marriage. Spouses could no longer be certain that provided their conduct fell short of the defined limits (offences) their marriage would be indissoluble. On the other hand it can be said that breakdown

would give persons the security of knowing that a momentary lapse, adulterous or not, would not spell a sudden end, but that continuing inattention to marital duties would mean an ultimate break. (Fitch, 9 C.B.J. at 87.)

Triable Issue:

59. The objection is sometimes made that the question of whether or not a marriage has broken down is a question which does not present the Court with an issue capable of being tried. It is admitted that to explore the question adequately the procedure of the Court should be enlarged in the way dealt with above. But, the objectors will claim, the Court is still faced with deciding something which is impossible to determine. It is submitted that this is not so. Sometimes no doubt, the question will be a very difficult one, but most times not. On this point, it might be helpful to look at a concept in the law which we already have, and which in some respects brings with it the same difficulties. We bring to mind the concept of negligence which pervades our law. Does this concept not on occasion present a question which is "impossible", to try? But we get along with it, and do so with a feeling that justice is being done. Coming back to matrimonial law we submit the question is no more difficult than deciding in a cruelty case whether the defendant spouse will continue a course of violent, or dangerous conduct; and whether if continued, the other spouse would suffer permanent injury. It is further submitted that breakdown is no more difficult of trial than making a decision in the following situation. A husband and wife have been quarrelling continuously for two years. The husband finally leaves. The wife then sues for alimony on the basis of desertion. The husband offers to return and the wife refuses to receive him. In the action the Court is put in a position where it must decide, (1) whether the offer to return is genuine, (2)

if genuine, whether the wife has just cause for refusing the offer, and (3) whether the wife (in Ontario, at least) by her conduct has disentitled herself to alimony on the basis that she could not sue for restitution of conjugal rights.

Recommendation:

60. The suggestion that divorce be based on the breakdown of marriage rather than on any matrimonial offence is deserving of the highest consideration. We recommend that the Joint Parliamentary Committee on Divorce be encouraged to give the suggestion priority in its deliberations.

Respectfully submitted,

James C. MacDonald,
Lee K. Ferrier.

November 29, 1966

FEB 6 1967



First Session—Twenty-seventh Parliament
1966

PROCEEDINGS OF
THE SPECIAL JOINT COMMITTEE OF THE SENATE
AND HOUSE OF COMMONS ON
DIVORCE

No. 10

TUESDAY, DECEMBER 6, 1966

Joint Chairmen

The Honourable A. W. Roebuck
and

Mr. A. J. P. Cameron, M.P.

WITNESSES:

The Catholic Women's League of Canada: Mrs. H. T. Donihee, National President; Miss Catherine Toal, Past National President; Mrs. G. J. Connolley, Diocesan President; Mrs. Roland Taylor, Past Diocesan President; Francis G. Carter, Esq., Solicitor for the League.

Canadian Mental Health Association: Gowan T. Guest, Lawyer, National President; John D. Griffin, M.D., General Director.

APPENDICES:

- 23.—Brief submitted by The Canadian Mental Health Association.
24.—Brief submitted by The Family Service Association of Metropolitan Toronto.
25.—Brief submitted by The Benchers of the Law Society of British Columbia.

ROGER DUHAMEL, F.R.S.C.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1966

MEMBERS OF THE
SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS
ON DIVORCE

FOR THE SENATE

Hon. A. W. Roebuck, Joint Chairman

The Honourable Senators

Aseltine	Connolly (<i>Halifax North</i>)	Flynn
Baird	Croll	Gershaw
Bélisle	Denis	Haig
Burchill	Fergusson	Roebuck—(12).

FOR THE HOUSE OF COMMONS

Mr. A. J. P. Cameron (*High Park*), Joint Chairman

Members of the House of Commons

Aiken	Forest	McQuaid
Baldwin	Goyer	Otto
Brewin	Honey	Peters
Cameron (<i>High Park</i>)	Laflamme	Ryan
Cantin	Langlois (<i>Mégantic</i>)	Stanbury
Choquette	MacEwan	Trudeau
Chrétien	Mandziuk	Wahn
Fairweather	McCleave	Woolliams—(24).

(Quorum 7)

ORDERS OF REFERENCE

Extracts from the Votes and Proceedings of the House of Commons: March 15, 1966:

“On motion of Mr. McIlraith, seconded by Mr. Hellyer, it was resolved—that a Special Joint Committee of the Senate and the House of Commons be appointed to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either House;

That 24 Members of the House of Commons, to be designated by the House at a later date, be members of the Special Joint Committee, and that Standing Order 67(1) of the House of Commons be suspended in relation thereto;

That the Committee have power to engage the services of such technical, clerical and other personnel as may be necessary for the purpose of the inquiry;

That the Committee have the power to send for persons, papers and records, to examine witnesses, to report from time to time, and to print such papers and evidence from day to day as may be ordered by the Committee, and that Standing Order 66 be suspended in relation thereto; and

That a Message be sent to the Senate requesting Their Honours to unite with this House for the above purpose, and to select, if the Senate deems it so advisable, some of its Members to act on the proposed Special Joint Committee.”

“By unanimous consent, on motion of Mr. McIlraith, seconded by Mr. Hellyer, it was ordered—That the order of the House of Monday, February 21, 1966 referring the subject-matter of the following bills to the Standing Committee on Justice and Legal Affairs, namely:—

Bill C-16, An Act to provide in Canada for the Dissolution of Marriage (Additional Grounds for Divorce).

Bill C-19, An Act to provide in Canada for the Dissolution and the Annulment of Marriage.

Bill C-41, An Act to amend the British North America Acts, 1867 to 1965, (Provincial Marriage and Divorce Laws).

Bill C-44, An Act to provide in Canada for the Dissolution of Marriage.

Bill C-55, An Act to provide in Canada for the Dissolution of Marriage.

Bill C-58, An Act respecting Marriage and Divorce.

Bill C-79, An Act to amend the Dissolution and Annulment of Marriages Act (Additional Grounds for Divorce).

be discharged, and that the subject-matter of the same bills be referred to the Joint Committee of the Senate and the House of Commons on Divorce”.
March 16, 1966:

“By unanimous consent, on motion of Mr. Stewart, seconded by Mr. Byrne, it was ordered—That the subject-matter of Bill C-133, An Act to extend the grounds upon which courts now have jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief, be referred to the Special Joint Committee on Divorce”.

“By unanimous consent, on motion of Mr. Stewart, seconded by Mr. Byrne, it was ordered—That the subject-matter of Notice of Motion No. 11 be referred to the Special Joint Committee on Divorce.”

March 22, 1966:

"On motion of Mr. Pilon, seconded by Mr. McNulty, it was ordered—That a Message be sent to the Senate to acquaint Their Honours that this House will unite with them in the formation of a Joint Committee of both Houses to inquire into and report upon divorce in Canada, and that the Members to serve on the said Committee, on the part of this House, will be as follows: Messrs. Aiken, Baldwin, Brewin, Cameron (*High Park*), Cantin, Choquette, Chrétien, Fairweather, Forest, Goyer, Honey, Laflamme, Langlois (*Mégantic*), MacEwan, Madziuk, McCleave, McQuaid, Otto, Peters, Ryan, Stanbury, Trudeau, Wahn and Woolliams."

LÉON-J. RAYMOND

Clerk of the House of Commons.

Extracts from the Minutes of the Proceedings of the Senate:

March 23, 1966:

"Pursuant to the Order of the Day, the Senate proceeded to the consideration of the Message from the House of Commons requesting the appointment of a Special Joint Committee of the Senate and House of Commons on Divorce.

The Honourable Senator Connolly, P.C., moved, seconded by the Honourable Senator Roebuck:

That the Senate do unite with the House of Commons in the appointment of a Special Joint Committee of both Houses of Parliament to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either House;

That twelve Members of the Senate, to be designated at a later date, act on behalf of the Senate as members of the said Special Joint Committee;

That the Committee have power to engage the services of such technical, clerical and other personnel as may be necessary for the purpose of the inquiry;

That the Committee have the power to send for persons, papers and records, to examine witnesses, to report from time to time, and to print such papers and evidence from day to day as may be ordered by the Committee, and to sit during sittings and adjournments of the Senate; and

That a Message be sent to the House of Commons to inform that House accordingly.

After debate, and—

The question being put on the motion, it was—

Resolved in the affirmative."

March 29, 1966:

"With leave of the Senate,

The Honourable Senator Beaubien (*Provencher*) moved, seconded by the Honourable Senator Inman:

That the following Senators be appointed to act on behalf of the Senate on the Special Joint Committee of the Senate and House of Commons to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, namely, the Honourable Senators Aseltine, Baird, Belisle, Bourget, Burchill, Connolly (*Halifax North*), Croll, Fergusson, Flynn, Gershaw, Haig, and Roebuck; and

That a Message be sent to the House of Commons to inform that House accordingly.

The question being put on the motion, it was—
Resolved in the affirmative.”

May 10, 1966:

“Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Roebuck, seconded by the Honourable Senator Croll, for the second reading of the Bill S-19, intituled: “An Act to extend the grounds upon which courts now having jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief”.

The question being put on the motion—

In amendment, the Honourable Senator Connolly, P.C., moved, seconded by the Honourable Senator Hugessen, that the Bill be not now read the second time, but that the subject-matter be referred to the Special Joint Committee on Divorce.

After debate, and—

The question being put on the motion, it was—
Resolved in the affirmative.”

J. F. MACNEILL,
Clerk of the Senate.

MINUTES OF PROCEEDINGS

TUESDAY, December 6, 1966.

Pursuant to adjourment and notice, the Special Joint Committee of the Senate and House of Commons on Divorce met this day at 3:30 p.m.

Present: For the Senate: The Honourable Senators Roebuck (*Joint Chairman*), Aseltine, Baird, Fergusson and Gershaw—5.

For the House of Commons: Messrs. Cameron (*High Park*) (*Joint Chairman*), Aiken, MacEwan, McCleave and Peters—5.

In attendance: Dr. Peter J. King, Special Assistant.

The following witnesses were heard:

The Catholic Women's League of Canada:

Mrs. H. T. Donihee, National President;
Miss Catherine Toal, Past National President;
Mrs. G. J. Connolley, Diocesan President;
Mrs. Roland Taylor, Past Diocesan President;
Francis G. Carter, Esq., Solicitor for the League.

Canadian Mental Health Association:

Gowan T. Guest, Lawyer, National President;
John D. Griffin, m.d., General Director;

Briefs submitted by the following are printed as Appendices:

23. The Canadian Mental Health Association.
24. The Family Service Association of Metropolitan Toronto.
25. The Benchers of the Law Society of British Columbia.

At 5.30 p.m. the Committee adjourned until Tuesday next, December 13, 1966 at 3.30 p.m.

Attest.

Patrick J. Savoie,
Clerk of the Committee.

THE SENATE

SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS ON DIVORCE

EVIDENCE

OTTAWA, Tuesday, December 6, 1966.

The Special Joint Committee of the Senate and the House of Commons on Divorce met this day at 3.30 p.m.

Senator Arthur A. Roebuck and Mr. A. J. P. Cameron (*High Park*) Co-Chairmen.

Co-Chairman Senator ROEBUCK: Honourable senators and members of the House of Commons, we can come to order; we have a quorum.

There are one or two small items I would like to bring up in advance. We shall be hearing two very distinguished delegations who have come to advise us in this matter that is under consideration; but before I introduce them I would like to put on record part of a very nice letter we have received from Messrs. MacDonald and Ferrier who addressed us on the last occasion. They say, "We also wish to use this opportunity to thank you very much for the courtesy extended to us...". They add that their visit to Ottawa was a most enjoyable occasion.

There is also a letter from the Reverend Mr. J. R. Hord, who spoke to us at some length. He says, "I wish to thank you for your personal hospitality, and so on, and concludes: "With every good wish for continued success in the sessions of your committee and anticipating significant reform in this field..."

I wish to put on the record a telegram from the Women's Liberal Federation of Manitoba. It is addressed to:

Joint Committee of Senate and House of Commons on Divorce Ottawa. We respectfully submit the following resolution that was first submitted to and passed at the annual meeting of the Women's Liberal Federation of Manitoba and later submitted to and passed at the open convention of the Manitoba Liberal Party: "Be it resolved that the Liberal Party of Manitoba recommend that the Canadian Divorce laws be amended to include as grounds for divorce "A" incurable insanity "B" persistent cruelty "C" desertion of three years "D" separation for three years and be amended to grant jurisdiction for divorce to the courts of the province where either spouse resides. Kay Schroeder President Women's Liberal Federation of Manitoba.

I replied to the wire:

Please accept my thanks for this information. The Joint Committee of both Houses studying the question of divorce is very pleased indeed to have this expression of views from the Liberal Women of Manitoba, and to note that the Liberal Men of Manitoba in an open convention agree with the women.

Honourable senators and members of the House of Commons, we have two delegations, as I have said. We have the Canadian Mental Health Association, and we have the Catholic Women's League of Canada. If you would allow me to

do so I intend to call on the Catholic Women's League first, chiefly for the reason that their brief is a short one and, I may add, an excellent one, for I have read it, and because two of the ladies have reasons, which I need not mention, for wishing to be through at the earliest moment.

There are five ladies here: Mrs. H. T. Donihee, Cornwall, Ontario; Miss Catherine Toal; Mrs. G. J. Connolley and Mrs. Roland Taylor, both of Ottawa; and we have Mr. Francis G. Carter, whom I shall introduce shortly.

And now I will ask Mrs. Donihee to present the brief on behalf of The Catholic Women's League of Canada.

Mrs. H. T. Donihee, The Catholic Women's League of Canada: Mr. Chairman and honourable senators and members of the House of Commons, on behalf of the Catholic Women's League of Canada I wish to tell you how much we appreciate the privilege you have accorded us of presenting to your committee our views concerning this very important subject of divorce. With your permission, I would now like to read the brief.

1. The Catholic Women's League of Canada incorporated by Federal Charter on December 12th, 1923 consists of some 160,000 members across Canada.

2. Among their objects the League seeks the betterment of social action, the stimulation of effort in all lines of women's work and gives unremitting support to the formation of enlightened public opinion. Politically, The Catholic Women's League of Canada is non-partisan.

3. The League, therefore, was highly interested in the Order of Reference directing "That the Senate do unite with the House of Commons in the appointment of a Special Joint Committee of both Houses of Parliament and to enquire into and to report upon divorce in Canada, and the social and legal problems relating thereto, and such matters as may be referred to it by either House," and at its 46th Annual National Convention held at Hamilton, Ontario, instructed its executive to make a submission to the joint committee on its behalf.

4. In the year 1911 the total population of Canada of those 15 years of age and older was 4,830,093 and of that number 4,426 persons were classified as divorced. In the year 1961 the total population of Canada of those 15 years of age and older had less than tripled standing at 12,046,325 but the number of divorced persons had increased more than eleven-fold standing at 52,592. In the year 1963 alone some 7,681 divorces were granted in Canada¹.

5. On the basis of the above statistics, therefore, there can be no doubt that divorce is on the increase in Canada reflecting a breakdown in the family life of many thousands of Canadians.

6. The British North America Act, 1867 (30-31 Victoria Chapter 3, Section 91 Heading 26) vests the Parliament of Canada with exclusive legislative authority in respect of marriage and divorce. It is submitted that divorce cannot be considered distinct from marriage as of necessity any marriage must antedate a divorce, and a divorce is a civil termination of a marriage. It is essential, therefore, that before dealing with divorce the nature of marriage itself must be considered.

7. In the view of the members of the Catholic Women's League of Canada marriage is both a contract by which a man and a woman freely and mutually grant to one another and accept from one another the exclusive and permanent rights to those bodily acts which could lead to the generation of children, and a state of permanent conjugal union brought into being by mutual consent.

8. We further believe that when a valid marriage contract is entered into between two baptized persons such contract is automatically a sacrament and may not be terminated or altered by any human power.

9. Therefore, while we believe that Parliament is established to pass laws for the common good we do not concede that Parliament has any power to pass on the morality or immorality of divorce itself.

10. The fact that Parliament has passed laws legalizing divorce and may conceivably pass laws enlarging the grounds for divorce will not alter our belief that a valid marriage cannot be dissolved.

11. On the other hand it must not be assumed from our stand on this matter that we are unaware of the fact that while marriages may be made in heaven they must be lived out on earth and that the parties to a marriage are human, not divine.

12. We are fully aware that many marriages are, in truth, nothing less than a hell on earth, because of the adultery, the drunkenness, the insanity, the criminality, the bestial conduct or the cruelty of one spouse or the other. We are not unaware of the heartbreak, the trauma, and the mental and sometimes physical agony suffered by the innocent party and by the children of a marriage where one or more of the conditions we have listed above exists.

13. We would also emphasize that while we have our beliefs in the matter of marriage, we do not wish to impose those beliefs on the entire Canadian society through the medium of civil law. While we would resist any attempt of the legislators of this country to pass laws which would prevent us from freely expressing our belief and acting in accordance with that belief, at the same time we would not deny that same consideration for other members of the Canadian society who do not hold the same opinion as we do on this question, providing always that the common good is uppermost.

14. The Declaration on Religious Freedom approved by the Second Vatican Council on December 7th, 1965 includes the following declaration "This Vatican Synod declares that the human person has a right to religious freedom. This freedom means that all men are to be immune from coercion on the part of individuals or of social groups and of any human power in such wise that in matters religious no one is to be forced to act in a manner contrary to his own beliefs. Nor is anyone to be restrained from acting in accordance with his own beliefs, whether privately or publicly, whether alone or in association with others, within due limits"².

15. Having regard to the foregoing while we do not believe in divorce ourselves we cannot expect the laws of this country to be used in such a manner as to prevent those who, unlike ourselves, do not believe that marriage is monogamous and indissoluble, from acting in accordance with their own religious convictions.

16. Therefore, while we do not put forward any suggestions in favour of widening the grounds for divorce we would make certain positive recommendations with reference to marriage itself.

17. Firstly, we would urge that some uniform code pertaining to marriage and divorce be in effect throughout Canada. In this regard we would urge that legislation permitting the Courts of the provinces which at the moment do not have the power to grant a judicial separation to be given such power. We understand that the courts of New Brunswick, Nova Scotia, Newfoundland possess the power to grant a judicial separation but that the courts of other provinces such as that of Ontario do not have this jurisdiction.³ We would feel, therefore, that this remedy should be available to those who do not believe that the civil courts have power to grant a divorce *a vinculo matrimonii* but who because of unhappy conditions existing in their homes desire the civil protection and effects which would flow from a judicial separation (divorce *a mensa et thoro*). We would further urge this step because the welfare of the children of such an unhappy marriage would appear to have a better chance of being

properly considered if a judicial separation were obtained than it has under a separation agreement and certainly where there is no separation agreement by reason of the refusal of one of the parties to such an unhappy marriage to enter into a voluntary separation agreement.

18. Secondly, we would urge that if consideration is being given to making the civil termination of marriage easier, that the preservation of the whole idea of marriage and of family life would better be fostered by making the contracting of marriage itself more difficult. We would, therefore, feel that before any marriage licence is issued that couples contemplating marriage be required to afford themselves of some counselling service which would acquaint them of the legal, social, biological, financial and other aspects of marriage.

19. Thirdly, we would feel that, in the interests of giving any marriage a fair chance, no application for a divorce be entertained by the courts unless and until at least three years and preferably five years have passed from the date of the marriage and unless it is shown that both spouses have attended a marriage counselling clinic in a sincere effort to reconcile their differences before the trial of the divorce action. We would suggest that such marriage clinics be set up as an adjunct of the courts in much the same manner as the Office of the Official Guardian or of the Public Trustee functions in certain provinces.

20. Fourthly, we would recommend that all questions relating to family life such as marriage, judicial separation and divorce be handled by a special section of either the County or Supreme Court in each province, in order that the judge might be able to give proper consideration to each case brought before him and not be subjected to pressure to dispose of matrimonial causes as a matter of routine, sandwiching such cases in between damage actions and negligence cases, as happens in many localities at the present time. We feel that the continuance of family life has sufficiently far-reaching social implications to merit more than a cursory examination and routine inspection. It should be the duty of the judge to do his utmost to effect a reconciliation between the parties if at all possible and to grant a divorce only if all hope of reconciliation has gone.

21. Fifthly, we would strongly suggest that no divorce be granted unless and until adequate and continuing provisions are made for the welfare of the children of such broken marriage and that it be impressed on both spouses that each has the continuing responsibility of contributing in one way or another towards the welfare of such children.

22. Finally, we would earnestly submit that if this joint committee should consider widening the grounds of divorce to include what is commonly known as "cruelty" that every effort be made to so define cruelty that the abuses which have crept into the granting of divorce decrees under this heading in other jurisdictions cannot occur. In the event that it is found that the term "cruelty" cannot be precisely defined we would suggest that it not be included as an enlarged ground for divorce.

REFERENCES

1. Historical Statistics of Canada, Cambridge, Universal Press Toronto: The MacMillan Co. of Canada Limited 1965, page 17 Table A60-74 and the Canada Year Book 1965 Page 176 Table 13 and Page 263 Table 30.
2. The Documents of Vatican II, Herder and Herder, New York, 1966 Page 678-679.
3. See Hounsell vs. Hounsell (1949) 23 Maritime Provinces Reports 59 (Newfoundland).
See also Power on Divorce, pages 162-164 and Reid vs. Aull (1914) 32 Ontario Law Reports Page 68.

Co-Chairman Senator ROEBUCK: Before we call on the speakers to answer questions I would like to introduce to you, ladies and gentlemen, Mr. Francis Gerard Carter. I suggest that such questions as you intend to ask be directed to him, although I am sure the speaker who has just sat down is capable of answering any question you might wish to put to her.

Mr. Carter was born in St. John's, Newfoundland, on October 14, 1922, and studied at Osgoode Hall Law School. He was called to the Bar of Ontario in 1950 and has practised law in London, Ontario, since that date. He was created Knight Commander of the Order of St. Silvester by Pope John XXIII in 1962 for services to Church and community.

He is the author of a book entitled *Judicial Decisions on Denominational Schools*. He is a Past-President of Ontario Separate School Trustees Association and a former Chairman of the London Separate School Board. He is Director of the Canadian Catholic Educational Association, 2nd Vice-President of the Association of Catholic High Schools of Ontario, and Chairman of the Diocese of London High School Boards.

Mr. Carter is solicitor for Roman Catholic Episcopal Corporation for the Diocese of London. He has been active in education law and has appeared as counsel before the Supreme Court of Canada and the Ontario Court of Appeal, and appeared before the Hall Commission on matters relating to education. He is a trustee of Middlesex Law Association.

In view of what I have read, I think I am justified in saying that I am introducing now a very well-informed gentleman, a barrister, and a valued citizen of this province. I give you Mr. Carter.

Mr. Francis Gerard Carter (For the Catholic Women's League of Canada): Thank you for that kind introduction, Senator Roebuck. I will take a few moments to enlarge on this brief, but before doing so I would like to say how glad I am to see Senator Baird of Newfoundland—my birthplace—as a member of this committee. Senator Baird was well acquainted with my father, who was City Solicitor for St. John's, Newfoundland.

Ladies and gentlemen, this brief is an attempt to do two things, the first being to put forward the position of the Catholic religion, as understood by the Catholic Women's League of Canada, on divorce. That position is that, even if the divorce laws of Canada are changed, that fact will not alter their opinion as to the indissolubility of a valid marriage.

Having said that, they go on to say that they do not wish to force their religious convictions on the entire Canadian community, because that would be an attempt to take advantage of civil law to further the opinion or conviction of a certain segment of the community. All they ask is that, in considering the question of enlarged grounds for divorce, the common good of the entire Canadian community be uppermost.

Now I want to touch on some of the recommendations, as to why they have been made. The first recommendation is actually double-barreled. It contains the request that there be some uniform code across the country and not the hodge-podge we have at the moment.

In Nova Scotia adultery is still a crime; it is not in Ontario, although it is not considered normal conduct.

As to the request for a judicial separation—I am using "judicial separation" as distinct from separation agreement—I am a lawyer, and those among you who are lawyers well know what frustrations and waste of time are involved in the preparation of separation agreements. You know what it entails. We go through long interviews with the parties concerned and at the last moment, after you have or think you have everything down, either husband or wife says, "I will not sign it," and there is a certain amount of work gone out of the window, completely.

Let us say you are acting for the wife. You then go to the Family Court and try to get an order for maintenance, and then go to the County Court to get an order for custody, or you go to the Supreme Court for an order for partition of property, or go and get an order for alimony, if the grounds are there. There are five or six different remedies, all of which have to be taken separately.

What is envisaged here is that there are large portions of this population who do not believe in divorce *a vinculo matrimonii*.

Senator ASELTINE: They apply for divorce just the same. I was Chairman of the Standing Committee on Divorce in the Senate for ten years or more. I heard four thousand cases, and in one-third of them the people involved were of the Roman Catholic faith. How do you reconcile that with your brief and with what you are saying now?

Mr. CARTER: The reason these people apply for divorce is merely to get the civil protection which a civil divorce gives. That is one reason. The other reason would be that these parties might well have got a decree of annulment in their Church, but that decree of annulment has no civil effect in Canada and therefore it is necessary to buttress a decree of annulment with civil divorce in order that they may legally remarry. I do not know whether I have made it clear.

Senator ASELTINE: It doesn't register with me.

Mr. CARTER: This is where we agree to differ, Senator Aseltine. But there are many people who are taken into the courts as defendants, or many people who are plaintiffs, apart from many who appear before you, who do not wish to go to court. Now if there were a provision whereby, for lesser offences than adultery, a judicial decree of separation could be obtained, it would do away with all this waste of time and would mean that in one application to the court the entire matter of custody, division of property, and so on, could be handled at one time.

May I now discuss the second recommendation.

Mr. PETERS: May I ask Mr. Carter a question, Mr. Chairman?

Co-Chairman Senator ROEBUCK: At this point it is for Mr. Carter to say.

Mr. CARTER: I have no objection.

Mr. PETERS: According to my understanding of your presentation, you are bringing together the various Acts now used in the civil law to provide relief from matrimonial difficulties so that it may not be divorce. Why do you use this as a religious argument whereas other countries, where the population is predominantly, in fact totally, Catholic do not make this kind of legal request but go much further and establish the legal ground for divorce. Why is a difference made in this case for legal separation whereas in Italy and some other countries they have much the same type of divorce as we have?

Mr. CARTER: The reason is that, in many Latin countries, although the people may nominally be classified as Catholic many of them, in actual fact, have not been inside a church for years. They are not adherents of any religion and therefore there has to be provided for these people some recourse to a court which would give them relief.

By the same token, however, as has been pointed out in the brief, the remedy of judicial separation does exist in Nova Scotia as well as in other parts of Canada, but it does not exist in Ontario. If we are to have a uniform code it should go one way or the other; and if you give it to those who have not got it, make it sufficiently embracing so that the court could dispose of all matters in the one action.

Mr. PETERS: Is it your opinion that the Marriage and Divorce Act of 1930 would be capable of creating this type of separation facility in the provinces by federal enactment?

Mr. CARTER: We are right back to the question as to when the English Act was introduced into the various provinces, and of course that is what gives certain provinces jurisdiction while others have not. I certainly feel it is within the jurisdiction of the Parliament of Canada, insofar as the British North America Act gives exclusive jurisdiction over marriage and divorce, to give this jurisdiction, certainly to a federal court.

It is suggested that marriage be made more difficult. I would like to state a paradox here. In many provinces it is much more difficult to obtain a driver's licence than it is to obtain a marriage licence.

Before you obtain a driver's licence you have to take a written test to determine that you know the rules of the road. I am not going to go so far as to suggest that a practical test be given, because this would suggest trial marriages, and that is out of my jurisdiction.

Mr. McCLEAVE: There is a program that will televise it if you do.

Mr. CARTER: Pursuing the analogy, if you do not keep the rules of the road in the use of your motor vehicles you start losing points, and when you have accumulated a sufficient number of points you lose your licence. Now, when you lose your licence the authorities do not allow you to go and buy another car and start all over again; but in marriage, although you lose your licence for a breach of the rules of the road, as it were, there is nevertheless provision whereby you can go and get another car.

Co-Chairman Senator ROEBUCK: If you can afford it.

Mr. CARTER: Yes, if you can afford it; and some people have a different car every two or three years. So that divorce can be used, in a manner of speaking, by some people as nothing more than legalized polygamy seriatim.

Senator ASELTINE: A new model, so to speak.

Mr. CARTER: I did not hear that.

Co-Chairman Senator ROEBUCK: Senator Aseltine said, a new model.

Senator ASELTINE: So to speak.

Mr. CARTER: I understand that California law does require pre-marital counselling. I am sure the lawyers amongst you are well aware that in many cases in court, divorce hearings are treated as something for the judge to do when he has maybe half an hour or an hour to spare in between other cases, or when the jury is out on a civil case trying to reach a verdict. He has a few moments and they put two or three on the list.

There is one point I would emphasize and this is something I feel very strongly. I have read some of the previous reports of your committee and I have seen statements made by people presenting cases to you to the effect that everyone knows that these cases are rigged; that there is perjury; that there is collusion, and what have you.

I have been trying to determine who the "everyone" is, because to my mind as a practising solicitor—and I do know our ranks are not perfect by any means—this is a slap in the face to the judges and to the practising Bar of every province in this country; because most of the solicitors I know, if parties came to them suggesting in any way, shape or form that they had rigged a divorce case, would have such people sent out of the office with the statement "I am sorry, I cannot take this case". I just wish to get that on the record.

Co-Chairman Senator ROEBUCK: And as Benchers of the Law Society, if facts of that kind came to our attention we would throw them out of the profession without hesitation.

Senator FERGUSON: In regard to the hearing of these cases, so far as my province is concerned, such cases are not heard by some judge who sandwiches them in between civil matters. There is a special Divorce Court with a special judge assigned to the hearing of divorce cases. I have sat in and listened to them

and it is my opinion that these cases get more attention than they would under any other system.

Mr. CARTER: I say, if it is going to be done, for heaven's sake let it be done properly. If you widen the grounds of divorce you might as well throw the whole thing out the window unless it is done properly. It is just making it ridiculous for this committee to be sitting week after week talking about widening the grounds if, should they be widened, the administration will be no better than it is suggested it is at the present time.

Co-Chairman Senator ROEBUCK: That does not apply to the Parliamentary Divorce Committee?

Mr. CARTER: No.

Mr. PETERS: The witness mentioned the operation of the divorce courts and it would not be fair for him to say that he is unaware of the fact that certain lawyers specialize in this particular field; and the majority of lawyers, who are well aware of what the situation is, will not handle divorces. I am quite sure the witness does not handle many divorce cases in Ontario, but other members of his profession do and this suggestion which has been made is based on the fact of conviction for perjury in a number of cases. This is the reason Bar Associations have been so vocal in the last ten years to have this type of reform made, as they were doing things they did not question too deeply, because they are not unaware that if they did they would not be able to handle them and would not provide the relief which they believe is justified.

Mr. CARTER: I do not think that follows, because it would be saying that lawyers who specialize in marriage problems are connivers and what have you, and I know many highly respected lawyers who specialize in this type of work who would certainly have no part in a collusive case. I am not saying there are not some; what I am saying is that if that "some" did come to the attention of the Law Society they would not be around very long.

I am not so naive as to think that these things do not go on; but if someone came to my office and said that he wanted to get a divorce from his wife and would provide certain false evidence, that he would do so and so, I would tell him where he could go. But if in the course of doing so I told him what was wrong with what he was suggesting, and, armed with this knowledge which he had gained in my office, he went to another lawyer's office and concealed from him the fact that the case was rigged, and the second lawyer acted in good faith, the responsibility is with that client.

The question of cruelty is, I think, a very important one because unless this can be defined more precisely than it is at present you will have cases where divorces are granted because the husband's breakfast toast was not toasted on both sides. There will be grounds of incompatibility because he reads the newspaper at breakfast.

Mr. McCLEAVE: That is a rather flamboyant statement. Have you read the English cases of cruelty? You are really referring to incompatibility cases from American jurisdiction. Read the English cases on cruelty.

Mr. CARTER: I had a discussion with Professor Julien Payne, who is located in London, and they have attempted to define cruelty in the English cases. There is no question at all on that matter specifically when they go into mental cruelty. But even though they have done their utmost to come up with a fair definition, the judicial mind is such that there is going to be a wide pendulum. Some judges will give an extremely narrow definition, even having regard to the English cases; others will take a much wider view.

I am not suggesting there is an answer; perhaps there is a logical answer: you will find this in every sphere of law. All we ask is that every attempt be

made to tie down the precise definition of cruelty so that we shall not have abuses such as we have heard of, particularly from south of the border.

Mr. McCLEAVE: You are mixing incompatibility cases with cruelty.

Mr. CARTER: I am well aware of the distinction between incompatibility and cruelty.

Mr. McCLEAVE: Your English professor friend did not tell you there were cases in England where they threw red pepper at the breakfast table?

Mr. CARTER: Oh, no.

Mr. McCLEAVE: Good.

Co-Chairman Senator ROEBUCK: One judge in England said that while cruelty was difficult to define, it was not difficult to recognize it when you saw it.

Mr. CARTER: The closest you can come to a definition is: Anything which is liable to put the offended party in jeopardy with reference to physical or mental health. Beyond that, I do not know how far you can go. Every individual is different, and the nature of the act that will have the effect contemplated in this definition will not necessarily be the same in one case as in another.

Mr. Chairman, I must thank you for the opportunity of speaking for the delegation.

Co-Chairman Senator ROEBUCK: Are there any other questions? I would like to hear from my Co-Chairman.

Co-Chairman Mr. CAMERON: I want to ask one question before I say anything else, and that is in reference to the brief here, where it is advocated that the law which exists in certain provinces be extended to all the provinces in regard to judicial separation. I can see that that would tie in with the brief because you may deal with the preservation of the sanctity and permanence of marriage, and yet give a woman the remedies of living a separate life and having financial protection for herself and family. If you go a step further and say there be a uniform law throughout the country in the matter of divorce, it must be administered by all the provinces.

Mr. CARTER: I think that is implicit, Mr. Chairman, in the first recommendation, which appears in paragraph 17.

Co-Chairman Senator ROEBUCK: There are certain provinces which do not want divorce. They might be willing to grant separation. What is your answer to that particular problem?

Mr. CARTER: I come from one of those provinces. Here again I think it is a question of the common good. This is a question of federal and not provincial jurisdiction, and if certain provinces could object, while their objections must be given due weight, in the final analysis it is the common good that must be the paramount consideration in reaching the decision.

Co-Chairman Mr. CAMERON: Thank you Mr. Carter for your presentation.

Co-Chairman Senator ROEBUCK: Before you leave, Mr. Carter, there is something which I think ought to be on the record. Can you tell us something more about the Catholic Women's League? You come from the Province of Ontario, and so I believe does the lady who spoke first. Perhaps you could give us some idea of the League and its purposes.

Mr. CARTER: I think Mrs. Donihee is much better informed than I am in that respect. I do not hold membership in the League.

Co-Chairman Senator ROEBUCK: Will you tell us about the League, Mrs. Donihee?

Mrs. DONIHEE: The Catholic Women's League has 163,000 members and we are organized on four levels: parish, diocesan, provincial and national. We are

also international, being an affiliated part of the World Union of Catholic Women's Organizations.

Co-Chairman Senator ROEBUCK: Have you members in all provinces?

Mrs. DONIHEE: We have members in all provinces except Newfoundland, which is not yet organized. The other provinces are organized.

Co-Chairman Senator ROEBUCK: I presume your greatest representation would be in the large provinces such as Ontario and Quebec?

Mr. DONIHEE: Yes. In the Province of Ontario we have 75,000 members, and about 163,000 across Canada, so that the greater part of the membership is in Ontario.

Co-Chairman Senator ROEBUCK: But you are represented in the province of Quebec?

Mrs. DONIHEE: Oh, yes. We are represented in the Province of Quebec and in the prairies, in fact in all the provinces.

Co-Chairman Senator ROEBUCK: Every one of them?

Mr. DONIHEE: Yes, every one except Newfoundland.

Mr. PETERS: Could I ask Mr. Carter a question with reference to paragraph 18, mainly because of his background in the educational field. We have heard much about marriage breakdown and I think most members of the committee are impressed with the upset this makes in the community, and the fact that marriage itself is performed by the Church in a pseudo-civil service capacity. I gather that part of the problem of education in connection with marriage is that it is not extensive enough. The witness drew a parallel between the granting of licences to the drivers of motor vehicles and the granting of marriage licences. In the first case, he said, people were given driving lessons and had to pass certain tests; in the second case the granting of licences had no such conditions attached.

Is it his suggestion that some system of education with reference to marriage be introduced into the high schools so that students may learn about marriage, not in a religious context but in a civil contractual context? In other words, there are obligations that fit into the role that the clergy are now performing in the civil field, and the fact that many of the people who are being married by the Church and by the civil authorities are not in a position to receive instruction, or do not apply for instruction, suggests a reason for incorporating into the educational system some form of instruction for marriage. Is that what the witness is proposing?

Mr. CARTER: Either that it be part of the educational system or that such service be performed by specially qualified social workers. I would think that in the ordinary Church marriage, regardless of denomination, where the parties go to minister or priest or rabbi, a certain minimum of instruction is given prior to marriage, particularly where banns are published and there is an interval between the publishing of the banns and the performance of the marriage.

In a civil marriage performed by a magistrate, for example, I do not think the average magistrate would take it on himself to advise anyone. The suggestion is, therefore, that there be set up a social department through which, when people go for a marriage licence, they can be referred to some welfare agency in the community where they are given two or three lectures on the responsibility of marriage. After they have taken this they come back and get the licence.

Mr. PETERS: Do you suggest that this be extended into the school system? I have not heard of this before and I think it is an excellent suggestion. I was thinking of the parallel between driving instruction and instruction for marriage, separating the theological from the civil aspects of the marriage contract.

Mr. CARTER: We are talking about the formalities of marriage and the substance. Certainly, whether it is going to be done through the schools or

through welfare or social agencies, there has to be consultation with the provinces, because once you get into the question of education you are in the provincial realm of authority.

Speaking for myself personally, and so far as the members of the League are concerned, I believe it would make absolutely no difference to them where pre-marital instruction was given, so long as the opportunity for such instruction was afforded and proof given to the person issuing the marriage licence that the instruction had been received.

Senator FERGUSON: Mr. Carter referred to California. I do not know how far he has gone into that. How is it done in California? Does the government provide the counselling service to people who apply for licences?

Mr. CARTER: I have not gone into that matter personally. What little knowledge I have I was told by a social worker who had come from California. I was informed that in California such pre-marital instruction is given as a prelude to the marriage.

Senator ASELTINE: In every case?

Mr. CARTER: That I do not know, sir. He indicated it was a matter of form similar to the blood test that is made in some places.

Mr. AIKEN: I am interested in the fourth recommendation, which appears on page 5 of the brief, concerning the courts that might handle divorce. At one time there was the Probate, Divorce and Admiralty Division of the High Court, which in fact did have the special duty which it is now being suggested should be assigned to a similar type of court to be established. I do not know the history of it but I assume that for convenience only the courts were consolidated into the Supreme Court of each province. Are you suggesting that there be a divorce branch of the Supreme Court of each province?

Mr. CARTER: I am suggesting something in the nature of the present Surrogate Court. The blending of probate, divorce and admiralty was abandoned by reason of malfunctioning. But if a court similar to the Surrogate Court were set up, which would be exclusively matrimonial, this might give better service to the entire community, in my opinion.

Mr. AIKEN: May I refer to another matter that is not in the brief. Have you any idea of the role that the family courts might play? I am not suggesting that they could grant divorce, but is there any role that family courts could play? They are people who are acting day by day in an effort to solve family problems and are not restricted, as we are told the Supreme Court must necessarily restrict itself, to an hour or so in the intervals between other cases.

At least the Family Court, when a case comes before it, spends a considerable amount of time hearing witnesses. Can you think of any function it could perform similar to that discharged by a Master of the Supreme Court when he hears references, which would enable the Family Court to inquire into all phases of the marital problem before the granting of a divorce?

Mr. CARTER: If I understand you correctly, Mr. Aiken, I think the Family Court could do a very good job, but the Family Court has not got the power. It can deal with a very limited situation, and, even limited as that situation is, when it comes to enforcing its judgment you discover how circumscribed are the powers of the Family Court.

Mr. AIKEN: What I am suggesting is this. The Family Court could be used in the case where, when a divorce action was brought into the Supreme Court, that court could refer to the Family Court certain matters requiring investigation and inquiry, and the Family Court could report back something in the nature of the report made in guardianship.

Mr. CARTER: I think there is merit in the suggestion but I have not studied the matter sufficiently to go into it. All I am suggesting is that there be some

form a court, the *modus operandi* of which must be a matter of trial and error before you come up with something that works.

Mr. AIKEN: Do you feel that a court that does only divorce work would be preferable to the system of putting divorce in the regular docket?

Mr. CARTER: It would be far preferable; and I think it would be far preferable also if it were not called a court. Then we would get away from the stigma that it was something wrong that was being taken into a court. I think it would be better if such an institution were called a commission, or by any other name that avoided the stigma of wrongdoing attached to it.

Co-Chairman Senator ROEBUCK: Thank you, Mr. Carter. Could we have a word from Mrs. Donihee?

Mrs. DONIHEE: Referring to marriage counselling services, I may say that a great deal of this has been done not only under our own Church auspices and with the support of our own organization, but such work is being carried on by the co-operation of church groups, where a course of six weeks is provided, with one lecture a week on preparation for marriage, and all those contemplating marriage endeavour to take the course. Many of the young people in our own city have expressed appreciation of the course and indicated how much they have learned from it. They realize the responsibility that marriage imposes upon anyone.

Heretofore people who had never had an opportunity to attend such lectures would not have realized, at any rate to the same extent, as those who have followed these lectures have done, the responsibilities of married life.

This is one field in which those of us who are associated with community projects can help to establish courses for marriage preparation, and try to get as many denominations as possible in the community interested in inducing young people to attend their courses.

We as Catholic women feel that the greatest hope lies in instilling into young people a full sense of responsibility when they get married. In that way marriage will be much more lasting.

Co-Chairman Senator ROEBUCK: Miss Toal is Past National President of the Catholic Women's League of Canada. Do you wish to say anything, Miss Toal?

Miss TOAL: I don't think there is anything I can add to what has been said, Mr. Chairman.

Co-Chairman Senator ROEBUCK: Mrs. Taylor?

Mrs. TAYLOR: I think it has all been covered. I don't think I could add anything. Thank you, Mr. Chairman.

Co-Chairman Senator ROEBUCK: Mrs. Connolley? Have you anything to say?

Mrs. CONNOLLEY: No, Mr. Chairman; thank you.

Co-Chairman Mr. CAMERON: May I, on behalf of the committee, thank Mrs. Donihee, Miss Toal, Mrs. Connolley and Mrs. Taylor for having appeared before the committee. Mrs. Donihee has presented an excellent brief on behalf of the Catholic Women's League. It was a concise, succinct statement of their views on the subject matter that we are considering.

Mr. Carter explained the brief and was ready with answers to the questions which were addressed to him and I can assure the delegation that the information they have given us will be of valuable assistance. On behalf of the committee I would like to express our sincere appreciation.

Co-Chairman Senator ROEBUCK: We have a second delegation, which is making a submission on behalf of the Canadian Mental Health Association. Would you gentlemen please come forward.

May I introduce the first speaker, Mr. Gowan T. Guest. Mr. Guest is National President of the Canadian Mental Health Association, educated at the University of Toronto (B.A.) and at Osgoode Hall, and at the University of

British Columbia where he received the degree of LL.B. He is a partner in the law firm of Robson, Alexander and Guest of Vancouver. Mr. Guest has been called to the Bars of British Columbia, the Yukon Territory and Ontario.

Mr. Guest was first elected a director of the British Columbia Division of the Canadian Mental Health Association in 1957, and elected to the National Board of Directors of the Association in 1960. In 1962 he became the Chairman of the Constitution Committee of the Canadian Mental Health Association. In 1965 he became Vice-President, and in 1966 became the National President of the Association. Mr. Guest was Executive Assistant to the Prime Minister of Canada from 1958 to 1960.

And so once again we have a very well informed witness before us. I give you Mr. Guest.

Mr. Gowan T. Guest, National President of the Canadian Mental Health Association: Messrs. Chairmen and honourable senators and members of the House of Commons, I think I would find it easier to do, as concisely as I would like to do, the task before me if I chose not to read the brief which has been submitted but simply to comment on it.

SENATOR: We have already read it.

Mr. GUEST: I wish to tell you what the brief is getting at and to direct your attention to its application.

The Association is very large by the standards of voluntary health associations. Our auditors certify to some 33,000 paid-up members, but over 300,000 people are involved, because in most areas we work through the Community Chest, and our auditors do not get in touch with the members of any organization of that kind, which is a lay group and not a medical or a professional group, so that it is impossible to reach any sort of consensus.

We direct your attention to this fact in the appendix to the brief, and I would reiterate that while the view of majority of the members of our Association, as we have considered the matter, is reflected in the opinions of their representatives, our Executive Committee are clearly in favour of amending the divorce law so that legal action may proceed on a more rational basis than is possible under existing legislation.

There is still a significant minority group which is firmly dedicated to the principle that a marriage once solemnized is unbreakable, and the Association recognizes and respects the views of this minority. Accordingly, rather than come before you to attempt to suggest to you what should be the grounds for divorce in Canada, or even amendments to statutes as they exist, we wanted to present to you the point of view which arises from the scientific and professional experience of our advisers and as interpreted by the lay feelings and involvement of our members.

We do not presume to recommend provisions of a new law relating to divorce. At this point I must tell you frankly as president that when the brief that has been submitted to you first found its way to my hands in its final form I considered it a masterpiece of words chasing each other across the paper, discussing the issue in a way that would make it impossible to be quoted for or against any specific question.

Having that in mind, I then asked myself: Why did it come out in this manner? The answer is that the subject matter to which we wish to direct your attention is not black or white; and the difficulty is that in the field of mental illness there has been so much progress in such a little time that answers are not today as clear as people once thought they were.

I refer specifically to page 5, which in many ways is the heart of our submission, and with your permission I will paraphrase it.

It is commonly believed that patients, once they enter a hospital, rarely if ever improve enough to leave it. This is no longer true.

Senator FERGUSON: May I ask the witness where he is reading from?

Mr. GUEST: I am paraphrasing page 5 of the substance of the brief. I was not reading directly but looking at the third line on page 5, which is the paragraph numbered 8: "It is still commonly believed that such patients rarely, if ever, improve enough to leave the hospital." I am trying to fill in what is stated in the four previous pages. It is no longer true, if it ever was, that this is the situation. Most patients make recovery and leave mental hospitals.

Many patients make remarkable recovery as a result of new therapeutic programs even after several years of hospital treatment, and even if they have not recovered completely, modern treatment programs in many parts of Canada provide for their care and rehabilitation in the community, in a foster home, or a boarding home, if not in their own homes.

It is becoming increasingly difficult therefore, even for a highly qualified specialist in psychiatry, to certify that a person suffering from mental illness is incurable, and that he will never be able to live at home in the community again.

In this connection, the term "chronic unsoundness of mind," which appears in most of the highly responsible and well thought out submissions we have seen, troubles us. It no longer has much medical meaning, and my friend Dr. Griffin, who has specialized in this field, can pursue that when he answers your questions.

It follows that changing the law to allow a divorce on such a ground might encounter great difficulties including the embarrassment of a person designated as having chronic unsoundness of mind who recovers completely. It is just as logical to name any disabling disease as a ground for divorce. There is no longer, in view of modern knowledge, any reason to consider mental illness as a peculiar disease distinct from other sources of illness.

That is the essence of the submission that is being made to you and which I recognize may stagger you, coming from an organization of our kind—that we have doubts about the suggestion that chronic unsoundness of mind is a valid ground for divorce. By way of illustrating that, your questions may elicit useful information.

I as a member of the Canadian Bar Association and its council was interested in the submission they made to you, and I take their submission to you partly as an example. I am speaking of the submission which came to you on November 1 in which reference was made to incurable unsoundness of mind.

Senator ASELTINE: As a ground.

Mr. GUEST: Yes. If you were to follow our reasoning, your first step would be to substitute "illness" for "unsoundness of mind," and you would be asked then to consider: Is an incurable illness, where the afflicted spouse has been continuously under care and treatment for a period of five years, a fair and proper ground on which to grant divorce? Bear in mind that, as an integral part of almost every, if not every, marriage contract or ceremony performed in Canada, the vow includes such words as for better or for worse, in sickness or in health.

If you do not subscribe to our proposition that mental illness should not be singled out as something unique, then suppose you were talking about a man with a chronic heart condition, or a man with Parkinson's affliction, or suppose you were talking about any numbers of incurable illnesses, the question is: Is incurable illness really a ground for divorce? Is it not rather that it is the consequence of this illness which is the breakdown of the marriage in terms that have been put to you, or the fact that the marriage is no longer a living institution?

Taking again, the immediately preceding ground in their submission to you: the separation of the husband and wife for a period of three years immediately preceding the commencement of proceedings, provided the court is satisfied that there is no likelihood of the resumption of cohabitation and the issue of the decree will not prove unduly harsh or oppressive to the defendant spouse. If that were adopted as a ground for divorce, then the so-called classic case "of which everyone knows," is covered—that is, the case of the poor woman whose husband has been in a mental hospital for years, and will stay there forever. We wonder how many cases of that kind there are—certainly some—but that classic case is covered; for that marriage is dissolved, not because the husband is mentally ill but because there has been separation for an extended period of time, where there is no likelihood of the resumption of cohabitation and the issue of the decree will not prove unduly harsh or oppressive to the defendant spouse.

That is what our brief tries to bring to your attention and we want it on the record of the committee for your consideration. Our basic submission is that there is no reason why mental illness should be singled out as an illness different from any other illness, and frankly we think that people who over the years have presented arguments concerning divorce, on the basis of unsoundness of mind, did not really ponder that argument in the light of modern psychiatric knowledge.

Having said that, I think our purpose would be best served by saying that we are prepared to answer any questions you would like to put to us. Doctor Griffin is our trained specialist. You have his curriculum, Mr. Chairman.

Co-Chairman Senator ROEBUCK: Yes, and I will read it. I believe Mr. Peters has a question already formulated.

Mr. PETERS: In the bill that I contemplated some time ago mental illness is treated under the clause dealing with desertion. There are two forms of desertion, voluntary and involuntary. A person who has been in an institution for a period of time has involuntarily deserted the marriage partnership. Would you agree to that proposition? Would you accept the suggestion that he had involuntarily deserted, whether the desertion was permanent or temporary. If the person met the requirements of desertion in the terms of involuntary desertion, would this be in keeping with the suggestion you are now making?

Mr. GUEST: I would sooner not see that, sir, because of my inability to reconcile it, on ethical grounds, with the promise contained in the words "in sickness or in health". When there exists the unhappy social situation you are putting forward there, where there has been what you refer to as involuntary desertion—and it is not a matter of a period of time—I would rather see the dissolution permitted on the proviso that the court is satisfied there is no reasonable likelihood of a resumption of the state of matrimony and that the defendant spouse would not be unduly oppressed.

I think that qualification should be maintained because of the pressures and difficulties of the breakdown and collapse of the marriage. One spouse might say: Well, he is sick, and a sick person is unable to fend for himself—and so the responsibilities which exist between spouses are overlooked. I would be somewhat afraid, the way you worded it.

Mr. PETERS: Do you not say, using your criteria, you would need to have a medical statement. I am thinking of Ontario, where, under the clause in respect of disabling illnesses, you have total and permanent desertion. I agree with you that it is almost impossible, when you put a person in a mental institution, to have a doctor give you a "guestimation" as to whether the mental state of that person on admission is permanent. Are you not getting into a situation where the medical profession will be actually unable, not only unwilling but unable, to advise the court in such a manner as to convey any meaning at all?

Mr. GUEST: I do not think so. I can imagine the medical profession would be unhappy about it, and I can well imagine also it would not like to make a decision; but I think it is possible for evidence to be presented by which an experienced judge would be able to say whether or not there was reasonable likelihood that the marriage would ever be resumed, and that would be a finding of the court around which jurisprudence would grow up.

I can see a divorce being granted even if it were likely that the patient would come out of the hospital. There are to my knowledge cases where—whether I could get all my psychiatrist friends to agree or not—I could get a consensus of a jury, and of many judges, I think, to the effect that, as a result of their experience, while the patient might not remain in hospital for the rest of his life, that person was nonetheless a different personality.

I know of cases where the wife has said frankly: This is not the same man I married and never will be. And there you have a situation where cohabitation will never be resumed. So the doctor does not have to tell you that such a person, by reason of his mental illness, is likely to stay in hospital forever; all he has to say is that he will be there a very long time. In other words, he has undergone permanent personality changes of a very drastic nature.

If and when he comes out he will be a different man, and the wife says: I know that kind of “different man because I lived with him two years before he went into the hospital and I will not live with him again. It would be evidence that you had a permanent collapse to deal with.

Mr. PETERS: You now have people in mental institutions for a period, and I am sure all lawyers are aware of at least one case where the husband has been in an institution for twenty years and the wife has established a common-law marriage. One of the duties this committee is charged with is to recommend a means of eliminating this informal marital state known as common-law marriage. This is a type of situation that happens many times, where perhaps the wife suffered brain damage during childbirth and the father has lived with another woman for many years and raised children. If the wife came back, where would she fit in? This particular case has existed close to twenty years.

Mr. GUEST: My answer to that, sir, is that you have stated a set of facts in which there has been separation of the parties for three years or more and it is obvious there will be no resumption of cohabitation. The evidence is the fact that the husband has taken a new wife, in fact if not in law, so that he will not resume cohabitation with the first wife, and it can also be said that it is not unduly harsh or oppressive to the defendant spouse, that is the woman in the hospital, because she is not aware of the reality of the world. The solution of that situation is that the problem is not really just that the first wife is mentally ill.

Mr. PETERS: I wonder if we could hear from Dr. Griffin?

Co-Chairman Senator ROEBUCK: I will call on Dr. Griffin, but for the record I would like to state who he is. Dr. Griffin—M.D., M.A., D.P.M.—is a psychiatrist and is General Director of the Canadian Mental Health Association. He graduated in medicine from the University of Toronto in 1932 and took post-graduate work in the United States and England. Dr. Griffin joined the Canadian Mental Health Association in 1936 as assistant to the founder, Dr. C. M. Hincks. He became General Director of the Association in 1952.

Dr. Griffin is a former lecturer at the University of Toronto in mental health aspects of education and social work. During the war he was Consultant Psychiatrist to the Canadian Army at Ottawa.

Ladies and gentlemen, Dr. Griffin.

Doctor John D. Griffin, M.D., M.A., D.P.M., General Director of the Canadian Mental Health Association: Messrs Chairmen, honourable senators and members

of the House of Commons: I think my best contribution here can also be made in answering questions

Those of you who have read the brief will see that in addition to the central problem to which we call attention, namely, the difficulties in arriving at a diagnosis of chronic unsoundness of mind, there are the difficulties that ensue when divorce is based on that idea alone. In addition to that, we have mentioned several things that have to do with mental health aspects of marriage, separation and divorce, and one of the things we have been aware of is the importance of the problem of children in a family where the marriage is in jeopardy.

Most of us concede that the family, intact, is essential and is certainly the best possible social environment for the production of healthy, normal children. This is obvious. What happens when this family is threatened with breakdown? What about the children?

We are aware of many parents who have been counselled to stay together through thick and thin, at least until the children have grown up, and they do just that: they live together in a state of hostility and frustration which creates a most unfortunate climate for the children to grow up in.

We are drawing attention to the fact that it is an open question: Which does more harm in such a situation, to keep such parents together willynilly when they both want to break away from each other, or to allow a separation or divorce to take place?

I have known many families where the children were vastly relieved and the mental health of the whole family vastly improved when divorce, or separation at least, has taken place, which is contrary to what some people believe.

We have made some comments with reference to the business of professional marriage counselling and the problems of marriage breakdown. This was referred to extensively in the previous brief from the Catholic Women's League, and it is not my intention at this stage to discuss it further except to make one point if I may.

I think all of us, especially those of us who are professionally trained in one of the mental health professions, are agreed that it would be ideal if marriage partners who are applying for divorce could be persuaded, or even required by law to do so, to go through the process of conciliation with the help of marriage guidance counselling, so that only when this failed would the divorce proceed.

Our point is this: that nowhere in Canada is there a satisfactory marriage guidance counsel service so well organized that courts dealing with this kind of human relationship would be adequately serviced and staffed. There are simply not enough professional people in Canada to do the job—psychiatrists, psychologists and clergymen with a special inclination in this field.

It is therefore only wishful thinking when you suggest that professional counselling be made available automatically before divorce is granted.

May I refer in passing to the New York divorce law. This, like the California law, makes provision for such conciliation procedure before divorce is allowed, and although the New York law is only a year old they have run into the sort of professional difficulty I am talking about, with the result that almost anybody who happened to be lurking around has been appointed to do this kind of work as marriage conciliator—often a political hack. Some of these people have been professionals in their time—a doctor or a lawyer—but they know nothing about marriage counselling, about the subtle psychological and emotional factors that lead to marriage breakdown. A professional marriage guidance worker must be able so to counsel the two persons concerned that they will view themselves and each other in proper perspective and come to appreciate what they have been doing over the years.

This is an important and exacting type of therapy, and no casual intervention will be helpful. So true is this that in New York State a great many of the religious and legal personnel concerned with the problem of divorce are now expressing discontent with the new law, even though, as I have said, it is only a year old.

One fact I would bring to your attention is that the situation we are in at the present time is such that there are only two centres in Canada, that are training professional marriage guidance personnel, and they both happen to be in Montreal. One is a French centre and the other English, and they are training a few people each year to do this special work.

We also make passing reference in the brief to preventive work in the field of marriage to prevent marriage breakdown, and this bears upon the point made by your last delegation, the Catholic Women's League, in which the importance of property and education was emphasized.

The Canadian Mental Health Association would emphasize the importance of education in the schools, particularly in high school. We are quite aware of, and I am greatly interested in the present trend throughout the country as manifested in Ontario where very recently a course in family life education has been introduced in high school, down to 7 and 8, which is junior high school. It is an attempt to introduce gradually, carefully, sensitively and intelligently a system of preparing children to understand themselves and their growth, the way they have grown and have come into the world, so that when they get to high school age and later leave high school and begin to think of marriage they will have a better understanding of themselves than our young people seem to have.

Co-Chairman Senator ROEBUCK: Did you see the C.B.C. show about three weeks ago in which they attempted to discuss this question?

Dr. GRIFFIN: I did not see that, Mr. Chairman, but I had a full report on it and it was a most unfortunate presentation for various reasons I could go into. The first objection that I personally had to it was that the children collected to view that picture represented a very wide age-range. Some of the children were far too young to be included in the group, while others were beyond the age of a class of that kind.

We know from what went on in the studio that the presentation and discussion were badly handled by interviewers of the C.B.C. type but not by professionally trained teachers, and that makes all the difference in the world. I deplore that kind of thing, almost an exploitation of the education program.

Co-Chairman Senator ROEBUCK: Tell me, is it necessary to be vulgar in explaining sex and marriage and that sort of thing?

Dr. GRIFFIN: Certainly it is not.

Co-Chairman Senator ROEBUCK: I saw the show in question and thought it extremely vulgar—unnecessarily so.

Dr. GRIFFIN: This may have set back family life education, including sex education, a great many months, perhaps years. I took part personally in an exercise in family life education in 1946 in Toronto right after the war. It was almost exactly the same as the recent program and we organized and trained teachers and prepared excellent films, and we were all set to go when suddenly one or two members of the board got uneasy and raised a public fuss and immediately everything was cancelled, so that it has taken twenty years to get back to the point where we were at that time. We are therefore anxious about this. We do not want anything like the C.B.C. program. That was completely negative and destructive.

Co-Chairman Senator ROEBUCK: You have told us about the lack of trained staff to do the job you have in mind. What positive suggestion could you make to us now?

Dr. GRIFFIN: The suggestion I have to make is that the government, either federal or provincial, make it possible to develop and train centres for marriage guidance counselling within the university centres. This work could well be within the department of psychiatry, or it could be a co-operative effort between the departments of psychiatry, social work and psychology. In some universities they are coming together in what is called the health service centre. The University of British Columbia is a good example which we are all interested in.

Here they are breaking through the barriers between professional groups and working together to train people.

Co-Chairman Senator ROEBUCK: It is not necessary that trained personnel along this line be medical doctors?

Dr. GRIFFIN: No, that is true; but any such person should be someone who is professionally trained in terms of the business of helping people in this field. I have already attempted at an earlier committee meeting today to point out that sometimes an intelligent and sensitive layman is of great help to a distressed mentally disordered person. We see this demonstrated all the time in the volunteer work of our Association.

In one very important general hospital, in the out-patient clinic our psychiatrists are training a group of volunteers to carry on the therapy with people whom they diagnose, and the volunteers are doing a splendid job.

Co-Chairman Senator ROEBUCK: If we did establish such centres, have we the personnel who could act as teachers?

Dr. GRIFFIN: The personnel do exist; I can give an example. For some years we have been endeavouring in Toronto to train teachers to be more sensitive about mental health needs of children in their classes. We have a small group coming in from all over the country to take one academic year of being a teacher—not to make quasi-psychiatrists of them but better teachers. We have four or five such teachers each year. This class could be forty or fifty.

Co-Chairman Senator ROEBUCK: Where is that?

Dr. GRIFFIN: At the University of Toronto, Institute of Child Study.

Co-Chairman Senator ROEBUCK: Is that the only one in Canada?

Dr. GRIFFIN: The only one of its kind I know of. Graduate schools of education are beginning to see the importance of training teachers in the mental health field and I am glad to say that in the Ontario College of Education they have established a post-graduate department and in large part their interest is to train teachers this way. If we can establish it across the country our work will have been done, but it has taken a long time.

Co-Chairman Mr. CAMERON: These people will be paid by the province?

Dr. GRIFFIN: Yes.

Mr. AIKEN: Eventually, I suppose, we may have to consider the terminology to be used if we are to regard mental illness as a ground for divorce. You commented, and so did Mr. Guest, as others have done off and on, on the different phrases used such as unsoundness of mind, chronic mental illness, incurable insanity, which is a term often used, and so on. Can you help the committee to define the type of phraseology that would be most acceptable to psychiatrists so that they could use that language in declaring that this person was or was not in the condition denoted by the particular term adopted?

Dr. GRIFFIN: Mental disability is what the psychiatrist prefers, which could be of any degree you wished to specify.

Mr. AIKEN: You would make the term mental disability the central theme, and from that the committee would have to decide where one would use the word chronic, and so on?

Dr. GRIFFIN: Something of that kind. Take the example that was mentioned by one member of the committee—the woman who suffered brain damage as a result of childbirth.

Mr. PETERS: My medical terminology may not be right.

Dr. GRIFFIN: This is what we were referring to when we pointed out that there are many types of illnesses that can create disability, and disability referring to personality change. Parkinson's, as Mr. Guest has indicated, is one—multiple sclerosis is another—where you can have a gradual deterioration. It does not seem to be mental illness, but is illness relating to the central nervous system, resulting in personality changes—and a person does change sometimes in an unhappy way. It is a terrible tragedy to see one spouse with this condition. If you say mental illness you will have divorce but not multiple sclerosis or Parkinson's. Even chronic arthritis is associated with personality changes and it is manifestly unfair to point out one mental illness without indicating that there are many other illnesses that can lead to complete breakdown.

Mr. PETERS: Would not the term "involuntary desertion" cover those cases?

Dr. GRIFFIN: I see the logic of your point but I do not like "desertion" because it raises a question of semantics.

Senator GERSHAW: Does not mental illness stand out as being a little different from ordinary cases of sickness, because of the violence, or the criminal act, which the mentally disturbed patient might commit? Should it not for that reason have special mention in relation to divorce, as distinguished from similar illnesses?

Dr. GRIFFIN: May I answer this way. It might be supposed that the public appreciation of what mental illness, unsoundness of mind or insanity is would be as clear as anything, but that is simply not true. The number of people who are curiously disturbed in that sense of the term is very small and they can be brought under control quickly; and the number of people mentally ill, who are also criminals, is, as far as we can determine, no greater in proportion than the number of people who are not mentally ill but become criminals.

This is simply not generally understood or accepted by the public. People somehow associate crime and mental illness. It is not true that a large number of mentally ill people are also terribly criminal or depraved or dangerous. The assertion is not supported by the facts.

Senator ASELTINE: I would like to ask Mr. Guest a question. I take it, Mr. Guest, it is the opinion of your association that "chronic unsoundness of mind" or "incurable insanity" should not be included as a ground for divorce in anything this committee may recommend, but that separation bringing about the final breakdown of marriage by reason of chronic unsoundness of mind or incurable insanity should be included as a ground of divorce.

Mr. GUEST: I could answer that question with a simple yes but I fear the trap—not that I suggest you laid the trap, but I fear the trap that I would be accused of saying that our association does not think that chronic unsoundness of mind resulting in the total breakdown and end of marriage is justification for divorce.

Senator ASELTINE: By the separation of the parties. Can I put it that way?

Mr. GUEST: We would be unhappy if this committee recommended, aside from desertion, cruelty and other traditional grounds as in other countries, dissolution on the basis of chronic unsoundness of mind. We would be disturbed by that, but we do not think that would be used very much in practice. We would far sooner see the committee specify in its recommendations the real ground for divorce, which is the consequence of chronic illness, whether it be mental illness or anything else, chronic incurable illness which puts an end to the marriage. I

wish I could have answered your question with a simple yes, but I had to put it this way.

Senator ASELTINE: I do not know how you would describe in legal language a condition of that kind.

Mr. GUEST: I would direct your attention to ground No. 4 recommended by the Canadian Bar Association, taking out the word "voluntary," that is, the first word: in other words, divorce can be granted by reason of the separation of husband and wife for a period of three to five years—they say three years—immediately preceding the commencement of proceedings provided that the court shall be satisfied that there is no reasonable likelihood of a resumption of cohabitation, and the issue of a decree will not prove unduly harsh or oppressive to the defendant spouse.

Senator ASELTINE: That is probably the answer to my question.

Co-Chairman Senator ROEBUCK: It leaves out the words mental or physical disability?

Mr. GUEST: Yes, sir, it does.

Co-Chairman Senator ROEBUCK: It allows dissolution of marriage whenever the breakdown of the marriage takes place for a certain length of time. I did not so understand your submission to us. I understand you are ready to allow the breakdown of marriage as a ground for divorce when it is the result of mental or physical disability?

Mr. GUEST: Bringing about separation.

Co-Chairman Senator ROEBUCK: Yes, bringing about separation but with due regard to whether cohabitation may ever be expected in the future, and having regard to whether the dissolution of the marriage would be unduly harsh to the other spouse?

Mr. GUEST: That is correct. In our submission we confine ourselves to what we consider to be our field, mental illness. I answered the honourable Senator Aseltine's question by going beyond that into the whole field of the breakdown of marriage.

Co-Chairman Senator ROEBUCK: Yes.

Mr. GUEST: We can say that from the work we have done in our Association we feel that the majority of our members would support the position that incurable illness leading to the breakdown of marriage, with the assurance that no resumption of cohabitation is likely, and that there is protection against unduly harsh treatment of the other spouse, as a ground should be allowed. All our members would support such a ground.

Senator ASELTINE: Thank you.

Co-Chairman Senator ROEBUCK: That was very well expressed.

Senator ASELTINE: May I say, Mr. Chairman, I for one appreciate the fact that these gentlemen have come and given us this lucid explanation of what in their opinion we should recommend. It has been a real pleasure to listen to them.

Co-Chairman Senator ROEBUCK: I always call on my Co-Chairman, who sits quietly while I am too prominent, I am afraid.

Co-Chairman Mr. CAMERON: I have only this to say: I cannot express better than Senator Aseltine has done the feelings of the committee with regard to the two distinguished gentlemen who have spoken to us today. They are learned gentlemen and they have given us a valuable presentation, and I think we are very fortunate indeed to have men of their calibre and knowledge appear before us. We are greatly indebted to them.

The committee adjourned.

APPENDIX "23"

A Submission to the
SPECIAL JOINT COMMITTEE
OF THE
SENATE AND HOUSE OF COMMONS
ON
DIVORCE
from the
CANADIAN MENTAL HEALTH ASSOCIATION NATIONAL OFFICE

52 St. Clair Avenue East
Toronto 7, Ontario.

Represented by
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DECEMBER 6, 1966

SUMMARY AND CONCLUSIONS

- (i) The Canadian Mental Health Association is deeply concerned with the mental health aspects of marital breakdown, separation and divorce. These should be carefully considered before new legislation on divorce is drafted. The Association has attempted to summarize in this brief a few of the pertinent facts about mental health and mental illness, as they relate to marriage breakdown, and to the children of a family threatened with breakdown. It hopes that this information will provide a useful background for the Special Joint Committee.
- (ii) Without attempting to recommend a clause by clause revision of the present divorce law, the CMHA has outlined some of the important facts and principles emerging from clinical studies in the fields of psychiatry, psychology, and the social sciences. These should be kept in mind in considering the cause, cure and prevention of marriage breakdown and the impact of such breakdown on children in the family.
- (iii) In particular the CMHA has emphasized the quite significant difficulties surrounding the designation of a patient as one suffering from "chronic unsoundness of mind", a condition which has been frequently suggested as a logical ground for divorce.
- (iv) The CMHA has also referred to the impact of minor mental and emotional disorders which are now recognized as being very prevalent in our population today. Such minor disorders create tensions which often lead to family breakdown. Conversely marital incompatibility and personality conflict, even when not caused by

mental or emotional disease, can be an important factor in the development in one partner, or both, of disabling illness of this type.

- (v) The CMHA has indicated that it is an open question whether a complete break in the family, such as that following separation or divorce, is more damaging to young children than the situation where the parents continue to live together in a state of conflict, hostility and tension.
- (vi) Finally, the CMHA has discussed the question of conciliation procedures, marriage counselling services and family life education as preventive and curative measures in threatened family breakdown. The importance of properly trained personnel and the establishment of sound standards for such services has been emphasized.

I N D E X

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Appendix B The Officers, Members of the National Board and the National Scientific Planning Council.	

INTRODUCTION

1. The Canadian Mental Health Association is a national voluntary organization concerned with mental health and mental illness. It is representative of both professional groups and lay citizens. It is dedicated to the promotion and protection of good mental health for all Canadians and the development of exemplary treatment services for the mentally ill. Its structure and program are briefly outlined in Appendices A and B.

2. This submission was prepared in response to an invitation extended by the Special Joint Committee of the Senate and the House of Commons on Divorce. It represents a point of view arising from scientific and professional experience in the fields of mental health and mental illness. The CMHA does not presume at this point to recommend the provisions of a new law relating to divorce. It is concerned chiefly in bringing to the Special Joint Committee a summary of the more pertinent knowledge in the field of family relationships, marital breakdown and mental health. It hopes the Committee will find this information pertinent when it considers the need for amending the divorce laws of this country.

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3. In assembling the material for this submission, the CMHA was guided by the views of its scientific advisers which in turn were firmly rooted in clinical experience and research. In addition, the recent scientific literature and research reports were reviewed including studies from Britain, the United States and Canada. The submission further reflects the fact that CMHA, although non-denominational, is guided in its work by humanitarian and ethical values, as well as scientific and medical goals.

MARRIAGE BREAKDOWN AND MENTAL ILLNESSES

4. The CMHA assumes that personal emotional and social maturity is an aspect of personal mental health. In this connection it views the breakdown of a marriage as an indication of a failure to maintain healthy, responsible and mature human relationships. This does not mean that a breakdown in marriage indicates that one or both partners is mentally ill, although this possibility must be considered (see below). But it certainly does represent a problem from the

mental health point of view because of the unhappy and stressful reactions resulting in the partners concerned, and the threat it represents to the security, health and happiness of the children.

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5. Mental and emotional disorders sufficiently serious to cause recognizable disability occur far more frequently than is commonly supposed. Careful prevalence studies reveal the fact that those suffering from complete mental breakdown (psychosis) may represent as much as 3% of the population, while those with minor and partial mental disability (neurosis) may amount to 20% or even 30%. Although modern medicine now recognizes that these disorders are true illnesses, it should be realized that they are different from physical illnesses in that the total personality of the patient is involved, and that most commonly the symptoms involve deviations in emotional and social behaviour. It is often very difficult therefore to appreciate that the behaviour of mentally ill people is, for example, characterized by irritability, aggressiveness, hostility, suspicion or by apathy and disinterest and may be symptomatic of an illness and not just a pattern of behaviour which can be altered at will by the person involved. One cannot escape the fact that many marriages are strained to the breaking point by one of the partners becoming mentally ill (neurotic) in this way. Frequently

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both partners seem to be involved to some degree, and each feels the other should see a psychiatrist.

6. The reverse situation also occurs. People who are incompatible and who have learned through the years of struggle and conflict to hate each other (as well as to despise themselves) create such continued tension that it can and frequently does affect adversely the mental health of one or both partners. In susceptible individuals this can become a substantial cause of mental breakdown (mental illness of a minor or even major type). Thus a vicious circle is created.

7. *Mental illness now can be treated successfully in the vast majority of cases*, if the condition is diagnosed early and appropriate treatment measures are begun immediately. One of the major difficulties is that a person involved in such an illness is often reluctant or downright resistant to accept the fact of the illness and the need for treatment. Part of the problem here may well be the social stigma that still surrounds the concept of mental illness and psychiatric treatment.

8. With reference to people who are suffering from a major mental illness involving a complete break with reality (psychosis), psychiatric treatment

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usually involves admission to a psychiatric or mental hospital or clinic where their medical, psychological and social programs can be supervised day by day. It is still commonly believed that such patients rarely, if ever, improve enough to leave the hospital. This is certainly no longer true. Many such patients have made truly remarkable recoveries as a result of the new therapeutic programs, even after several years of hospital treatment. Even if they have not recovered completely, modern treatment programs in many parts of Canada, provide for their care and rehabilitation in the community—in a foster home, or boarding home, if not their own homes. And psychiatric skill, knowledge and drugs are improving all the time. It is becoming increasingly difficult therefore, even for a highly qualified specialist in psychiatry to certify that a person suffering from mental illness is incurable, and that he will never be able to live at home in the community again.

9. In this connection, the term "chronic unsoundness of mind", which occurs so frequently in the Private Members Bills concerning divorce presently before Parliament, and in many of the Submissions made before this Committee, no longer has much medical meaning. It would follow that changing the Law to allow a divorce on such a ground might encounter great difficulties including the

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embarrassment of a person designated as having "chronic unsoundness of mind", who recovers quite completely. Furthermore, the Association protests that by singling out one kind of illness (or even two or three if we include chronic alcoholism and drug addiction) as grounds for divorce, it would represent unfair discrimination against persons who, through no fault of their own, are suffering from such disorders. It would be as logical to name other grossly disabling and chronic diseases as grounds for divorce, including such disorders as multiple sclerosis, cerebral hemorrhage, or even severe disabling arthritis. Such illnesses, in addition to being frequently incapacitating, are also very often associated with difficult personality disorders.

10. It is freely conceded, on the other hand, that a person who has a severe personality disturbance resulting from a disabling physical or mental disease can create a situation in the family causing hardship and even damage to the health of the spouse and children. Frequently such patients must be cared for outside the home (in nursing homes, hospitals or institutions, for example, and in effect a marital separation exists. It would appear to be more rational and less

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discriminatory therefore to suggest that a ground for divorce might be the complete and final breakdown of a marriage associated with a prolonged separation over a number of years where there has been severe personality changes associated with any disease. This would be preferable to the designation of "chronic unsoundness of mind" as if it were a specific disease entity giving ground for divorce.

MARRIAGE BREAKDOWN AND THE EFFECT ON CHILDREN

11. The CMHA is impressed by the substantial research evidence which indicates the importance for children of a home and family atmosphere characterized by stability, security and consistent affection and which is relatively free from either over indulgence or neglect. It is vital for the well being and healthy development of the infant and child that he have a mother (or a mother substitute) who can consistently provide him with tender loving care. A father contributes significantly to the security feelings of both mother and child. Children raised without this kind of environmental experience are very prone to develop quite serious social and psychological disturbances of behaviour. The CMHA deems that it is now a proven fact that such a desirable emotional and social setting for child rearing is best provided by the family in which both

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parents are present, and where there is emotional harmony, warmth and devotion. Any home where these emotional conditions are even modestly represented is preferable to no home (e.g. institutional care). No child therefore should be removed from the care of his parents, without very serious and careful assessment of the possible consequences for all concerned.

12. The CMHA has reviewed scientific studies which indicate that the negative effect on children of an unhappy marriage where parents continue to live together "for the sake of the children" is as bad, or worse than the effect created by a complete separation or divorce. There is a tendency for such parents

to feel trapped, to develop heightened feelings of hostility towards each other and to involve the children in their conflicts and to exploit them by appealing to them for support, testimony and sympathy. Such a situation denies the opportunity for the children to identify with even one parent as a good model—an important experience for the healthy maturation of all children.

13. Children are remarkably perceptive to emotional tension in the home. There is evidence that when there has been unhappiness, mutual hostility and a

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breakdown in communication between the parents, a legal separation or divorce is actually anticipated with some relief by the children. In such cases a divorce and the subsequent adjustment is not particularly traumatic for the children. Nevertheless it is true that a complete family with reasonably healthy relationship between the parents provides a decidedly better mental health milieu than when the family is broken by any means (death, desertion, separation or divorce).

PROFESSIONAL MARRIAGE COUNSELLING

14. With increasing knowledge about the conscious and unconscious factors that create marital problems and family tensions, there has developed a growing number of people trained in one of the so called "helping professions" (psychicians, psychologists, social workers, clergymen and certain lawyers, for example) who have become particularly interested and have become reasonably expert in helping people who have marital problems. Such "marriage counsellors" are able to recognize the kinds of difficulties which may be at the root of the problem, but of which the clients themselves may be quite unaware. Thus the basic problem may indeed be an emotional or mental disturbance of one or other of the

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partners. Or it may relate to differences in cultural background, social attitudes and aspirations in the two partners. It may reflect differences in religious views and moral values, or it may be related to the difficulty in fulfilling adequately the many different roles which modern society today expects of young married couples. Whatever the basic difficulty, the professional "helper" or "conciliator" is prepared to try to help the partners understand their problem and plan a program to rehabilitate the marriage.

15. The CMHA has studied with interest and concern the recently revised divorce legislation in New York State, which provides for a compulsory conciliation procedure, prior to the divorce being granted. It would appear that this device (recommended in some of the private member bills on divorce now before Parliament) is not working well, for the simple reason that no adequate provision is made in the law to establish a full time conciliator or counselling facility appropriately staffed with properly trained professionals. While CMHA solidly supports the importance and work of properly qualified marriage counsellors, it is obvious that in Canada this type of professional person is still scarce. As is the

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case with professional mental health workers, we have all too few psychiatrists, psychologists, and social workers. The work is far too delicate to leave in the hands of some politically appointed, unqualified professional person as has happened apparently all too frequently in certain courts in New York State. If a conciliation procedure is contemplated in connection with divorce procedures in Canada there must be adequate time and money provided to develop the staff required. So far neither the federal government nor the provincial governments, in the opinion of CMHA, have indicated sufficient interest and determination in providing such staff even for the vital mental health services.

16. A professional service which conceivably would be combined with, or made part of, the court conciliation procedure, if such is established, is a facility for conducting a thorough assessment of the relationships between two partners of a marriage and their children. It is obvious from what has been said above that the impact of emotional tension and conflict is very serious from the point of view of the mental (and even physical) health of young children. The provision of adequate professional services to protect the children in cases of separa-

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tion or divorce would be obviously essential. The comments on the shortage of professionally qualified personnel made above, become even more pertinent in this connection.

17. The Canadian Mental Health Association knows of only two institutions in Canada specially organized for the training of marriage counsellors—both of them in Montreal.* In addition to training such professional counsellors these centres are actively engaged in working with couples who are facing a possible break in marriage, and are conducting and supervising courses in premarital education for young people. Many clergymen of all denominations are interested in such courses and are doing helpful work in counselling but few have had extensive training in this particular field. In addition family case work agencies (welfare organizations) are becoming increasingly involved in working with families where there is a threat of breakdown. There is a need for establishing professional standards as well as training programs for professional people working in this difficult and sensitive area.

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AN EMPHASIS ON PREVENTING MARRIAGE BREAKDOWN

18. The CMHA is committed to the development of preventive programs where such are possible. It is logical that efforts in this direction should have at least equal importance in the planning and thinking of the Special Joint Committee. It is the view of the Association that a preventive program must begin long before a marriage gets into trouble. This means that the program must be directed to parents, newly married couples, couples about to get married, adolescents, and even school children. In a submission of this kind the details of such a program cannot be delineated in detail.

19. Obviously to develop in people the capacity to choose a mate wisely and then to achieve a stable and happy marriage, may require a change in our system of formal and informal education—a change which recognizes that man, despite all his academic education, remains a barbarian until he knows more about himself. We need to modify gradually our educational process so as to give every human being from an early age a deeper insight into himself, his personality needs and his relationships with others. In Canada many provinces are now introducing courses on family relationships which include an opportunity to

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understand the biological, as well as the social and psychological problems of development, growth and reproduction. Some schools are beginning these courses at the 7th and 8th grade, at a time when children are, on the average, proceeding into puberty. Such developments are long overdue, and if carried out intelligently, observed objectively and evaluated and improved consistently, there is every reason to hope that they can contribute to the stability of family life and the diminution of the desire for separation and divorce.

* 1. The Marriage Counselling Centre of Montreal, 3696 Peel Street, Montreal 2, P.Q.
2. Centre de Consultation Matrimoniale, 3826 rue St. Hubert, Montreal 24, P.Q.

APPENDIX A

Submission of the Canadian Mental Health Association to the Special Joint Committee of the Senate and House of Commons on DIVORCE The Canadian Mental Health Association Facts Relating to Personnel, Objectives and Nature of the Organization

This Association is a voluntary society of citizens concerned with the mental health of Canadians and the care and treatment of mentally ill citizens. It is incorporated under Letters Patent of Canada dated December 1, 1926 and operated as a Committee prior to that time. It functions through ten provincial divisions and 159 local branches, making up those divisions. The current membership in the Association is estimated to be approximately 100,000.

Some of its members are engaged professionally in the mental health field. Most are not. It meets annually in ordinary circumstances on a national and provincial basis. Most of its branches meet six or more times a year and their committees and special project groups meet and function continuously in almost all parts of Canada.

The Association concerns itself in four general fields; research, social action, volunteer services to the mentally ill and public education. This brief is authorized by a majority of its National Executive Committee comprising its principal officers elected at large and one representative of each provincial division. By its constitution the Executive Committee carries the authority of its whole National Board of Directors which meets twice annually in January and June. The decision to submit a brief was taken by the whole Board. The detail of the brief was considered and approved by the Executive Committee.

It should be noted that, while the majority of the members of the association as reflected in the opinions of their representatives on the Executive Committee are in favour of amending the divorce law in Canada so that consideration and legal action may proceed on a more rational basis than is possible now under existing legislation, there is a minority group which is firmly dedicated to the principle that a marriage once solemnized is unbreakable. The association recognizes and respects the views of this minority group within its membership.

On the other hand, this minority group, while unable to accept any recommendations relating to the subject of divorce, wish to associate themselves with those portions of the brief that relate to the work of conciliation and the care and protection of children.

APPENDIX B

Officers of the Association

President:	*Mr. Gowan T. Guest, Vancouver, B.C.
Vice Presidents:	*Mr. Jean-Paul W. Ostiguy, Montreal, P.Q. *Mr. J. F. O'Sullivan, Winnipeg, Man.
Hon. Treasurer:	*Mr. Desmond Owen-Turner, Vancouver, B.C.
General Director:	Dr. John D. Griffin, Toronto, Ont.

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- Mrs. R. E. Smart, Ottawa, Ont.
- *Mr. Charles Strong, St. John, Nfld.
- Rev. Charles Taylor, Wolfville, N.S.
- Mr. John A. Tory, Q.C., Toronto, Ont.
- *Mr. Fred Wansbrough, Toronto, Ont.
- Dr. William Wigle, Ottawa, Ont.
- Dr. Keith Yonge, Edmonton, Alta. (ex officio)
- *Member National Executive Committee

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 Mr. R. E. Jones, Toronto, Ont.
 Dr. Angus M. Hood, Toronto, Ont.
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 Dr. C. A. Roberts, Toronto, Ont.
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 Dr. Allan Roeher, Toronto, Ont.
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 Dr. Keith Armstrong, Toronto, Ont.
 Dr. David A. Stinson, Toronto, Ont.
 Dr. Marvin Stock, Toronto, Ont.
 Dr. Helen Mussallem, Ottawa, Ont.
 Mr. W. T. McGrath, Ottawa, Ont.
 Dr. J. D. Griffin, Toronto, Ont.—Secretary

CMHA Submission to JOINT COMMITTEE ON DIVORCE.

ERRATA

Page 3, para 5 of INTRODUCTION, line 17.

The sentence beginning; "It is often very difficult . . ." *should read:*

"It is often very difficult therefore to appreciate that the behaviour of mentally ill people, as for example, characterized by irritability, aggressiveness, hostility, suspicion or by apathy and disinterest, may be symptomatic of the illness and not just a pattern of behaviour which can be altered at will by the person involved."

APPENDIX "24"

BRIEF

to

SPECIAL JOINT COMMITTEE

OF THE

SENATE AND HOUSE OF COMMONS

ON

DIVORCE

Submitted by

FAMILY SERVICE ASSOCIATION OF METROPOLITAN TORONTO

22 Wellesley Street East

Toronto 5, Ontario

SUMMARY—MAIN CONCLUSIONS AND RECOMMENDATIONS

1. The Family Service Association of Metropolitan Toronto concludes both from a special survey and from its general experience that:
 - (i) Except in a few cases, proven uncondoned adultery is not the major cause of serious marriage breakdown.
 - (ii) Extramarital sexual behaviour in general is probably more often a symptom of marriage breakdown than its cause.
 - (iii) Present divorce legislation is often an obstacle to the establishment of healthier family life, for at least the two following reasons: (a) it prevents the dissolution of marriage on grounds which may be as detrimental to the good of society as adultery, if not more so, and (b) the cost of the proceedings is too great for persons of limited means.
2. The Association recommends to the Committee that:
 - (i) Serious attention be given to proposals for the establishment of marriage breakdown as a ground for divorce, in addition to the establishment of any particular matrimonial offences which other research might justify.
 - (ii) Steps be taken to make sure that divorce be available to those whose inability to afford it is their only obstacle in initiating the proceedings.
 - (iii) Marriage counselling be made available to petitioners for divorce, and be made mandatory when appropriate.

TEXT OF SUBMISSION

3. The Family Service Association of Metropolitan Toronto is a non-profit family service agency whose purpose is, and has been since its inception in 1914, to strengthen family life and prevent family breakdown. It is the largest family service agency in Canada.

The Association operates under Provincial Charter, and has a Board of Directors composed of 27 men and women. Its staff (administrative and case-work) includes 50 social workers, who have their Master of Social Work degree.

In 1965 the agency's counselling services were used by 6,210 families through 20,347 personal interviews.

In addition to its counselling, an integral part of its services to the community is a holiday program at Bolton Camp for mothers and children from low income families, and, at Illahee Lodge in Cobourg, a holiday program for elderly people, and children with special health needs.

FSA is a member agency of the United Appeal. In 1965 its operating budget was \$709,351.

4. The Family Service Association has long been concerned by the degree of hardship imposed on many of its clients who have been unable legally to terminate marriages that have broken down without reasonable hope of restoration. These clients have no acceptable way to establish a healthier family life for themselves and their children. Their lives are often needlessly complicated by the ambiguous character of their rights with respect to children, property and personal relationships. In other cases the existing law tends to encourage couples remaining together in a mutually and socially destructive union. The Association therefore supports a comprehensive review of divorce legislation, and is grateful for the opportunity to contribute relevant data and experience.

5. For this submission the Association has made a survey of all clients receiving counselling service as of November 1, 1966. Social workers completed questionnaires on all clients whose marriages had broken down beyond reasonable hope of restoration. A marriage was considered to be broken down in this sense in any of the following circumstances:

- (a) The client had obtained a divorce and had not remarried.
- (b) The client had been separated for at least two years.
- (c) The client had established a "common law" union.

Each social worker was asked to report selected data and to give his professional opinion as to both the primary causes and the precipitating factors which led to the breakdown. In addition, each social worker was asked for an opinion as to why separated clients had not obtained a divorce. From a total case load of 1283 families, reports were received on 125 broken marriages. Twenty-seven of these could not be used as the social worker judged he did not have enough information to give a professional opinion. The findings concern the remaining 98 cases. FSA believes these are a representative sample of clients in these circumstances.

6. The survey shows that marital breakdown is not necessarily related to extramarital sexual behaviour. In two-thirds of the cases (65), extramarital sexual behaviour was judged to be neither a cause nor a precipitating factor in the breakdown of the marriage. In the remaining 33 cases, in which extramarital sexual behaviour was a factor, it was seen as a cause of breakdown in 17 cases only. In most of these it was one cause among several others. In the remaining 16 cases, it was judged to be a precipitating factor only.

We conclude, therefore, that extramarital sexual behaviour (behaviour which is not wholly confined to adultery) is a significant factor in less than a third of broken marriages.

7. The survey also shows that most clients, whose marriages had broken down without hope of restoration, were not able to obtain a divorce either because of existing legal requirements, or because of economic difficulties, or both. There were 83 clients with broken marriages who had not obtained divorce. Four had divorces pending, and there were 8 in which the social worker could not make a judgment. Seventy-one clients were unable to obtain a divorce. In the social workers' judgment, 46 were unable to obtain a divorce either because of legal or economic restrictions or both. Of the 25 remaining cases, 18 clients were judged not to want a divorce. Other reasons were given in 7 cases. Legal and economic difficulties would have constituted an obstacle to divorce in some of these 25 cases also.

We conclude, therefore, that many persons whose marriages are broken beyond reasonable hope of restoration are in fact prevented from attempting to establish a healthier family life by the circumstances of present divorce procedures.

8. The survey also indicates that persons whose marriages are breaking down, frequently do not receive any marriage counselling. Only 46 of the 98 clients were known to have received counselling from any professional person or agency in the year prior to the breakdown. The quality and amount of the counselling they did receive appeared to be inadequate in many cases.

We conclude, therefore, that many persons in severe marital trouble either fail to seek marriage counselling or find it unavailable.

9. It is the judgment of FSA staff that matrimonial offences of a sexual nature are more often the result than the cause of marriage breakdown. The same may prove to be true of other matrimonial offences (e.g. cruelty, etc.) which are sometimes proposed as further grounds for divorce. Furthermore, legally offensive behaviour is not unknown in many marriages that do not break down, including some relatively stable marriages. To allege such behaviour as a ground for divorce may encourage the dissolution of some marriages which might otherwise be restored, especially when the only requirement is that one spouse prove that he or she has been legally offended. The present legislation can also prevent the dissolution of a broken marriage when the offended spouse, for extraneous and sometimes petty reasons, refuses to sue for divorce. We therefore submit that to broaden present legislation merely by adding to the number of matrimonial offences will not alone be a realistic way of protecting human dignity, or of contributing to healthier family life.

10. We believe that adequate divorce legislation should permit legal dissolution of marriages that have broken down beyond reasonable hope of restoration. We respectfully submit that present legislation fails signally in this respect. Many persons with broken marriages, but capable of re-establishing family life, cannot obtain divorce because there has been no proven and uncondoned adultery. Also the right of many others to obtain divorce rests on the sometimes capricious judgment of an estranged spouse, or on financial ability to afford the cost of the proceedings.

We also believe that adequate divorce legislation should ensure the provision of marriage counselling service, and should require that an effort be made to use it when there is reasonable hope that the marriage might be restored. We also respectfully submit that present divorce procedure often tends to discourage efforts at reconciliation.

November 24, 1966.

APPENDIX "25"

Brief to the
SPECIAL JOINT COMMITTEE OF THE SENATE AND
HOUSE OF COMMONS ON DIVORCE

Submitted by
The Benchers of the Law Society of British Columbia

NOTES FOR BRIEF ON DIVORCE REFORM

Social Implications of Divorce Reform

1. The institution of marriage as established in Western society is of fundamental importance and social forces which operate to weaken or break down the institution present a grave danger. Nevertheless it must be recognized that these forces exist and cannot be eliminated. Therefore the concept of divorce must also be accepted. Divorce in one form or another and for one ground or another has been recognized for centuries, but in our country and until recent times in Great Britain, with a few minor exceptions, the only ground for divorce has been adultery or a combination of adultery and cruelty.

2. Since marriage is of such importance in our society, all laws relating thereto should have as their social object the preservation and strengthening of marriage as an institution. Even our divorce laws, while making possible the dissolution of individual marriages, should be designed to protect the institution of marriage as much as possible.

3. This object has probably accounted for the very restricted grounds for divorce heretofore allowed and the very limited and sometimes artificial rules of practice and law which have grown up in our system of jurisprudence on this subject. However, it is the opinion of many that this approach attempting to block divorce and in many cases making it impossible of attainment, when the whole basis of a marriage has been destroyed, has operated to weaken rather than preserve the institution of marriage. Further, it has tended to drive many members of the legal profession away from practice in the divorce courts since the consideration of matrimonial problems from a legal point of view is considered an unpleasant form of practice.

4. The present divorce laws have been self-defeating of their purpose in the following respects:

- (a) By making divorce hard or even impossible to obtain even in extreme cases of cruelty, desertion or the insanity of one of the parties. They have encouraged the aggrieved party to form irregular unions with others outside the marriage relationship, creating the many problems that result from illegitimacy and thus creating an unlawful and socially undesirable substitute for marriage rather than supporting it.
- (b) For the reasons stated in sub-paragraph (a) hereof, the divorce laws have encouraged bigamous marriages and thus encouraged people in the commission of crime.
- (c) They have led people either to the commission of adultery where it would not otherwise occur or to the fabrication of evidence of adultery to enable parties to procure a divorce, leading to the commission of perjury, and the perpetuation of other frauds upon the Court.
- (d) They have by depriving an aggrieved spouse of an effective legal remedy also from a practical point of view deprived children of the marriage of any really effective right against an erring parent and

made the law relating to the support of children by their parents in many cases ineffective.

- (e) They have made any solution of many serious matrimonial problems impossible in many cases and have tended to drive legal practitioners away from this field of practice to the injury of the aggrieved parties, frequently infants who require effective legal assistance.
- (f) They have tended to degrade the whole institution of marriage since they recognize only a special sexual offence as a ground for dissolution of marriage, disregarding many other more significant grounds and adopting the view that the only important ingredient in a marriage in the sexual one.
- (g) They have tended, because of the difficulty in obtaining a divorce, to perpetuate in some cases unions which ought to have been dissolved for the benefit of the parties to the unions and often, and which is more important, for the benefit of the offspring.

The result of these factors has been that divorce laws have not served a useful social purpose insofar as the preservation of the institution of marriage is concerned. They have not protected or supported it but insofar as they have had any effect, they have probably weakened it.

5. In addition to the above, the law has made divorce expensive, so expensive that sometimes people have been deprived of any effective remedy. The cost of getting evidence which by its nature must be sought out and is rarely readily available, is frequently great and beyond the means of many people, particularly women. The alternative, that is, falsified or collusive evidence, often the only practical alternative to the person seeking relief, is surely unacceptable by any standard but is nevertheless encouraged by the laws as they stand at the moment.

6. It is clear and has long been recognized that the present divorce laws do not meet the need of modern society and have not done so for many years. With the growing complexity of society and the increasing pressures under which people live, it cannot be denied that our divorce laws, unless reformed, will become even less adequate for our present social needs.

Legal Aspects of Reform

Constitutional:

1. It appears to be well settled law that the power to legislate on substantive divorce law resides in the Federal Parliament and the Provincial Legislature is precluded from altering the grounds for divorce which existed in the Province before Confederation (*Attorney-General for British Columbia vs McKenzie* (1965) S.C.R. 490, per Ritchie, J. at 496). It also appears doubtful, although the judgments are not consistent on this point, if the Federal Government may delegate such powers.

2. It also seems clear that for a variety of local reasons which need not be examined here that all provinces would not agree to any particular reform and some might not agree to any form of reform at all, so that a Federal Act passed to have application all across Canada would probably be a political impossibility and if such an enactment were required, there is little likelihood of effective divorce reform.

3. It is, however, submitted that the Federal Parliament could enact legislation covering divorce law which would provide that such legislation would come

into effect only in those provinces which, by an act of the Provincial Legislature, adopted the Federal Act. This would not, in our view, constitute a delegation of power provided that the provinces would be bound to accept the Federal Act as passed without any power of amendment. Any power in a province to amend or to select parts of the Federal Act and reject others would, in our opinion, constitute a delegation of powers and raise constitutional issues which can readily be avoided by simply passing permissive legislation of the kind described.

Content of Federal Act:

1. We suggest that there are at least two possible, practical approaches which could be adopted by the Federal Parliament with a view to getting some reform and possibly keeping controversy and its attendant delays to a minimum.

- (a) The adoption of the grounds for divorce set out in the English Matrimonial Causes Act of 1965.
- (b) The adoption of the grounds for divorce set forth in the resolution of the Canadian Bar Association, passed at the Annual Meeting of the Canadian Bar Association on the 2nd day of September, 1966.

2. As to the English Act, it is not suggested that there is any special virtue in adopting English law and practice merely because it is English, nor is it suggested that the English Act is a model of divorce legislation. Certainly it has been the subject of criticism by many writers in England. From the lawyer's point of view, however, this course would have certain distinct advantages in that a body of jurisprudence has grown up in the decided cases under the English Act and good text books have been written upon the Act and the law which has grown up around it. We would therefore have a base from which to work and eventually develop our Canadian law upon the subject. Furthermore, it might well eliminate a good deal of detailed argument as to the content of any Federal Act by the simple acceptance of the existing English Act. It is well known that there will be many pressures upon the legislature when any divorce code is discussed, religious, social and regional influences will be exerted to the full, and it would probably be easier to gain acceptance of an established code of divorce law than to open the whole field for discussion, as would be required if the Federal Legislature endeavoured, as it were, to build from the ground.

3. As to the acceptance of the Canadian Bar Association proposals, it can be said in their favour that they have the advantage of being the product of a large and responsible body in the Canadian community and therefore claim already the support of a substantial segment of our population. Furthermore, they result from the experience of Canadians dealing with actual Canadian conditions and are probably more suitable for this reason and probably more acceptable to Canadians who are willing to support the proposition that our divorce laws require amendment.

It therefore appears that despite the advantages of simply taking the English Act, as mentioned above, the wise and practical step would be to endeavour to base any new Federal enactment on the subject of divorce on the resolution of the Canadian Bar Association. It may well be that this could lead to greater controversy, but in the long run will probably produce a better result.

4. The English Act provides the following grounds for divorce:

- (a) Adultery by either spouse;

- (b) Desertion without cause for at least three years immediately prior to the presentation of the petition by either spouse;
- (c) Cruelty by either spouse;
- (d) Incurable insanity of either spouse for at least five years prior to the presentation of the petition, and
- (e) For a wife—proof that since the celebration of the marriage the husband has been guilty of rape, sodomy or bestiality.

Section 2 of the English Act restricts the right to petition for divorce in the first three years of the marriage, but gives the Court the power to shorten this period upon certain grounds.

5. The resolution of the Canadian Bar Association is set out hereunder:

“BE IT RESOLVED:

That the grounds for divorce in Canada be:

- 1. Adultery, sodomy or bestiality, or conviction upon a charge of rape;
- 2. Cruelty (as defined below);
- 3. Desertion without just cause for a period of three years immediately preceding commencement of the proceedings;
- 4. Voluntary separation of the husband and wife for a period of three years immediately preceding the commencement of proceedings provided that the Court shall be satisfied that:
 - (i) there is no reasonable likelihood of a resumption of cohabitation, and
 - (ii) the issue of a decree will not prove unduly harsh or oppressive to the defendant spouse.
- 5. Incurable unsoundness of mind where the afflicted spouse has been continuously under care and treatment for a period of five years immediately preceding the commencement of proceedings.
- 6. Wilful refusal to consummate the marriage.

Definition of Cruelty

Cruelty shall include any conduct that creates a danger to life, limb or health and any conduct that in the opinion of the Court is grossly insulting and intolerable, being of such a character that the person seeking the divorce cannot reasonably be expected to be willing to cohabit with the other spouse who has been guilty of such conduct.

BE IT FURTHER RESOLVED:

That no decree of divorce shall issue unless and until the Court is satisfied as respects every child of the marriage and of the family who is under the age of sixteen years that:

- (i) arrangement for the care and upbringing of such child has been made and are satisfactory or are the best that can be devised in the circumstances.

BE IT FURTHER RESOLVED:

That the defences of condonation and collusion constitute discretionary and not absolute bars to matrimonial relief.”

6. It will be seen that the Canadian Bar Association proposals extend the grounds beyond those permitted in England, the principal extensions being found in Paragraphs 4 and 6 of the resolution.

7. The principle of divorce without proof of fault as set out in Paragraph 4 of the Canadian Bar Association resolution may be somewhat startling on first consideration. The suggestion in Paragraph 4 is a bold one, and may give offence and it may be open to the objection that a Canadian Legislature would not pass such an enactment. However, there is nothing new in this proposal and it has been adopted both in New Zealand and Australia. The results have not been catastrophic in either jurisdiction and in our view, the principle could be adopted here with the safeguards set out in the resolution. In Volume 29, No. 5 of the *Modern Law Review*, at p. 478, appears an article entitled "The Development of Divorce Law in Australia". The article is written by Selby, J., Judge in Divorce, Supreme Court of New South Wales, and deals at some length with the experience in Australia in this field. The Commonwealth Matrimonial Causes Act of 1959 in Australia came into effect in Australia on February 1st of 1961. It included a provision similar to that recommended in the Canadian Bar Association resolution. Figures appearing in the article, at page 476, show that in the year 1961, 350 divorces were granted on the separation basis, rising to 1,272 in 1962, 1,495 in 1963, 1,687 in 1964 and 747 in the first six months of 1965. These figures reveal, as one would expect, a substantial increase in divorce on the basis of voluntary separation for the first four and a half years of the operation of the Act in Australia, and at page 488, figures are produced which show that there has been a steady though not spectacular rise in the number of petitions filed for divorce since 1960. In the year 1960, 8,187 petitions were filed in Australia, in the year 1965, 10,935 were filed.

It is too early to form any firm judgment on the Australian experience, but it is submitted that the Canadian experience in the field of divorce has not been satisfactory and almost any change can be considered a change for the better. It may be that a broadening of the grounds for divorce will increase the number of divorces which are sought and obtained through the Courts in each year. However, it is submitted that it is better that the law provide machinery for the legal dissolution of marriages when the entire basis for the marriage has disappeared than attempt to artificially perpetuate an unhappy marriage and thereby cause the undesirable results referred to above.

7. Jurisdiction:

Jurisdiction to hear divorce causes has heretofore been based upon domicile. This has not been true in all jurisdictions in the United States of America, but with that exception, domicile has been the test to establish jurisdiction in the Court to hear divorce causes.

This fact has led frequently to hardship. A deserted wife whose domicile follows that of her husband may well find that she must bring her action in a foreign jurisdiction with all of the consequent expense and difficulty. Even for men, problems can arise where actual residence even for long periods of time does not in law coincide with domicile. To make domicile the only test would appear at first blush to be somewhat artificial. However, so many other legal relationships depend upon domicile that it is felt that any change in the law on this point would require careful and serious consideration which would go beyond the scope of this submission. Therefore no change is recommended on this heading at the present time but it is submitted that this whole subject should be carefully examined with a view to possible future amendment to our divorce laws.

It is true that the Divorce Jurisdiction Act enables a wife to commence proceedings in the Court of the area in which she resides if she has been deserted

for a period of two years. It is submitted that the two year delay before the wife can bring proceedings is unjustified. The legislature has recognized this departure from the otherwise inflexible rule of domicile and it is submitted that the two year waiting period in the case of an aggrieved and deserted wife is artificial and not supportable in principle. To this extent, then, it is submitted that the law should be changed and a deserted wife should be able to bring her proceedings in the Court of her residence at the time of the desertion once desertion can be established and should not be compelled to wait out a period of two years for this purpose.

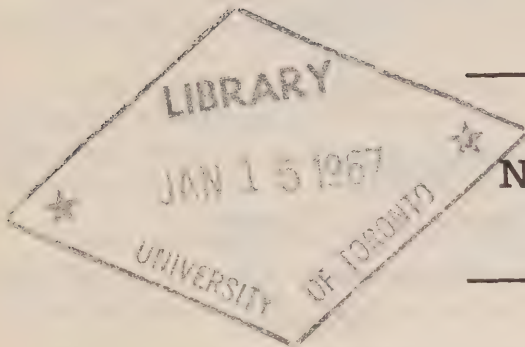
22nd November, 1966.



First Session—Twenty-seventh Parliament
1966

PROCEEDINGS OF
THE SPECIAL JOINT COMMITTEE OF THE SENATE
AND HOUSE OF COMMONS ON

DIVORCE



No. 11

TUESDAY, DECEMBER 13, 1966

Joint Chairmen

The Honourable A. W. Roebuck

and

Mr. A. J. P. Cameron, M.P.

WITNESSES:

The Baptist Federation of Canada: The Reverend Dr. Edgar J. Bailey,
President; The Reverend Fred Bullen, General Secretary.

ROGER DUHAMEL, F.R.S.C.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1966

MEMBERS OF THE
SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS
ON DIVORCE

FOR THE SENATE

Hon. A. W. Roebuck, Joint Chairman

The Honourable Senators

Aseltine	Connolly (<i>Halifax North</i>)	Flynn
Baird	Croll	Gershaw
Belisle	Denis	Haig
Burchill	Fergusson	Roebuck—(12).

FOR THE HOUSE OF COMMONS

Mr. A. J. P. Cameron (*High Park*), Joint Chairman

Members of the House of Commons

Aiken	Forest	McQuaid
Baldwin	Goyer	Otto
Brewin	Honey	Peters
Cameron (<i>High Park</i>)	Laflamme	Ryan
Cantin	Langlois (<i>Mégantic</i>)	Stanbury
Choquette	MacEwan	Trudeau
Chrétien	Mandziuk	Wahn
Fairweather	McCleave	Woolliams—(24).

(Quorum 7)

ORDERS OF REFERENCE

Extracts from the Votes and Proceedings of the Houses of Commons: March 15, 1966:

"On motion of Mr. McIlraith, seconded by Mr. Hellyer, it was resolved—that a Special Joint Committee of the Senate and the House of Commons be appointed to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either House;

That 24 Members of the House of Commons, to be designated by the House at a later date, be members of the Special Joint Committee, and that Standing Order 67 (1) of the House of Commons be suspended in relation thereto;

That the Committee have power to engage the services of such technical, clerical and other personnel as may be necessary for the purpose of the inquiry;

That the Committee have the power to send for persons, papers and records, to examine witnesses, to report from time to time, and to print such papers and evidence from day to day as may be ordered by the Committee, and that Standing Order 66 be suspended in relation thereto; and

That a Message be sent to the Senate requesting Their Honours to unite with this House for the above purpose, and to select, if the Senate deems it so advisable, some of its Members to act on the proposed Special Joint Committee."

"By unanimous consent, on motion of Mr. McIlraith, seconded by Mr. Hellyer, it was ordered—That the order of the House of Monday, February 21, 1966 referring the subject-matter of the following bills to the Standing Committee on Justice and Legal Affairs, namely:—

Bill C-16, An Act to provide in Canada for the Dissolution of Marriage (Additional Grounds for Divorce).

Bill C-19, An Act to provide in Canada for the Dissolution and the Annulment of Marriage.

Bill C-41, An Act to amend the British North America Acts, 1867 to 1965, (Provincial Marriage and Divorce Laws).

Bill C-44, An Act to provide in Canada for the Dissolution of Marriage.

Bill C-55, An Act to provide in Canada for the Dissolution of Marriage.

Bill C-58, An Act respecting Marriage and Divorce.

Bill C-79, An Act to amend the Dissolution and Annulment of Marriages Act (Additional Grounds for Divorce).

be discharged, and that the subject-matter of the same bill be referred to the Joint Committee of the Senate and the House of Commons on Divorce."

March 16, 1966:

"By unanimous consent, on motion of Mr. Stewart, seconded by Mr. Byrne, it was ordered—That the subject-matter of Bill C-133, An Act to extend the grounds upon which courts now have jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief, be referred to the Special Joint Committee on Divorce."

"By unanimous consent, on motion of Mr. Stewart, seconded by Mr. Byrne, it was ordered—That the subject-matter of Notice of Motion No. 11 be referred to the Special Joint Committee on Divorce."

March 22, 1966:

"On motion of Mr. Pilon, seconded by Mr. McNulty, it was ordered—That a Message be sent to the Senate to acquaint Their Honours that this House will unite with them in the formation of a Joint Committee of both Houses to inquire into and report upon divorce in Canada, and that the Members to serve on the said Committee, on the part of this House, will be as follows: Messrs. Aiken, Baldwin, Brewin, Cameron (*High Park*) Cantin, Choquette, Chrétien, Fairweather, Forest, Goyer, Honey, Laflamme, Langlois, (*Mégantic*), MacEwan, Mandziuk, McCleave, McQuaid, Otto, Peters, Ryan, Stanbury, Trudeau, Wahn and Woolliams."

LÉON-J. RAYMOND,

Clerk of the House of Commons.

Extracts from the Minutes of the Proceedings of the Senate:

March 23, 1966:

"Pursuant to the Order of the Day, the Senate proceeded to the consideration of the Message from the House of Commons requesting the appointment of a Special Joint Committee of the Senate and House of Commons on Divorce.

The Honourable Senator Connolly, P.C., moved, seconded by the Honourable Senator Roebuck:

That the Senate do unite with the House of Commons in the appointment of a Special Joint Committee of both Houses of Parliament to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either House;

That twelve Members of the Senate, to be designated at a later date, act on behalf of the Senate as members of said Special Joint Committee;

That the Committee have power to engage the services of such technical, clerical and other personnel as may be necessary for the purpose of the inquiry;

That the Committee have the power to send for persons, papers and records, to examine witnesses, to report from time to time, and to print such papers and evidence from day to day as may be ordered by the Committee, and to sit during sittings and adjournments of the Senate; and

That a Message be sent to the House of Commons to inform that House accordingly.

After debate, and—

The question being put on the motion, it was—

Resolved in the affirmative."

March 29, 1966:

"With leave of the Senate,

The Honourable Senator Beaubien (*Provencher*) moved, seconded by the Honourable Senator Inman:

That the following Senators be appointed to act on behalf of the Senate on the Special Joint Committee of the Senate and House of Commons to inquire into

and report upon divorce in Canada and the social and legal problems relating thereto, namely, the Honourable Senators Aseltine, Baird, Belisle, Bourget, Burchill, Connolly (*Halifax North*), Croll, Fergusson, Flynn, Gershaw, Haig, and Roebuck; and

That a Message be sent to the House of Commons to inform that House accordingly.

The question being put on the motion, it was—
Resolved in the affirmative.”

May 10, 1966:

“Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Roebuck, seconded by the Honourable Senator Croll, for the second reading of the Bill S-19, intituled: “An Act to extend the grounds upon which courts now having jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief”.

The question being put on the motion—

In amendment, the Honourable Senator Connolly, P.C., moved, seconded by the Honourable Senator Hugessen, that the Bill be not now read the second time, but that the subject-matter be referred to the Special Joint Committee on Divorce.

After debate, and—

The question being put on the motion, it was—
Resolved in the affirmative.”

J. F. MACNEILL,
Clerk of the Senate.

MINUTES OF PROCEEDINGS

TUESDAY, December 13, 1966.

Pursuant to adjournment and notice, the Special Joint Committee of the Senate and the House of Commons on Divorce met this day at 3.30 p.m.

Present: For the Senate: The Honourable Senators Roebuck (*Joint Chairman*), Aseltine, Baird, Belisle, Burchill, Denis, Fergusson, and Gershaw—8

For the House of Commons: Messrs. Cameron (*High Park*) (*Joint Chairman*), Brewin, Forest, Mandziuk, McCleave, McQuaid, Peters and Wahn—8

In attendance: Dr. Peter J. King, Special Assistant.

The following witnesses were heard:

The Baptist Federation of Canada:

The Reverend Dr. Edgar J. Bailey, President; The Reverend Fred Bullen, General Secretary.

At 5.05 p.m. the Committee adjourned to the call of the Joint Chairmen.

Attest.

Patrick J. Savoie,
Clerk of the Committee.

THE SENATE
SPECIAL JOINT COMMITTEE OF THE SENATE AND
HOUSE OF COMMONS ON DIVORCE
EVIDENCE

OTTAWA, Tuesday, December 13, 1966.

The Special Joint Committee of the Senate and House of Commons on Divorce met this day at 3.30 p.m.

Senator Arthur A. Roebuck and Mr. A. J. P. Cameron (*High Park*), Co-Chairmen.

Co-Chairman Senator ROEBUCK: Honourable members, we have a distinguished delegation before us today from the Baptist Federation of Canada. We have two representatives, the Rev. Bailey and the Rev. Bullen. I will introduce the Rev. Bailey first, and for the record let me say that he has been the Minister of Kingsway Baptist Church, Toronto, from 1962 to the present time. He has had a long and distinguished career. He was born—and this is interesting—in Wales and he migrated to Canada as a farm immigrant in 1928—which puts him on a common basis with some of the rest of us—after seven years in the mines of Wales and three years in steel works. He graduated as a B.A. from Brandon College in 1933, a B.Th. at McMaster University in 1936, an M.A. from Yale University in 1948, and a D.D. McMaster University in 1960.

He has served in the Tabernacle Baptist Church of Winnipeg, the First Baptist Church of Edmonton, and Westmount Baptist Church of Montreal. He has held the presidency of the Baptist Federation of Canada from 1964 to 1966, and he was President of the Baptist Union of Western Canada from 1952 to 1954.

He has made many speeches all across Canada, and has been referred to in *Saturday Night* as being one of Canada's seven outstanding preachers. We do not expect you to do any preaching today, Mr. Bailey, but I have much pleasure in introducing you to this committee. Ladies and gentlemen, I give you the Rev. Bailey.

The Reverend Dr. Edgar J. Bailey, President, Baptist Federation of Canada: Thank you, Mr. Chairman. May I read into the record a brief introductory statement? You have the brief before you, and then we can look at the brief together and submit to your questioning, because I know you are tremendously interested in the subject.

It is my privilege to have the opportunity of addressing this Special Joint Committee on Divorce, and to present a brief on the subject under discussion. The purpose of our coming is to support the committee in its task and to share views that may be of help in preparing new legislation on this important subject.

May I first of all say that we come as representative and responsible members of the Baptist Federation of Canada rather than the instructed delegates of that body. The Baptist Federation of Canada is a consultative body, not administrative, and represents three administrative bodies; the Baptist Union of

Western Canada, the Baptist Convention of Ontario and Quebec and the United Baptist Convention of the Atlantic provinces.

It is exceedingly difficult to consult the various social action committees of these conventions, except over very lengthy periods, to secure material for a prepared brief.

The best that can be done is to consult with the records to see what has been expressed on resolutions, and to seek to interpret these statements and to reflect conferences and other means of gathering together expressions of opinion. This we have tried to do in a relatively short time, which included the summer months since the invitation to appear before this committee was received.

In keeping with the foregoing, I wish at this time to read into the record the appropriate resolutions and to file the Year Books so that you may have the material before you. There are two aspects here, the primary one having to do with marriage and the second one having to do with divorce.

Co-Chairman Senator ROEBUCK: Have you other copies?

Dr. BAILEY: Just the two Year Books that I will file with you as supporting documents. We could have sent you supplementary documents in addition if you wished, but these are the only copies that I have to file with you.

Co-Chairman Senator ROEBUCK: You have not more copies that you could give to each member?

Dr. BAILEY: No; they were not available.

Resolution concerning Christian marriage and sexual morality.
This is what raised the question.

We deeply regret that loose talk about the "new morality" has given countless young people today the false impression that there are no enduring moral principles in the realm of sexual morality and that the wisdom of the past as well as the clear teaching of our Lord can be ignored with impunity or without serious damage to true happiness and the proper respect for the human person, whether man, woman or child.

Nevertheless, we Baptists recognize that the separation of Church and State in modern societies means that civil law, concerned with the whole community and with persons of many different religious persuasions or in some cases none at all, cannot forcibly impose the Christian ideal of marriage. Christian marriage cannot be created and sustained by legal action alone. Nor do we believe that our Lord, where marriage breaks down and all attempts at reconciliation have failed, would deny to men and women the opportunity to start afresh and seek the re-establishment of an enduring family life. We do not believe that failure in marriage is the only sin for which there is no forgiveness or that the church should refuse its help and ministrations to those who have been divorced.

The decision as to whether a divorced person should be remarried in church has among us usually been left to the discretion of the minister in consultation with the deacons and with the approval of the local church.

It must be clearly stated again that the Christian ideal of marriage and the self-discipline which it requires does not rest upon any depreciation of the sexual life as in itself evil or unworthy. Marriage in both its physical and spiritual aspects was blessed by our Lord both by His presence and His words. It is also used in the New Testament as the type of the mystical relationship between Christ and His Church.

There is a word here about the limitation of families which is not necessary or pertinent to this discussion so I will continue.

This Baptist Convention of Ontario and Quebec wishes to reaffirm its conviction:

- (a) That Jesus clearly enunciated the principle of monogamous marriage as expressing the true relationship which should bind together man and woman according to the divine intention in creation.
- (b) That this view of marriage is binding upon all Christians and that persons should only be married with Christian vows where the minister who performs such a marriage is convinced of the sincerity of those who wish to take these vows and who earnestly seek the grace of God in fulfilling the ideal of Christian Marriage.

Then this final passage, which relates again to divorce:

- (d) Finally, we affirm against the importance of the pastoral and educational responsibilities of the church in preparing young people for Christian marriage. The Church should be primarily concerned, not only to heal broken marriages, but to provide the spiritual foundations in which alone an enduring relationship can be based. It is our conviction that no more potent witness for Christ can be given in the modern world than through a family life where human love is transfigured and blessed by the living Lord Himself.

Co-Chairman Senator ROEBUCK: Would you please state what that resolution is again, who passed it and when?

Dr. BAILEY: It was passed by the Baptist Convention of Ontario and Quebec at their annual convention; it is related to the Year Book 1964-65, and is found on page CVII. I file this with you. This is on marriage.

Co-Chairman Senator ROEBUCK: That is representative of the thought of Ontario and Quebec. What about the other provinces?

Dr. BAILEY: We should be glad to give you a little more on that after reading in one specific resolution on divorce, if I may.

Co-Chairman Senator ROEBUCK: Yes.

Dr. BAILEY: This is from the 1965-66 Year Book, the annual meeting, and it is found on page C-32. It is specifically devoted to divorce. It is the same convention, the Baptist Convention of Ontario and Quebec. Perhaps I should read the whole thing.

Whereas we recognize that by law, divorce in Ontario is granted only on grounds of adultery, and that this has contributed to the increasing number of so-called 'Common Law' marriages in case of some and the use of perjury in the case of others;

Therefore be it resolved:

- (a) That the Baptist Convention of Ontario and Quebec in affirming its stand on religious liberty and the dignity and value of man, encourage our Premiers and legislators to initiate discussion with the Federal Government and to study a broader basis for divorce laws.
- (b) That before any divorce proceedings are considered, the principle of conciliation be made an integral part of the legislation.

May I say that the man who drafted this resolution, Dr. Clayton Kitchen, feels very strongly that the principle of conciliation should be included. I take issue with him here, and would be glad to discuss this at a later time, concerning the principle of conciliation being made mandatory.

There is also a statement from the Baptist Union of Western Canada, which represents an intention rather than a carried out act, if I may read it. It is from the Baptist Union of Western Canada Year Book, 1961, and I was only able to

secure this from a reference library, but it can be made available by writing. It is at page E-82.

Marriage and Divorce:

Because of the increasing divorce rate in Canada: Be it resolved that our Ministers do their utmost to counsel couples preparing for marriage, and to help them assume responsibility for marriage and family life.

Whereas legislation respecting divorce is vested in the federal Parliament; and whereas the existing divorce law generally applicable in Canada limits the grounds of divorce to adultery;

And whereas experience has shown that the existing legislation has resulted in grave injustices to many innocent married persons and children of the marriage;

Be it resolved that we request the Christian Social Action Committee of the Union to seriously study this issue, and encourage the churches to do so, with a view to preparing a brief to the federal Government for consideration at next year's Convention.

This is simply to express their concern; they were never able to carry out the intention that is resolved here.

I have also gone through the records of the United Baptist Convention of the Atlantic provinces and they have not anything on record that clearly indicates where they stand on this matter, but at conventions and meetings with the ministers and others they have expressed real concern about the Government taking action.

Co-Chairman Senator ROEBUCK: Would we be justified in assuming that the other provinces would agree with the statements contained in the Year Books of the two greater provinces?

Dr. BAILEY: I would have to say that Baptists are an exceedingly independent group, and while you would receive a good deal of approbation, you would also receive some criticism of the points of view that are expressed here.

Co-Chairman Senator ROEBUCK: So we could not take it holus bolus?

Dr. BAILEY: Holus bolus, no. I express this in continuation. The United Baptist Convention of the Atlantic provinces has no record of any publicly expressed opinions, but conversation with clergy and laity alike indicates that they share a general concern, but are generally more conservative in their theological outlook on this subject. They are less likely to move easily beyond what many believe is the biblical basis of divorce, namely adultery, while expressing concern over the unfortunate victims of broken marriages. The concern here is just as great, but the remedy is not as easily seen.

To sum up, there is substantial agreement in central Canada and in the west, and to a lesser degree in the Atlantic provinces, with the views expressed in the brief. The genius of the Baptist church is to be found in the willingness of its people to share in decision making without requiring that large committees and boards must first of all present definite findings. The doctrines of the separation of church and state and that of local church governments militates against what might be called church statements, and against the church being a pressure group for our favourite point of view in a social situation. Responsible leaders are expected to make their views known and to accept the consequences of the views expressed. In an organizationally-minded world this method is not easily accepted by those who prefer the bloc approach to every subject.

With this brief introduction, Mr. Chairman, we are ready to answer your questions and to deal with the brief that is already in your hands.

Co-Chairman Senator ROEBUCK: I would suggest, Dr. Bailey, that you read the brief.

Dr. BAILEY: Would you like me to read the brief?

Co-Chairman Senator ROEBUCK: It is not very long.

Dr. BAILEY: Not the introduction, you do not need the introduction?

Co-Chairman Senator ROEBUCK: Use your own judgment in regard to that, as to how much you read or what you read.

Dr. BAILEY: Well, it is fairly short and I will read the whole thing.

Co-Chairman Senator ROEBUCK: I think so. We have plenty of time. You are the only delegation before us today, so take your time.

Dr. BAILEY: The Baptist Federation of Canada is affiliated with the Baptist World Alliance that represents 50 million members and adherents in 111 countries. By the way, Mr. Bullen and I happen to be on the Baptist World Alliance Executive, so we are very much a part of that body. There are some 200,000 members and adherents in 1,211 churches in Canada. The headquarters of the Baptist Federation is located in Brantford, Ontario, and the Rev. Fred Bullen is the general secretary.

Canadian Baptists have three mission fields: India, Bolivia and Angola, with 149 active and 55 retired doctors, nurses, teachers and ministers. In India alone there are 649 full-time Indian and Canadian workers.

The Baptist Federation of Canada is an active partner in the Canadian Council of Churches and in other inter-faith activities.

Baptists favour co-operation between church and state on matters of mutual concern but the separation of church and state as a general principle.

Canadian Baptists share the concern of Parliament in matters relating to both marriage and divorce and want to support the joint committee in the task it is undertaking.

Baptists believe that the greatest contribution that can be made by the Christian church is to be found in the willingness of its individual members to be involved at all levels of community life as Christians and citizens. Leadership of both the Conservative and N.D.P. parties in Ottawa is in the hands of dedicated Baptists. We believe churches ought not to be political pressure groups, but to be the conscience of the state and to be willing to share in the tasks of thinking through contemplated changes of law in areas affecting the general well-being of all Canadians.

The church has often stood in the way of change in matters like that of divorce because of its deep concern with the moral implications of such changes. We sympathize with our brethren who feel that divorce is ever and always wrong and ought not to be tolerated, but at the same time believe that modifications are necessary at the present time. We therefore urge this joint committee to be bold and imaginative in contemplated changes, recognizing that parliamentary debate will likely modify any legislation to conform to the will of the majority.

This brief is presented by the Rev. Dr. Edgar J. Bailey, minister of Kingsway Baptist Church, Toronto, and the Rev. Fred Bullen, president and general secretary respectively of the Baptist Federation of Canada. The brief has been prepared in response to an invitation by the committee for public bodies to appear before it and present their views.

The Baptist churches of Canada have been clear in their attitudes for many years on divorce by declaring that good marriages are the best answer to the divorce courts. By instruction, counselling, preaching and teaching on the

importance of marriage and family life they have sought to hold high the Christian ideals. At the same time, they have permitted divorced people to re-marry, and, where convinced of the good intent of those involved, have performed the marriages in accordance with the will of the local church. They have at the same time not forbidden the full practice of their faith to those so re-married or divorced.

Divorce is the result of marriage failures, and, as in all other areas of life, those who have failed should be given another chance to live a normal, happy and useful life. Marriage is commended and commanded by both the church and society, and while divorce is permitted, it must not be condoned as a way of life. It is these views of a general nature that guide the proposals to be made to this special joint committee.

Proposals—and here we are getting to the meat of the thing:

1. That the term “dissolution of marriage” be substituted for that of “divorce” in all future legislation. Divorce is used to describe a matrimonial offence involving a guilty and an innocent party and carries social stigma for both the parents and the children of such marriages. These terms are no longer valid in the modern context involving the breakdown of marriages rather than criminal intent or context.

2. The purpose of the legislation shall be to rationalize rather than to liberalize the law with regard to the dissolution of marriages. Easy divorce is not the intent of modern public concern nor the will of the churches who have expressed opinions in favour of a modernizing of present legislation.

3. That dissolution of marriages be recognized as a legislative function of the Parliament of Canada, and therefore the act should be mandatory in every province. It is to be remembered that support of the family involved is a provincial matter and therefore precaution is needed to protect the children. The filing of an affidavit of intent acknowledging responsibility can be a preliminary to the granting of any decree. Copies of these papers in the hands of both parties can be evidence in any criminal or civil action.

4. That both marriage and divorce be withdrawn from the mainly ecclesiastical areas they now occupy and recognition be given to the secular interests of modern society. The Christian church no longer has the right to force its views on a pluralistic society.

5. The processes of nullity should be retained as performing a useful function.

Grounds for Divorce:

This area is the most difficult to delineate because of the need to be specific and to avoid legal loopholes that will vitiate the intent of all concerned.

1. Adultery.

2. Desertion, to include disappearance, wilful separation, failure to provide when able to do so, but not to include incarceration or absence due to war or business. The proven period to be not less than five years and to include corroborated evidence.

3. Insanity, where treatment over a period of five years has failed to bring evidence of recovery and where the patient is certified as being of incurably unsound mind. Extreme alcoholism and drug addiction should be classed as a form of insanity.

4. Breakdown of marriage.

Legal cruelty, where actions of a repeated and continuous physical nature endanger health and are so certified by a medical practitioner.

Habitual criminals, where long and repeated imprisonments indicate the inability of the prisoner to assume the role of parent, husband or wife because of repeated offences.

Permanent breakdown of marriage, where the court has no reasonable ground to believe that a reconciliation is possible, where the parties have not lived together for a period of seven years, or where a legal separation has existed for a seven-year period.

Shall we go on with the addenda?

Co-Chairman Senator ROEBUCK: Yes, go right ahead. This is very interesting.

Dr. BAILEY: Legal Costs: The prohibitive cost of the dissolution of marriage is an incentive to common-law relationship and other asocial practices. This lucrative area of jurisprudence has been sacrosanct up to the present so that there is, in effect, one law for the rich and another for the poor. To make any positive contribution in this area is to risk offending large sections of public opinion, including the legal profession, the politicians who see this as a "hot potato" and the churches who resent any state interference with their sacred rites. It is right and proper, therefore, that a churchman should rush in where angels fear to tread and risk, if necessary, public opprobrium in starting a new train of thought, if not procedure.

Here is a very radical suggestion, I believe. Dissolution of marriages should be permissible under administrative law:

1. Uncontested divorces could be processed more adequately under administrative law, with less cost to all concerned, than under judicial law.

2. Processes involved should closely follow those employed in the instituting of marriages.

- (a) Applications for a licence to dissolve the marriage be processed by an issuer of licences;
- (b) Appearances of both parties with witnesses before an administrative officer;
- (c) Signing of a declaration of intent and a statutory form of legal separation to the satisfaction of both parties. This to be registered as are marriages;
- (d) A preliminary interview with the parties involved for discussion of reconciliation shall be regarded as advisable but not mandatory. Such interviews to be with an administrative officer or his designees (e.g. marital tribunal, social worker, clergyman and lawyer);
- (e) Seven years to be the period of voluntary and legal separation;
- (f) The decree shall be made final by an officer of the law on production of enabling documents and a further signing of a voluntary act of consent. Publication shall then be made of the said decree to avoid fraud and collusion, and after thirty days the dissolution shall be in irrevocable effect;
- (g) Parties under age shall require the parents' consent as in the marriage;
- (h) The legal costs involved in these procedures shall be published either as a guide or as set fees for all concerned.

Agenda II:

Provincial Responsibility—and I think this is important, at least it is from my point of view:

The question of divorce be referred back to the provinces and that Parliament pass enabling legislation to remove the matter concerned from the federal

area. This action would force the provinces to set up the necessary legislation to conform with the will and practice of its people and remove the present embarrassment to Parliament caused by its being in effect a divorce court as well as a legislative body. Marriages are handled by the provinces. Why not their dissolution also? If they have the power to institute marriages, why not accept the responsibility when marriages break down? The care of the families involved in marriage breakdown is already in the hands of the provinces. While some provinces may wish to avoid this responsibility, most provinces would welcome this method of dealing with a difficult problem. The B.N.A. Act appears to make possible this course of procedure.

Mr. Chairman, there are three sections: the first, modifying, if you like, the present act; the second, new procedures; the third, an opinion regarding perhaps a change of the seat of veto.

Co-Chairman Senator ROEBUCK: Why do you say the British North America Act appears to make possible this course of procedure?

Dr. BAILEY: I understand that it is possible for the federal Government to legislate out of a particular area, as it has done in other areas, by simply giving the provinces permission to do this kind of thing. The provinces have marriage. Why not the dissolution of marriage?

Co-Chairman Senator ROEBUCK: Mr. McCleave, what do you say to the British North America Act?

Mr. McCLEAVE: Well, Mr. Chairman, probably the witness does not know that we had asked for an opinion earlier on from the Department of Justice regarding certain ancillary issues, but to us very important issues, dealing with maintenance and the care of the children. Do you regard this as an absolute necessity, sir, or if we can work it so that we can give the proper protection under federal legislation to these questions of maintenance and care of children, would you be happy to see us vested with the entire authority?

Dr. BAILEY: Yes, from my point of view I believe this is a way out of a dilemma that appears to be confronting Parliament. There would have to be a divorce court. By giving it back to the provinces, I am afraid some of the provinces would not accept this responsibility, and for the time being it seems perhaps wise to leave it in the federal area. This is why I put it as a second addendum.

Mr. McCLEAVE: So you were not dealing with the moral or constitutional issue?

Dr. BAILEY: No.

Mr. McCLEAVE: But with what you imagine to be a legal difficulty?

Dr. BAILEY: That is right, yes.

Mr. McCLEAVE: If I may have just one other question, Mr. Chairman.

Co-Chairman Senator ROEBUCK: Go ahead.

Mr. McCLEAVE: The brief has mentioned cruelty as being confined only to physical acts, but courts in England, and also in Nova Scotia, have broadened it much beyond that, so frequently you hear psychiatric evidence that a form of behaviour is actually threatening the sanity of one of the spouses of the marriage and relief has been granted on that ground.

Dr. BAILEY: I would agreed with this interpretation. My feeling is that the simple addition of mental cruelty opens the door so wide that it is almost impossible. For instance, a man may not like the way his wife burns his toast in the morning, or forgets to draw the proper water, or to prepare his underwear;

all these kinds of things can be regarded as mental cruelty. In order to close that gap I suggest that doctors can give necessary certificates that indicate that cruelty is involved, and where mental cruelty and physical cruelty are clearly akin to one another.

Mr. McCLEAVE: May I suggest, sir, that your ideas about mental cruelty are really derived from American practice.

Dr. BAILEY: Correct.

Mr. McCLEAVE: Not from English or Nova Scotian.

Dr. BAILEY: Correct.

Mr. McCLEAVE: I do not think any doctor in Nova Scotia that I am aware of would recommend that a person has been driven out of his or her mind because the loved one to the marriage has been burning the toast or doing something of that nature. It is a problem we have met before, but I think the difference between incompatibility and mental cruelty can be defined in the courts, and has been defined successfully both in the United Kingdom and in Nova Scotia.

Senator DENIS: Did you say that marriage and dissolution of marriage come under the jurisdiction of the provinces?

Dr. BAILEY: Marriage comes under the jurisdiction of the provinces.

Senator DENIS: And consequently you contend that dissolution of marriage should also be under the jurisdiction of the provinces?

Dr. BAILEY: It would seem to me to be a wise way of dealing with a very difficult situation.

Senator DENIS: At the present time the provinces have different grounds for the dissolution of marriage. Supposing the federal Government kept completely out of the question of marriage and the dissolution of marriage, leaving it to the provinces to decide for themselves the grounds upon which there could be a dissolution, do not you think that would be a better way of settling this divorce problem? If each province was free to decide on giving these unfortunate people a divorce and the right to re-marry, and also decide on the care of the children, do you not think that would be more appropriate and in accordance with the will of the provinces?

Dr. BAILEY: It is my feeling that it would be best left to the provinces, but in view of circumstances that apply in Canada perhaps there is wisdom in leaving it with the federal Government for the time being.

Co-Chairman Senator ROEBUCK: You appreciate, Dr. Bailey, do you not, that marriage is within the jurisdiction of the Dominion, and it is only the celebration of marriage that is within the jurisdiction of the provinces?

Dr. BAILEY: Yes.

Senator DENIS: Oh yes, but that could be arranged with a new confederation, or new institution if you like. If these questions are related it would be much better to leave it completely to the provinces to legislate on the matter. If a couple in Quebec want a divorce they cannot get one because there is no divorce law there, so they would have to move to one of the other provinces; if cruelty was the ground, they could not get a divorce in Ontario because it is not a ground there and they would have to go to Nova Scotia. In provinces with no divorce laws there might be pressure from the people to introduce legislation, and each province could decide its own grounds; it may be they would have to be resident in the province five or seven years. If each province had the right the Senate would be freed from examining the matter. This seems to be a funny

matter to be discussing in Ottawa for one or two provinces alone. If Newfoundland, with no divorce law, were free to legislate on the matter the people of Newfoundland, if against divorce, could leave the situation as they want it. What do you think of my suggestion?

Dr. BAILEY: This is inherent in what I have suggested, that if there are provinces that do not wish to enter into any terms of divorce and deprive their people of what seems to be a right, then public opinion eventually would begin to make its voice heard and say, "We must have action", and the legislative body would be forced to produce legislation necessary to provide for divorce.

Senator DENIS: Those in the provinces with no divorce law can still get a divorce by applying here, but it is very expensive and a waste of time for legislators and courts alike; we have judges and three or five senators; there is an administrative body to look after that. I do not want to be explicit, but most of the cases that come to Ottawa are pre-arranged. The lawyers are very well known, they are expert, they know how to make enquiries, how to find fault with the husband or wife. It is a tricky way to get divorce in provinces where there is no divorce law.

Senator GERSHAW: Only a small percentage are made up cases. The great majority are genuine cases, and very, very sad cases too.

Senator DENIS: What I mean is that even in provinces where there is no divorce law people can still get a divorce by applying to Ottawa.

Mr. MANDZIUK: Or live in a common-law marriage in provinces where they cannot get a divorce. Is not that a fact?

Senator DENIS: You can find fault in provinces where there is a divorce law. You have common-law marriages in Ontario.

Mr. MANDZIUK: Mr. Chairman, do I misunderstand the witness? How far would he delegate the jurisdiction of the federal Parliament to the provinces? Would he delegate the matter of grounds for divorce and have each province have jurisdiction to establish its own grounds?

Co-Chairman Senator ROEBUCK: In the way they do in the United States?

Mr. MANDZIUK: Well, I am just wondering.

Dr. BAILEY: We would have to apply this to a practical case. Let us take the Province of Ontario—and this can be representative of Manitoba or any other province. They themselves are able, and I think willing, to deal with this question but are precluded from doing so at the present time due to the federal act. If it could be turned over to them, I know it means a differentiation between the provinces, but at least it is one way out of a very human dilemma. A number of provinces want to do it, I believe, and are willing to do it, but at the present time they are precluded.

Mr. MANDZIUK: What provinces have given any indication of wanting to do this, officially I mean? Unless we get something official this is just a matter of one man's opinion. Do not you think that would create ten different sets or grounds of divorce for ten provinces, ten sovereign states? Do you think that would help us as a united nation?

Dr. BAILEY: I do not think it would help us as a united nation, but I think it would help us to begin to move out of a very real dilemma that we are facing at the present time, when we are failing to deal with the matter adequately across Canada because of these divisions.

Co-Chairman Senator ROEBUCK: Of course, we have not got going yet.

Dr. BAILEY: No, this is true.

The Reverend R. Fred Bullen, General Secretary, Baptist Federation of Canada: May I speak to this?

Mr. MANDZIUK: I do not want to introduce a speech, like Senator Denis, but I have a further question or so to ask the witness.

Co-Chairman Senator ROEBUCK: Mr. Bullen has a word to insert here.

Mr. BULLEN: Mr. Chairman, I think it would be most unfortunate to the concept of Christian unity, which everyone in this room holds very dear, to encourage, even in the confines of this committee, the possibility of a variety of grounds for the dissolution of marriage in the provinces. Even to have two such grounds is one too many. Certainly speaking for Canadian Baptists, and in my unique office as their general secretary, where I am labouring most earnestly to build an understanding and a confidence of each other across the country—which indeed, sir, I do not hold as something distinct from the members of the Senate or the Commons—I think that a common national legislation would be needed, but the administration of this might be left in the hands of the provinces. I think there should certainly be national leadership given in this particular case in all aspects of the decision.

Co-Chairman Senator ROEBUCK: We should lay down the general rules?

Mr. BULLEN: That is right.

Senator DENIS: That may be as a guide line, but I suggest that a representative of each province should be called here to tell the members how they feel about divorce.

Co-Chairman Senator ROEBUCK: Senator Denis, may I say to you that we have invited the Attorneys-General of all the provinces, an invitation has gone to every one of them, and the provinces of Ontario and Manitoba have signified their intention to appear before us; the Province of Alberta will send a memorandum; so we are not in default in that respect.

Senator DENIS: I am not saying that, but if some provinces have declined I think it would be a good thing to know which provinces have declined to appear.

Co-Chairman Senator ROEBUCK: Now Senator Fergusson has asked for the floor.

Mr. MANDZIUK: I am not through, Mr. Chairman. Senator Denis keeps insisting on breaking in on me.

Senator DENIS: I must be permitted to ask a supplementary question.

Mr. MANDZIUK: The witness said that re-marriage in church of a divorced person is left entirely to the congregation. Does that not create discord right in the congregation? There are always people with pros and cons. It puts the minister in an embarrassing position, does it not? My question is: Why does not the church take a definite stand?

Dr. BAILEY: For marriage or for divorce, or against divorce?

Mr. MANDZIUK: Most churches are in favour. My church is in favour of marrying divorced people right in church with no questions asked.

Dr. BAILEY: This is left to the discretion of the minister and the church concerned because of the necessity we feel for consultation on all marriages, including those being re-married, before we marry anybody. We have them in for consultation, and sometimes we will refuse marriage and ask them to go elsewhere if we feel that their grounds for marriage are not sound and wise from their own discussion.

For instance, a girl may come in, she is pregnant, the family are with her and say, "This girl must be married, and we have brought the boy", so it is a shotgun marriage. We do not have to perform that kind of marriage; we can advise against that marriage; if our own conscience tells us that it is not a good marriage we ask them to seek someone else's services, and we are quite within our rights to do so according to our own church. It is the matter of consultation and preparation for marriage that seems to us to be important.

You have raised a very important question, though, about the re-marriage of divorced people. It is interesting to note that the current issue of *Life*, of December 16, says that in the United States two out of three people who are divorced re-marry, and nine-tenths of those who re-marry stay married. This a very interesting editorial comment, which indicates that re-marriage after divorce is not necessarily a failure.

Mr. MANDZIUK: I have just one more question, Mr. Chairman. I know there are other members who wish to ask questions.

Co-Chairman Senator ROEBUCK: That is all right. Pardon me if I was wrong just now.

Mr. MANDZIUK: No, you were not, sir.

Co-Chairman Senator ROEBUCK: Well, go ahead, please.

Mr. MANDZIUK: You set out a long list of things which you recommend as grounds for divorce. Now, sir, is that the view of your church or is that your personal view as a result of discussion but never going on record?

Dr. BAILEY: As I have already indicated, we have had a good deal of consultation back and forth, but our church is very much opposed to the idea of making church statements of a very wide and strong kind with regard to this, that or the other.

Mr. MANDZIUK: Does not the witness realize that he is weakening his case—

Dr. BAILEY: I certainly do say—

Mr. MANDZIUK: —when he says he dissociates himself from the representations he is making? I would like to know what 200,000 Baptists in Canada think.

Dr. BAILEY: We would love to tell you!

Mr. BULLEN: We would like to know also what the total membership of almost any other church thinks.

Mr. MANDZIUK: But they do not object to the leadership speaking in their name. You do not speak in that way, you see, and that is the only reason I brought this question up.

Mr. BULLEN: The other side too, Mr. Chairman, is that most of us in our Baptist work recognize that the Baptist churches of the world have grown up on the basis of local autonomy and local legislation, and we attempt to develop the role of the individual rather than to legislate from the top down. It is very difficult, unless you have a questionnaire—

Mr. MANDZIUK: You would rather have Parliament pull your chestnuts out of the fire. Is that right?

Mr. BULLEN: We realize this, and we also recognize your perspicacity in spotting our weakness, which we think is a great strength of Baptists.

Mr. MANDZIUK: Maybe it is a strength, sir.

Co-Chairman Senator ROEBUCK: I would like to hear from Senator Fergusson, but when she is through I would like, if you will permit me, to call on Mr. Bullen for what he has to say to us, and then go on with the questioning, if that is satisfactory.

Senator FERGUSSON: Mine is a very small question, Mr. Chairman. Some of the witnesses who have appeared before us have argued that divorce should be granted when a marriage has broken down, when the marriage is dead. Amongst the grounds that they would consider as evidence that a marriage had broken down would be a person having been put in gaol for a long time. I notice that under "Desertion" you exclude incarceration.

Dr. BAILEY: We refer to habitual criminals.

Senator FERGUSSON: You do not think incarceration is a ground on which divorce should be granted. I just wonder why. Would not you feel that a marriage had really come to an end if someone was incarcerated for 20 or 30 years?

Dr. BAILEY: I referred to habitual criminals, where long and repeated imprisonments indicate the inability of the prisoner to assume the role of parent, husband or wife because of repeated offences. I believe that habitual criminals should be in that category. I wanted to be quite sure that incarceration in a general way was not the reason.

Senator FERGUSSON: I see. If it is long and repeated you feel it is a ground?

Dr. BAILEY: Yes, that is right.

Senator FERGUSSON: Thank you. I did not understand that.

Co-Chairman Senator ROEBUCK: Are you taking the position the English have?

Dr. BAILEY: About the question of the breakdown of the marriage?

Co-Chairman Senator ROEBUCK: No, about incarceration. The Commons in England passed the bill in, I guess it was, 1957, making a long sentence a ground for divorce. The Lords threw it out on two grounds, as I understand it: first, that the Crown has the right of pardon, so that you cannot be sure a long sentence will be a long sentence; secondly, the rehabilitation of the prisoner is seriously interfered with when his home relations are cancelled while he is in gaol. They did that, and it leaves with us a very serious question when we come to consider that particular ground.

Senator FERGUSSON: Mr. Chairman, I may say I am rather a devil's advocate, because actually I agree with the British.

Dr. BAILEY: I said "long and repeated".

Senator FERGUSSON: I wanted to bring out the point.

Mr. MANDZIUK: I agree with the senator.

Co-Chairman Senator ROEBUCK: Let me introduce the Rev. R. Fred Bullen, B.A., B.D. He is the general secretary of the Baptist Federation of Canada. He was born in Plymouth, England, and, like his confrere, migrated with his parents to Canada in 1924.

He was educated and received his B.A. at McMaster University, specializing in social service, and his B.D. at McMaster University.

He was ordained a Baptist minister in 1941. He is at the present time the general secretary-treasurer of the Baptist Federation of Canada, since January 1, 1960. He has been a member of the Baptist World Alliance Executive since 1960. He has been a member of the Baptist World Alliance World Relief Committee

since 1960, a member of the Canadian Council of Churches Executive since that date, and president of the Ministerial Societies. Rev. Bullen, we would like to hear from you at this point.

Mr. BULLEN: Mr. Chairman, if I may accept your previous invitation I will remain seated. I am delighted to be here, and my function primarily is to uphold my president in his presentation. Some of you may recall that in the Old Testament there were two men, Aaron and Hur, who held up the arms of Moses, and as long as they did so things went well. That is really my main function here.

When I was a boy I helped to win the high schools debating teams for a specific year, and the subject of the debate on which I helped to win the coveted award was, "resolved that the Canadian Senate should be abolished."

Mr. MANDZIUK: You are still waiting.

Mr. BULLEN: I have lived long enough to regret it, and to benefit from this meeting with the senior member, the chairman of this committee. I want personally to express our appreciation that, in spite of some difficulties, you have persisted in holding this meeting at an hour convenient to us, and I want it to be recorded that we value that.

My only other comment is simply to say that some of the things which I anticipated saying have already been mentioned in some of the questions regarding the diversity of views. In this connection, may I say that, while other church denominations do have specific boards of social service to which is given the right and privilege to speak for their church, what we have already said regarding a slight reluctance in some areas of Canada to agree with a statement, prepared either by the president, or the Baptist Federation of Canada, or by a group in some other denomination, what is true of Baptists is true also, I think, of other churches too. The same pockets of conservative thinking, or a reluctance to give credence to statements by a person or group, is felt just as much. I find this in my association, and I think this is something that ought to be recorded, and therefore that truth, and keeping that truth in mind, ought not to detract from the validity or the value of the statements which we have placed before you.

The second thing I would like to say is that as Christians we are concerned with the breakdown of marriages, the increasing number of them, and anything which destroys what we believe to be the basic unit of the solidarity of society is of grievous concern to the churches of Canada. I want to assure this committee that in the prayers of many Baptists, and I am sure of other churchmen, the work of this committee will be remembered during the long months when tortuous thoughts and conferences will be held. If there is anything further that we can do to help the understanding of the work which you are trying to do for all of us we will be glad to do so.

I would like to add one third thing, and that is that for my own part I would have liked to see more emphasis upon conciliation than Dr. Bailey has included, and I am opening the door to comment on his statement that it ought not to be mandatory. I realize that mandatory conciliation is probably no conciliation at all, but I would like to see in any legislation opportunities presented for long and perceptive discussion in order to maintain marriage.

I am distressed that many marriages are dissolved because a person sees someone else that they feel a little more attracted to. Quite often the second marriage begins while the first marriage is still intact, and the attraction of someone outside of the marriage relationship is quite often the initial cause for the breakdown of a marriage.

Co-Chairman Senator ROEBUCK: Could you give any advice to wives how to make the attractions at home sufficient to offset those from outside?

Mr. BULLEN: Sir, if I had lived as long as the esteemed chairman of this committee I perhaps would be bold enough to make some suggestions. I can only commend the successful actions of my own spouse and commend her own activities to other women across the country. This, of course, would be presumption on my part.

None the less, I do have a concrete suggestion. While I am aware that many breakdowns in marriage occur among church people, I am certain of this, that as a nation we dare no longer simply pretend to be a Christian country without the active participation of persons being related to their church or to their synagogue in a way which commends their faith to their neighbours.

I believe that happiness and long marriages come only when both parties discover that marriage is not simply the continuance of two persons, but these two literally become one. If this is true, then the discovery of that is a lifelong proposition, and there is increased joy in its fulfilment. I believe that Jesus Christ and the Mosaic laws have given to people of Judao-Christian traditions the true basis by which they may have a higher esteem of each other, and in finding that therefore find the greatest and highest esteem for themselves.

Co-Chairman Senator ROEBUCK: Rev. Bullen, would you mind carrying forward a little further what you said with regard to conciliation? You have said that mandatory conciliation is useless. There comes to my mind the old saying that a man convinced against his will is of the same opinion still. Will you tell us what thoughts you have as to what we can do, remembering that we have a divided jurisdiction between the Dominion and the provinces? What can we do in a practical way to improve our conciliatory processes?

Mr. BULLEN: I know of one thing. I know that our Roman Catholic friends have set up in certain communities institutions, which are called by two or three different names. I know that the priests in charge of these have reported singular success, because people facing the dissolution of marriage in its early stages quite often are willing to go to a person of objective and trained talents to discuss their problem with them.

Co-Chairman Senator ROEBUCK: Is there anything we can do to assist in that?

Mr. MANDZIUK: You mean, Mr. Chairman, how we can incorporate this into our recommendations? Is that what you have in mind?

Co-Chairman Senator ROEBUCK: That is what I have in mind.

Mr. MANDZIUK: We are here to listen, not to argue.

Co-Chairman Senator ROEBUCK: You are perfectly right.

Mr. MANDZIUK: That is a good point, sir.

Co-Chairman Senator ROEBUCK: What can we recommend? That is what I am after.

Dr. BAILEY: May I speak to that, Mr. Chairman, going back to what I indicated earlier, that I am against mandatory conciliation. While in Britain this year I took the opportunity to seek out the sponsoring M.P., Mr. Leo Apse, the Member for Pontypool, who brought in the Matrimonial Causes Act, 1963, in which he added the phrase "breakdown of marriage" as an additional ground for divorce. At that time the church leaders in England called this a dangerous principle, but as a result of the passing of that act the Archbishop of Canterbury set up a committee which reported under the phrase "putting asunder", in which they suggested that we should abolish what I have called, and they have

called, matrimonial offences, that we should establish the breakdown of marriages as such completely.

Co-Chairman Senator ROEBUCK: May I ask at that point, have you read the report of the Lord Chancellor?

Dr. BAILEY: Yes; I was just going to refer to that. Sir Leslie Scarman, chairman of the Law Commissioners, said that this would put an impossible load on the over-burdened courts, and Mr. Leo Apse agrees that it would be impossible to supply the counsellors, adjudicators and procedures adequate to cover this phrase "mandatory conciliation", so it would block off almost all divorce if it were mandatory.

In order to make possible conciliation, I have suggested that we should delimit what conciliation is, to some extent, and establish procedures, which I have indicated here in this second addendum, having to do with how marriages should be dealt with under administrative law, and there is a section in that which indicates a method of procedure for dealing with this question; and then of course, more place for civil marriage should be established.

We really have not answered your question as to how we can make adequate procedures more available for conciliation. My only feeling here is that constantly they should be directed, if possible, back to their own clergymen. May I say that we do a good deal of work at conciliation at the present time, and I think reasonably successful work. I can count a number of cases over the years where people have been re-united. I spoke to a couple last night who were exceedingly happy, who had a break down of their marriage, when two children were involved, and they have a third one now.

I think that social workers can do a great deal in this area. I am sure that doctors and lawyers, too, do a great deal of work at conciliation, where people are able to go to them fairly freely and talk out the questions which bother them.

To write it into any act seems exceedingly difficult, except to make possible procedures for conciliation under what I have suggested is administrative law.

Co-Chairman Senator ROEBUCK: We could include a pious hope, I suppose, in our report.

Dr. BAILEY: Yes.

Co-Chairman Senator ROEBUCK: That is about as far as we can get though, I guess. Now the Rev. Bullen is open for any questions on the brief.

Senator BURCHILL: On Sunday night I saw the program "Sunday Night", which has been the cause of quite a lot of controversy in the last couple of weeks, and the statement was then made that every fourth marriage in the United States ended in divorce while every tenth marriage in Canada ended in divorce. I do not know whether those figures are correct or not, but that statement was made on television. Suppose it is correct. We all know that divorce is increasing very much; those of us who have been on this committee have some idea of the increase; there has been a very, very serious increase. When you say we should rationalize the offences that divorce can be procured for, what is your guess—and it can only be a guess—as to the effect on the increase such a change in the law would bring about? A statement was made here lately that there would be a tremendous increase. Do you agree with that?

Dr. BAILEY: We would have to accept the fact that there would be an increase in the incidence of divorce, but I think one must balance against that the ability of people to live as persons outside of the little hell that has been created by the conditions that bring about divorce. I think these people have a right to life and should not be condemned utterly to remain in the hell that is often created by some of these grounds that are set forth for divorce.

Mr. McCLEAVE: You do not think we confuse the fact that the divorce rate only partly reflects the amount of marriage breakdown?

Mr. MANDZIUK: Mr. Chairman, either one of the gentlemen could probably answer this. I was interested in this suggestion that the dissolution of marriage should be permissible under administrative law. Apparently, to hold this recommendation up the costs of divorce proceedings seem to be the basis. I trust that you are aware that the Province of Manitoba has taken a lead, and that both petitioners and respondents who cannot afford to either pursue or defend divorce actions are going to have the costs paid by the province, in consultation with the bar association, and I think that will go through. What I am interested in is, what do you mean by "administrative law"? Taking it out of judicial hands altogether? You apply, you would have a licence and you could have your friends sitting on this commission?

Dr. BAILEY: This is an exceedingly good question. First of all, I think your own E. Russell Hopkins read into the record the fact that it has been recognized over the years that there is one law for the rich and one for the poor when it comes to divorce. In those early days he read the case by Justice Maule, who indicated that it was somewhere about \$5,000 in those olden days for divorce. In your own records again, through Mr. John H. McDonald, Q.C., the cost of divorce was assessed at about \$1,500 as a minimum in Ontario.

Co-Chairman Senator ROEBUCK: The price was a little bit high.

Mr. MANDZIUK: May I say, not for the record but for your information, in Manitoba the cost of divorce is \$500, \$600 to \$700 at the top. I know the further you go east, those who come to the Senate, it is not the Senate who charge them but the gentlemen of the bar; it is very little, and yet their fees are pretty stiff; I understand that.

Dr. BAILEY: This was an answer to pay by time instead of by money. I am using my experience as a minister. This is the method by which you get married. Is not therefore the reverse of the procedure the method by which you can dissolve the marriage, so long as it is not just mutual consent but the consent of a community, the legal profession and everything else which comes under administrative law? This is exactly the process used to get married. Why not reverse the process to unmarry?

Co-Chairman Senator ROEBUCK: You would not leave it to the preacher, would you?

Dr. BAILEY: Certainly not.

Mr. BULLEN: Mr. Chairman, my colleague being a pastor of a church still, perhaps the problem lies in the fact that they do not charge for marriage. If they paid for marriage maybe they would want to keep it!

Co-Chairman Senator ROEBUCK: We do not charge for dissolution of marriage whenever it comes to our attention that the parties are poor. Time and time again we remit the fees, sometimes down to \$10.

Mr. MANDZIUK: I think the Soviets, in the U.S.S.R., had that method to start with. Now they are establishing divorce courts and making divorce more difficult to get than by going to a registrar's office and signing in. You are going to open the door to more dissolutions or divorces if you put this recommendation in.

Dr. BAILEY: This is far from being that, because if it is only by mutual consent—and that is what it was in the example quoted—you just apply for a marriage and you get it, you apply for divorce and you get it. But look at the conditions here.

Mr. MANDZIUK: You do not know whether the application for divorce is going to be contested or not until you file your petition. There is to be mutual agreement that my spouse is not going to contest the thing, so I am going to go to a commission, a bunch of friends, get it out of the courts, lawyers and everything else, and publicly make dissolution a lot easier. That is what I am worried about, sir.

Dr. BAILEY: I do not think it makes it easier. It makes it fairly long, and there are procedures that must be gone through that are set out by law. I do not think it makes it easier.

Mr. MANDZIUK: Would these be legal men, legally trained people?

Dr. BAILEY: Yes, administrative officers of the law.

Co-Chairman Senator ROEBUCK: How would that improve, say, what we are doing here? We have judicial officers who do nothing but hear these cases, and they are skilled in knowing whether it is true or not, and how much is required to prove the very things that you have set out as the grounds upon which we can act.

Mr. MANDZIUK: It would not be half as competent, Mr. Chairman, because the suggestion here is that the marital tribunal could be social worker, clergyman or a lawyer.

Dr. BAILEY: And a lawyer.

Mr. McCLEAVE: It would be much less expensive, would not it?

Dr. BAILEY: Much less expensive.

Mr. McCLEAVE: This is the point you are trying to get at?

Dr. BAILEY: This is the point.

Mr. McCLEAVE: That is why I referred to the fact that we must not confuse divorce rates with the realities of breakdown, of people going off and living with others in a so-called common-law relationship. I think that if we have studied the statistics at all, it will be seen that where legal aid prevails, as it does in certain provinces—I think perhaps in Manitoba, though I am not sure—there has been an increase of over 70 per cent. In the divorce rate, which does not prove that there is more marriage breakdown there; it simply proves that the people did not have the money before that to afford divorce costing anywhere from \$500 to \$2,000. I think you have put your finger on something. I do not think you have got the right formula for it, but I think you are on the right track.

Dr. BAILEY: I am quite willing to accept this thinking, I hope creative thinking.

Mr. MANDZIUK: I quite understand.

Dr. BAILEY: I am trying to get at a principle here. I am sure that you gentlemen are much more competent than I am; I am a layman in this respect, but I am tremendously concerned about the problems involved and I want to share any interested creative thought.

Mr. MANDZIUK: What you are saying is a pretty broad statement, that it should be a social worker, clergyman, or a practising lawyer who is going to work for nothing.

Co-Chairman Senator ROEBUCK: Mr. Forest, have you got a suggestion or question? You have been very silent so far.

Mr. McCLEAVE: Mr. Chairman, since I started to raise this, could I ask the witness this? I have not thought my way completely through it, but—

Co-Chairman Senator ROEBUCK: Before you do that, do you mind my saying—as I left it too long on another occasion and by the time I had made the announcement some of the members had gone—that we are going to hold a Steering Committee meeting after this is over. Will those members of the Steering Committee please keep their seats when we adjourn.

Mr. McCLEAVE: The point I was trying to make was that there may be some middle ground where an administrative tribunal has the couple before it, obtains a certain amount of information, and then may decide to send before a judicial tribunal, a judge, one specific issue or two specific issues in the marriage that should be tried, such as the issue whether adultery has in fact been committed or whether a certain amount of maintenance should be paid in the case of dissolution. This is what I am suggesting so that you may be able to cut down the costs drastically, and yet always have the judicial hand where the judicial hand should be imposed.

Dr. BAILEY: Right.

Co-Chairman Senator ROEBUCK: May I ask a question. I see you say on page two:

both marriage and divorce be withdrawn from the mainly ecclesiastical areas they now occupy, and recognition be given to the secular interests of modern society.

Do you mean that marriage, for instance, is to be taken out of the hands of the ecclesiastical representatives who now control it very largely? What do you mean by this sentence?

Dr. BAILEY: I believe that Christian marriage should be reserved for Christian people, that Jewish marriage should be reserved for Jewish people, and people may elect not to be married, and should move very easily into the civil marriages rather than feeling that there is some social stigma because they are not married in church, when quite often they are not necessarily Christian people involved. I think Christian marriage should be for Christian people, Jewish marriage for Jewish people, Buddhist for Buddhists and so on. We ought not to try to force our Christian rules and regulations upon those who dwell mainly in secular society.

Co-Chairman Senator ROEBUCK: That is to say, we should have secular marriage for those who wish it?

Dr. BAILEY: That is right.

Co-Chairman Senator ROEBUCK: Have we not got that at the present time?

Mr. MANDZIUK: Yes.

Dr. BAILEY: We do have it in point of fact, but so often I think clergymen, churches, are guilty of performing marriages because they feel that they are officers of the law and therefore must do it because someone brings a licence to them. I think this should be moved out into a wider ground.

Co-Chairman Mr. CAMERON (*High Park*): So a magistrate could do it.

Co-Chairman Senator ROEBUCK: Now may I hear from my co-chairman, who has been very silent up to date.

Co-Chairman Mr. CAMERON (*High Park*): Oh, I have a lot of questions, but I am not going to ask them.

Co-Chairman Senator ROEBUCK: Go ahead and ask them, please.

Co-Chairman Mr. CAMERON (*High Park*): No, not now.

Co-Chairman Senator ROEBUCK: Well, it is five o'clock and we must adjourn in the course of the next five or ten minutes.

Mr. McCLEAVE: If the co-chairman is not going to ask any questions I would like to ask one. What, in your experience, has been the effect of the machinery that you have to go through for divorce, where you have to prove your partner guilty of adultery, where you have to bring proof rather than the supposition, under the formula that we use now? What effect has this had on creating the situation you referred to, of very unhappy relationships, with, I presume, a connotation for society in that it is not advantageous? Also, there is the fact that some people have decided to do something about this, and there has been the establishment of, so the Bar Association considers, 500,000 common-law partners, which I presume means 250,000 relationships. What effect have you observed this has created?

Dr. BAILEY: The common-law relationship or the failure to obtain divorce?

Mr. McCLEAVE: You mentioned the failure to obtain divorce and the fact that it is detrimental to society. With regard to the other aspect, where they make their own arrangements, what does the church do about this?

Dr. BAILEY: Where they live in a common law relationship?

Mr. McCLEAVE: Yes.

Dr. BAILEY: We take no official position on this. We do not outlaw them. We feel that their relationship is before God and before men. They accept responsibilities, they are human beings in need of ministration and we take them on their human value, we do not sit in judgment upon their course of conduct.

Mr. McCLEAVE: We are concerned in a legislative sense with the role of society and the relationship that divorce and marriage has to our social structure. This must play quite an important part in that social structure. I am wondering whether from your point of view it had some apparent effect.

Mr. BULLEN: I would like to answer that, Mr. Chairman, if I may. We are hardly competent to answer, simply because when persons live in a common-law relationship they almost invariably withdraw from church groups. If, for example, they have been active in church work in some official capacity, they immediately withdraw from that. I am not sure whether this is out of a sense of personal conscience or out of respect for those with whom they have been working; it could be both.

Co-Chairman Senator ROEBUCK: But it is a good reason why we should do what we can to bring those relationships to an end.

Mr. BULLEN: With the absenting of themselves from church, I think the average minister will call on such people, and perhaps they will discuss their problem frankly. The church exists, not simply for saints, but for people who are striving to be saints, no matter what their marital situation and therefore they would be welcome in the church. Immediately we say that we have to recognize that the church is not simply a self-propagating society in which it is an introverted group. It is anxious to promote its doctrines. The teachings of the New Testament, particularly, call men to repentance and to a change of mind, to a change of behaviour. Consequently, if the church is true to its proclamation, even from the sermons, without any personal interviews, persons who are living in common-law invariably feel themselves faced with a conflict of philosophies and they have to do something about it. If their desire to live in common-law is greater than their respect for the proclamation of the church, then they are going more consistently to withdraw from the church, and this we regret very much.

Mr. PETERS: What does this do about the children as far as the relationship of our religion to the issue of common-law relationship is concerned?

Mr. BULLEN: I know many families in which children are living with parents who are dwelling in common-law. The children find a home within the Sunday school and within mid-week activities until the time when they are able to understand, because of childish gossip, the kind of situation in which their parents are living, and quite often the children are more embarrassed than their parents are and will withdraw from the society where they know that this is not the most desirable form of behaviour. I think this is a lamentable fact, because this is true mental cruelty, this is something which is imposed upon children without their asking, without their being involved in it.

Co-Chairman Senator ROEBUCK: Nor are they responsible in any way.

Mr. BULLEN: They may grow up with a very serious complex in society.

Dr. BAILEY: I wonder if I might relate one incident that has troubled me over the years. A lawyer called me one evening about nine o'clock. He said, "Mr. Bailey, would you marry a couple for me tonight?" I said, "Well, it is a little unusual, but come up and let us see what we can do." They were 73 years of age; they had children and grandchildren, and were bordering on having great grandchildren. Then they told me the story. The man had originally been married to a lady who was mental and had been in the hospital. This couple had established a common-law relationship, which went on, and they produced their children and had grandchildren. The original wife died but the same situation continued. They had been living with this grief all over the years, heartbroken that their children might find out. So at the, if you like, midnight hour almost we performed this quiet little wedding, and I doubt whether the children have ever heard what happened. This, I think, is the true ministration of the church, when we try to correct the situations that society has brought into being.

Co-Chairman Senator ROEBUCK: I can tell the same story in our own laws. Now it is time we adjourned, but I should like to hear from my co-chairman.

Co-Chairman Mr. CAMERON (*High Park*): Mr. Chairman, what I want to do is to thank the Rev. Dr. Bailey and the Rev. Bullen for their appearance here today, for the very interesting brief they have presented, and for the quite obvious concern they have with the subject-matter we are considering. I noted with some degree of pleasure, Dr. Bailey, that you are the pastor of Kingsway Baptist Church, which is in an area very familiar to me. I think we have had a very interesting and beneficial discussion, and on behalf of the committee, through you, Mr. Chairman, I would like to thank both of these very distinguished gentlemen for the presentation today.



First Session—Twenty-seventh Parliament
1966-67

PROCEEDINGS OF
THE SPECIAL JOINT COMMITTEE OF THE SENATE
AND HOUSE OF COMMONS ON
DIVORCE

No. 12

TUESDAY, JANUARY 31, 1967

Joint Chairmen

The Honourable A. W. Roebuck, Q.C.

and

A. J. P. Cameron, Q.C., M.P.

WITNESSES:

The Ontario Law Reform Commission: The Honourable James C. McRuer, LL.D., Vice-Chairman. *The National Council of Women of Canada:* Mrs. F. E. Underhill, Chairman of Laws; Mrs. Margaret E. MacLellan, Vice-President.

APPENDICES:

- 26.—Statement by E. A. Driedger, Q.C., Deputy Minister of Justice and Deputy Attorney General of Canada.
27.—Brief by the National Council of Women of Canada.
28.—Brief by Ray A. Graves, Esq., Saskatoon, Sask.

ROGER DUHAMEL, F.R.S.C.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1967

MEMBERS OF THE
SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS
ON DIVORCE
FOR THE SENATE

Hon. A. W. Roebuck, Q.C., Joint Chairman

The Honourable Senators

Aseltine	Connolly (<i>Halifax North</i>)	Flynn
Baird	Croll	Gershaw
Belisle	Denis	Haig
Burchill	Fergusson	Roebuck—(12).

FOR THE HOUSE OF COMMONS

A. J. P. Cameron, Q.C., (*High Park*), Joint Chairman

Members of the House of Commons

Aiken	Forest	McQuaid
Baldwin	Goyer	Otto
Brewin	Honey	Peters
Cameron (<i>High Park</i>)	Laflamme	Ryan
Cantin	Langlois (<i>Mégantic</i>)	Stanbury
Choquette	MacEwan	Trudeau
Chrétien	Mandziuk	Wahn
Fairweather	McCleave	Woolliams—(24).

(Quorum 7)

ORDERS OF REFERENCE

Extracts from the Votes and Proceedings of the House of Commons:
March 15, 1966:

“On motion of Mr. McIlraith, seconded by Mr. Hellyer, it was resolved—that a Special Joint Committee of the Senate and the House of Commons be appointed to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either House;

That 24 Members of the House of Commons, to be designated by the House at a later date, be members of the Special Joint Committee, and that Standing Order 67(1) of the House of Commons be suspended in relation thereto;

That the Committee have power to engage the services of such technical, clerical and other personnel as may be necessary for the purpose of the inquiry;

That the Committee have the power to send for persons, papers and records, to examine witnesses, to report from time to time, and to print such papers and evidence from day to day as may be ordered by the Committee, and that Standing Order 66 be suspended in relation thereto; and

That a Message be sent to the Senate requesting Their Honours to unite with this House for the above purpose, and to select, if the Senate deems it so advisable, some of its Members to act on the proposed Special Joint Committee.”

“By unanimous consent, on motion of Mr. McIlraith, seconded by Mr. Hellyer, it was ordered—That the order of the House of Monday, February 21, 1966 referring the subject-matter of the following bills to the Standing Committee on Justice and Legal Affairs, namely:—

Bill C-16, An Act to provide in Canada for the Dissolution of Marriage (Additional Grounds for Divorce).

Bill C-19, An Act to provide in Canada for the Dissolution and the Annulment of Marriage.

Bill C-41, An Act to amend the British North America Acts, 1867 to 1965, (Provincial Marriage and Divorce Laws).

Bill C-44, An Act to provide in Canada for the Dissolution of Marriage.

Bill C-55, An Act to provide in Canada for the Dissolution of Marriage.

Bill C-58, An Act respecting Marriage and Divorce.

Bill C-79, An Act to amend the Dissolution and Annulment of Marriages Act (Additional Grounds for Divorce).

be discharged, and that the subject-matter of the same bills be referred to the Joint Committee of the Senate and the House of Commons on Divorce”.

March 16, 1966:

"By unanimous consent, on motion of Mr. Stewart, seconded by Mr. Byrne, it was ordered—That the subject-matter of Bill C-133, An Act to extend the grounds upon which courts now have jurisdiction to grant divorces a *vinculo matrimonii* may grant such relief, be referred to the Special Joint Committee on Divorce".

"By unanimous consent, on motion of Mr. Stewart, seconded by Mr. Byrne, it was ordered—That the subject-matter of Notice of Motion No. 11 be referred to the Special Joint Committee on Divorce."

March 22, 1966:

"On motion of Mr. Pilon, seconded by Mr. McNulty, it was ordered—That a Message be sent to the Senate to acquaint Their Honours that this House will unite with them in the formation of a Joint Committee of both Houses to inquire into and report upon divorce in Canada, and that the Members to serve on the said Committee, on the part of this House, will be as follows: Messrs. Aiken, Baldwin, Brewin, Cameron (*High Park*), Cantin, Choquette, Chrétien, Fairweather, Forest, Goyer, Honey, Laflamme Langlois (*Mégantic*), MacEwan, Mandziuk, McCleave, McQuaid, Otto, Peters, Ryan, Stanbury, Trudeau, Wahn and Woolliams."

LÉON-J. RAYMOND,

Clerk of the House of Commons.

Extracts from the Minutes of the Proceedings of the Senate:

March 23, 1966:

"Pursuant to the Order of the Day, the Senate proceeded to the consideration of the Message from the House of Commons requesting the appointment of a Special Joint Committee of the Senate and House of Commons on Divorce.

The Honourable Senator Connolly, P.C., moved, seconded by the Honourable Senator Roebuck:

That the Senate do unite with the House of Commons in the appointment of a Special Joint Committee of both Houses of Parliament to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either House;

That twelve Members of the Senate, to be designated at a later date, act on behalf of the Senate as members of the said Special Joint Committee;

That the Committee have power to engage the services of such technical, clerical and other personnel as may be necessary for the purpose of the inquiry;

That the Committee have the power to send for persons, papers and records, to examine witnesses, to report from time to time, and to print such papers and evidence from day to day as may be ordered by the Committee, and to sit during sittings and adjournments of the Senate; and

That a Message be sent to the House of Commons to inform that House accordingly.

After debate, and—

The question being put on the motion, it was—
Resolved in the affirmative.”

March 29, 1966:

“With leave of the Senate,

The Honourable Senator Beaubien (*Provencher*) moved, seconded by the Honourable Senator Inman:

That the following Senators be appointed to act on behalf of the Senate on the Special Joint Committee of the Senate and House of Commons to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, namely, the Honourable Senators Aseltine, Baird, Belisle, Bourget, Burchill, Connolly (*Halifax North*), Croll, Fergusson, Flynn, Gershaw, Haig, and Roebuck; and

That a Message be sent to the House of Commons to inform that House accordingly.

The question being put on the motion, it was—
Resolved in the affirmative.”

May 10, 1966:

“Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Roebuck, seconded by the Honourable Senator Croll, for the second reading of the Bill S-19, intituled; “An Act to extend the grounds upon which courts now having jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief”.

The question being put on the motion—

In amendment, the Honourable Senator Connolly, P.C., moved, seconded by the Honourable Senator Hugessen, that the Bill be not now read the second time, but that the subject-matter be referred to the Special Joint Committee on Divorce.

After debate, and—

The question being put on the motion, it was—
Resolved in the affirmative.”

J. F. MacNEILL,
Clerk of the Senate.

MINUTES OF PROCEEDINGS

TUESDAY, January 31, 1967.

Pursuant to adjournment and notice, the Special Joint Committee of the Senate and the House of Commons on Divorce met this day at 3:30 p.m.

Present: For the Senate: The Honourable Senators Roebuck (*Joint Chairman*), Baird, Belisle, Burchill, Fergusson and Gershaw—6.

For the House of Commons: Messrs: Cameron (*High Park*) (*Joint Chairman*), Aiken, Baldwin, Brewin, Cantin, Fairweather, Honey, Mandziuk, McCleave, McQuaid, Otto, Stanbury and Wahn—13.

In attendance: Peter J. King, Ph.D., Special Assistant.

The following Witnesses were heard:

The Ontario Law Reform Commission: The Honourable James C. McRuer, LL.D., Vice-Chairman.

The National Council of Women of Canada: Mrs. F. E. Underhill, Chairman of Laws; Mrs. Margaret E. MacLellan, Vice-President.

Briefs and statement submitted by the following are printed as Appendices:

26. Statement by E. A. Driedger, Q.C., Deputy Minister of Justice and Deputy Attorney General of Canada.
27. Brief by the National Council of Women of Canada.
28. Brief by Ray A. Graves, Esq.

At 5.45 p.m. the Committee adjourned until Tuesday next, February 7, 1967 at 3:30 p.m.

Attest.

Patrick J. Savoie,
Clerk of the Committee.

THE SENATE

SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS ON DIVORCE

EVIDENCE

OTTAWA, Tuesday, January 31, 1967.

The Special Joint Committee of the Senate and House of Commons on Divorce met this day at 3.30 p.m.

Senator Arthur W. Roebuck and Mr. A. J. P. Cameron (*High Park*), Co-Chairmen.

Co-Chairman Senator ROEBUCK: Ladies and gentlemen, we have two really wonderful delegations today, the National Council of Women and the former Chief Justice of the Province of Ontario.

Perhaps the best compliment I could pay to the National Council of Women is one provided me by my own secretary. I was reading their brief and said, "This is a magnificent brief." She answered, "These women of the National Council are no slouches." In the vernacular I think that is perhaps the best compliment I could convey to them.

Our first witness, ladies and gentlemen, is the former Chief Justice of the Province of Ontario, now retired. I may say that the vigorous thought which he evidenced during his many years on the bench has left a permanent mark on the jurisprudence of his province and of Canada at large. So, too, while in private life, his public service and his contribution to the welfare of his fellow citizens is of outstanding merit and lasting benefit.

I must put on the record some of the facts. He was born in Oxford County—I do not mind telling you his age, although I will refrain from doing that when the ladies arrive—on August 23, 1890. He was educated at the University of Toronto and Osgoode Hall Law School.

He was called to the Bar of Ontario in 1914 and created a King's Counsel in 1929. He practised law in the City of Toronto for thirty years until his appointment to the bench. He is a member of the Bars of British Columbia and Alberta. He was a Bencher of the Law Society of Upper Canada from 1936 to 1944 and served as Chairman of the Legal Education Committee. He was Assistant Crown Attorney for the City of Toronto and County of York for several years, from 1921 to 1925, and he resumed practice in that year. He was a lecturer at Osgoode Hall Law School from 1930 to 1935 in criminal procedure. He was appointed to the Court of Appeal of Ontario in 1944, and was made Chief Justice of the High Court of Justice for the Province of Ontario in December, 1945. He retired from that position on June 30, 1964.

He was a member of the royal commission appointed to investigate the penal system of Canada in 1937, and is joint author of the report of that commission. I think all our senators here and probably most of our Members of Parliament will remember that report and its impact upon the people of our country. He has been active in the Canadian Bar Association for many years, and was elected President in August, 1946, for the year 1946-47. He is an honorary member of the American Bar Association. In 1954 he was appointed chairman of a royal commission to study the criminal law relating to criminal sexual psychopaths, and also of a royal commission to enquire into the law of insanity as a defence in criminal cases. He was chairman of the Canadian Corrections Association in 1956-57.

He is the author of *The Evolution of the Judicial Process*, which he published in 1957, which consisted of a series of lectures given by him in 1956 at the University of Saskatchewan. He is also author of *The Trial of Jesus*, published in 1964.

He was honoured by Laval University with the degree of LL.D. in 1947, by the University of Toronto in 1962 and by Osgoode Hall Law School in 1964.

He was appointed by the Government of Ontario on May 21, 1964, as a commissioner under the designation "Inquiry into Civil Rights," and I understand that he is still holding that position and interested in civil rights. In June, 1964, under the Ontario Law Reform Commission Act, 1964, he was appointed a member and Chairman of the Ontario Law Reform Commission, which position he held until July 1, 1966, and from that date he continued as a member and vice-chairman of the commission.

Well, honourable senators and members of the house, that is a very impressive statement which I have read. I may add to it that in his long experience on the bench he has come in contact with the administration of the law of divorce in a way that perhaps most of our witnesses and ourselves have not enjoyed. So I give you the Honourable J. C. McRuer, former Chief Justice of the Province of Ontario.

The Honourable James C. McRuer, former Chief Justice, province of Ontario: Mr. Chairman, honourable senators, honourable members of the House of Commons, ladies and gentlemen, I have not come here today to offer you any advice about what should be the grounds of divorce, but I want to discuss with the committee the problems, as I see them, of procedure and administration, which are very, very important.

I have presided at a great many divorce trials, and I may say that it was not a privilege I enjoyed, to use the chairman's language. It was very frustrating, and I want to bring the committee to a sense of the frustration and the importance of a divorce case, I do not care whether it is a non-contested case or a contested one. The most difficult and frustrating ones are the non-contested cases.

The divorce is the termination of the family unit, it is the break up of the family. Where there are no children, or no dependent children, it does not worry one so very much; the parties have decided to break up and the marriage is at an end; they are mature people, that is their business. But when there are children

there is something happening over their heads and there is no one there to protect them or to protect their interests.

Very often the parents are quarrelling over the children. Coupled with the divorce case you have the claim for custody and the claim for maintenance—maintenance of the children, and very often maybe maintenance of the wife. Too often it seemed to me that the children were pawns on the chessboard. The wife would say, "Well, give me so much maintenance and you can have the children," or the husband would say, "If you don't claim maintenance I'll let you have the children." I have repeatedly had cases before me where there has been no claim for maintenance, the husband going free, making no contribution to the children, with no one to speak on the children's behalf. These are the things that concern me very much in considering what should be the disposition of the difficulties that arise in divorce cases.

You are at once confronted with a constitutional problem. Constitutionally the province is responsible for the law of custody and the law of maintenance, the dominion for the dissolution of a marriage. In Ontario, some years ago I felt so anxious about this situation for the children that I discussed it with the Attorney General, and he accepted my suggestion that the Official Guardian should come into the picture on behalf of the children. We now have a system there—not a very good system, but it is something anyway—so that whenever there is a divorce action and there are dependent children, the Official Guardian must be notified and given a copy of the pleadings. He makes an investigation, which he carries out through the children's aid societies all over the province, and they make a report which goes in the papers and goes to the court. You have this Official Guardian's report, which is in the nature of *prima facie* evidence; anyone who wishes to dispute it may have it disputed, and the person making the report can be asked to come to the court for cross-examination. In all my experience that was never done, that a dispute with regard to the report was filed.

There is another step. According to the present law, jurisdiction in regard to divorce is in the superior courts, in the Supreme Court of Ontario. Jurisdiction in regard to custody may be with the surrogate court, which is the county court judge, the Supreme Court judge, or it may be that a family court judge can make an order for custody. So you have that division of authority over children, and orders for maintenance may be made in the Supreme Court, in the surrogate court or in the family court.

I always felt awfully helpless in deciding a question of custody as a Supreme Court judge. I was very remote. I would go to Welland, and I would probably not be back in Welland again for five, six or seven years. It is the same with other judges. We go on circuit, we go in and hear a case and we feel that we are not at the bottom of it at all, but we make an order for custody. We will say the children are young and you feel the mother is the one to have custody; but the father is a decent chap, he is a school teacher and could be a very good influence on the children, have access to them, take them out at the weekends, take them away skating and skiing, that sort of thing, all the things a father can do that a mother cannot do very well, and you make the order. Then before you are out of town they start quarrelling about it. You try to specify hours, which is so

difficult; you say the father can have the children on Saturday from nine o'clock in the morning until half-past six at night—these kinds of orders that you pull out of the hat, not knowing too much about the exact circumstances of the family; you get it in a casual way.

I will give you an example that I have had which brings home what I mean. I was sitting in Welland and a girl brought an action for divorce. She had married when she was 17, she had four children, and I think she was then about 25. There were three little boys and a little girl. Her husband was a first-class rotter. There was evidence that he was entertaining criminals at the house. What was going on at that house I will never know, but there was a lot of evidence which indicated that it was a hang-out for undesirable people. The little girl and the three little boys had a sort of dormitory in an unfinished attic, the husband had a woman whom he lived with downstairs, and the goings-on there were very unhealthy for children. The poor girl worked in Kresges and had a single room, and you could not make an order for custody there which would be a realistic one; she could not take the children. She said she thought she could manage with the little girl with some help.

There was a division in religion; the husband was a purported Protestant, she was a Catholic, so I sent for the Catholic Children's Aid and the Protestant Children's Aid and asked the officers to come in. They came in and discussed the case with me and I said, "What I am going to do is this. I am going to allow the wife to have the little girl. She cannot do anything for the little boys; I am going to leave them in the custody of the father, but I am going to put a condition to it that the house be inspected once a month by the children's aid societies to see what is going on there, and then they can report to me when I am sitting in Hamilton", as the most convenient place, "in about three months' time." Well, there I was handicapped; the children's aid people could not come to me; but they had made a report when I got to Hamilton. In the meantime the husband had sent all the children off to Nova Scotia. But that was a good thing for them, because the children's aid people followed it up and found they were living with a sister of his in very much better circumstances than they had been living before, and the children's aid people recommended the home.

What I am getting at is this. If you are going to maintain the interest of the children and the wife, if she requires maintenance, the solution of these domestic problems is a continuing solution; the divorce is not the solution by any means, it is only a step to what might be a better circumstance sometimes. I think it is imperative that there should be a concurrent jurisdiction on the county and district courts in Ontario. That is one thing that I think is very necessary, because in a case like the one I mentioned and other uncontested case—most of the cases are uncontested anyway—there may be the question of access by one parent and access being denied, and if you have to go back to a Supreme Court motion in Toronto it will cost you \$100 or \$150.

I think the county court judge could very well be one, if he is a good county court judge, who would take a bit of interest in the children, and if there is a complaint he can have them come in and iron the thing out. He can say, "Now look, you have to allow these children to go with their father as I ordered", or if

the father is falling down on the maintenance he can say, "Why aren't you paying up?"

It is a social problem. So very often the father, who should be maintaining the children and should be looking after them, just divests himself of the responsibility and then they become a welfare problem. I think an element of supervision is necessary in a great many of the cases. Now, I did that in other cases. I remember one case in which I came to the conclusion that neither of the parties should have custody of the children; they were both really bad characters, so I sent for the children's aid, asked them to come in, which they did. I said, "The father is claiming custody of the children. The order I am going to make is, I will give him custody of the children provided he consents that they be made wards of the children's aid," the children's aid officer said, "I have got good homes I can place those children in right now," and that is what I did.

If you leave the act as it is now, you have the sole jurisdiction in the Supreme Court judge, who must hear the case. You have a Supreme Court judge sitting hearing these non-contested cases, you are taking the whole time of one judge, all his sitting time during a year in Toronto. That is one judge alone hearing non-contested cases, where it is a pure formality: they come in, prove the services, the witness goes in the witness-box and proves the marriage, then they read from an examination for discovery in which the man says, "Yes, I am living with the other woman. I am living with her and I have got two children by her" and so on, decree nisi and off it goes.

Why should the plaintiff in cases of that sort be put to the costs of a Supreme Court trial, which are very considerable, when it should be, I think, disposed of by the county court judge? If county court judges are not good enough to try those kinds of cases I do not know how they are good enough to try people who may be sentenced to gaol for life, and I think it is just about as simple as that.

I would like to see in the first place a dominion act, in that it would be necessary for the dominion legislation to confer concurrent jurisdiction on the superior court and on the county courts as far as Ontario is concerned. When you get to Quebec you do not have county courts, you only have the superior court there. In British Columbia they have been able to do this by provincial legislation. But I doubt very much if that could be done in Ontario, because the majority of the courts hinge around the history of the local judges of the Supreme Court, county court judges who are local judges of the Supreme Court. Mr. Justice Judson's judgement would probably go the whole way and Ontario could do it, but I think it is very dangerous. I think it ought to be done clearly by legislation of the dominion government, because twenty years from now the point might be raised that the divorce was not valid because the court did not have the jurisdiction in a case where inheritance or something of that sort was involved; you have to be very, very sure of your ground.

I think there is an area which the province could probably be allowed to come in. They have their own rules now which govern the procedure, but what I am thinking of is this: could the jurisdiction be delegated to the provinces so that they could make their own procedures for tying the welfare of the children in with the divorce, so that you could have the children as a first charge in being

looked after? They are the ones that I am anxious about, and they are being neglected now; there is no question about that. I presided over many, many cases when I felt that the children were not being sufficiently safeguarded by our procedure and by the jurisdiction that we exercise.

I think, Mr. Chairman, that is all that I want to bring to the attention of the committee.

Co-Chairman Senator ROEBUCK: Might I seek the privilege of asking one or two questions that must be in the minds of all the rest of us here. Custody, maintenance, alimony and that sort of thing are, I think, within provincial legislation, are they not? Perhaps that is the explanation of what they did in British Columbia. But divorce is certainly not, and your suggestion is that we amend the act of 1930 which conferred jurisdiction with regard to the dissolution of marriage and annulment on the courts of Ontario and make it apply *mutatis mutandis* to the other provinces. That is your suggestion, is it?

Hon. Mr. McRUER: No, I am not concerned about the other provinces at all. I am concerned about Ontario. At the present time it is not a jurisdiction on the courts of Ontario, it is on the Supreme Court of Ontario. I think it should be a jurisdiction that is conferred on the Supreme Court and the country courts of Ontario, concurrent jurisdiction, so that if someone commences an action in the county court which the other party wishes to have tried in the Supreme Court there could be an application to move it into the Supreme Court. That might happen, and they should not be denied their right to be tried in the Supreme Court if they want to be there, but let them have their actions in the county court and get them tried on the county court scale, and not have to wait for six months until the Supreme Court sits there, when if some witness cannot be there at the time it goes for another six months. Those things have actually happened in cases I have presided over.

Co-Chairman Senator ROEBUCK: The question of judicial separation is before us. We are informed that decisions have been given in the Province of Ontario that our act of 1930 did not confer upon the Supreme Court of Ontario the right to try judicial separation, but conferred only the right to try dissolution of marriage and annulment. Have you found any difficulty in that regard?

Hon. Mr. McRUER: Well, I have not had any difficulty because I have never had anything to do with any case where they even discussed judicial separation, so I have no experience of that, I could not help you at all.

Mr. BREWIN: Perhaps I might preface my remarks by saying that with regard to the Province of Ontario I entirely agree that it would be better if county courts had jurisdiction. I was wondering if Mr. McRuer thought it would be possible for a federal act to provide that, whatever may be the grounds of divorce, the court could refrain from granting the divorce in its own discretion if it were not satisfied that adequate provision had been made for the custody and maintenance of the children of the marriage.

The details might have been worked out in some provincial law or provincial court, but as far as granting divorce is concerned, could there be any doubt as to the jurisdiction of the Parliament of Canada to say that at least a discretionary condition of granting the divorce is that the children of the

marriage be looked after as well as the circumstances of the parties permit? I doubt if there could be any doubt as to the constitutional right to do so. Is it not inseparable really from the concept of dissolving a marriage that there be some power to make sure that the families are properly look after? They would not be attempting to set out all the details, as to what was done, which might be left to provincial law, but it would at least give the court the right in a defended or undefended case to say to the parties—generally in undefended cases there is the consent of the parties, both wanting a divorce—“Ah yes, but before you get it you have to deal with this question of your children, who is looking after them and how.”

Hon. Mr. McRUER: Mr. Brewin, my view is that we should strive for that. Just how it is done within the constitutional limitations I do not know, but I think it is highly desirable that we get the philosophy that this is not just a divorce where there are children; this is a dissolution of a family and you have to look at the whole problem of dissolving the family and seeing that the children are protected.

Mr. BREWIN: I wonder whether I could get your constitutional opinion on this. Marriage and divorce were given by section 91 to the Parliament of Canada, and the historical fact is that the English divorce act of, I think, 1857 was the law of England at that time, and indeed applied I imagine in some parts of Canada. Included in this statute was the right for the court dissolving the marriage to deal with these problems of custody and maintenance. Does it not almost follow that if it is not strictly divorce, it is surely at least ancillary to the jurisdiction of divorce?

Hon. Mr. McRUER: All I can say is that I did not come to give any opinions on constitutional law, but I would be very pleased if that was the case, because I think it is intolerable that the important things are divided by constitutional divisions. I would not be prepared to offer any opinion. You present a very interesting thesis, but I do not know what the answer is.

Mr. BREWIN: I was hoping to get your authority in support of it possibly.

Hon. Mr. McRUER: I think there may be two ways. One is, if there is not the constitutional power, then by agreement with the province you can solve it, either by a delegation to the province to work it out or through some agreed form of complementary legislation. I think it would be a very happy thing if they could get together on an agreed form of complementary legislation, and certainly not leave it so that the family as a unit in the legislative scheme is not considered at all.

Co-Chairman Senator ROEBUCK: May I point out to the members that tomorrow or the next day you will receive copies of an opinion given us by Mr. Driedger, the Deputy Minister of Justice, that those things which are ancillary to divorce are within our jurisdiction. You may remember that Mr. Ollivier told us that for thirty years the dominion parliament dealt with matters of custody, maintenance, alimony and so on in their judgments where they passed bills divorcing people, and after thirty years they just stopped, so far as he knew for no particular reason—we may assume because the courts of the provinces undertook that work. So you will very soon have a good deal of information on that point.

In addition to that, may I advise everybody that the Attorneys General of both Manitoba and Ontario will be before us in due season, towards the end of February.

Are there any other questions?

Mr. McCLEAVE: Mr. McRuer, in Nova Scotia recently, I think by act of the legislature, the county courts outside Halifax, where the Supreme Court justices reside, were given the jurisdiction to try divorce cases, so you may find that the remedy is a legislative one in the province.

Hon. Mr. McRUER: Nova Scotia is under a different situation from the Province of Ontario.

Mr. McCLEAVE: Perhaps that is so because of certain pre-confederation statutes. The question I wanted to ask is not directly related to what you have been talking about this afternoon. We have been introduced to the theory of marriage breakdown in a number of the briefs that have been presented to us, and there has been a suggestion in the study commission by the Archbishop of Canterbury, and I think from other sources as well, that we replace the adversary system of trying the issues in the courts by—I had better not use the word “inquisition” because it might be misunderstood—by an inquest type of system in which marriage breakdown is examined by, say, a committee, not only of judges but social workers as well. It seemed to me that it may open up a real can of worms if we tried to follow that suggestion in the new Canadian law that we hope to have. I wondered if you from your vast experience in dealing with these cases in the courts would like to comment on this suggestion, which I think really derives from the ancient Roman civil law.

Hon. Mr. McRUER: I would approach it in this way. With all the rights that are dissolved upon the dissolution of a marriage there are a great many ramifications. In addition to the fact that the marriage no longer exists and these people are entitled to go their own ways and get married again if they wish, there are property rights, rights of inheritance and many things, so that I cannot see how you could satisfactorily take them out of the judicial system.

You can talk about marriage counsellors and a committee, but I feel that we do not know enough, when we are granting a divorce, about what is really at the bottom of this. After all, there would only be the cases that had to go that way that would go to the courts. I mean by that that there is no chance of reconciliation and so on. A judge from, I think, California, certainly one of the states, spoke to the Canadian Bar Association in British Columbia a few years ago on his method of trying to bring about reconciliations, which he claimed to be quite successful. I do not know enough about it, but I feel that not enough is known when the case gets into court, and that was the reason we had the investigation by the Official Guardian. I would be very loth to take it out of the judicial process, Mr. McCleave. I cannot see my way through that as being an improvement. I think we had better try to improve the judicial process, and I think it can be improved a great deal.

Mr. McCLEAVE: Could I ask a supplementary question to that then, Mr. Chairman? I agree with you, Mr. McRuer, in your assessment of this view of the inquest, but is there a possibility of some ground where triable issues only could

be presented to the judge for his decision, and other matters, say the formal matter of proof of the marriage, if it is not in dispute, could be assessed in some other way, to take a burden off the courts? I am quite positive that if we alter our law we shall throw a tremendous burden on the courts, at least in the initial years until it can be worked out.

Hon. Mr. McRUER: Yes, there might be in non-contested cases some more expeditious way of handling that. But, after all, in experience the proof of the marriage does not usually take five minutes; they have the marriage certificate or the certificate of registration of the marriage. We have now got a very good system of registering. Where you get marriages from other countries and so on it is more difficult. I would hesitate to get any pro forma proof, or say, "Let that go to the registrar" or something like that.

Mr. McCLEAVE: This is what I thought, that several registrars could deal with such issues as marriage, birth dates of children, and factors that might clearly indicate if there was a problem of domicile or not.

Hon. Mr. McRUER: You may have a point there, having in mind that there will be a great increase in the volume of work, they could file all this with the registrar in setting their case down; they would file the proof of marriage and so on, which would be rather procedural, then the registrar could make a report that he has satisfied himself on that, and if anybody questioned that, the report could be available to the parties.

Mr. McCLEAVE: It could be a triable issue.

Co-Chairman Senator ROEBUCK: If we gave the county court concurrent jurisdiction, would not that pretty well take care of the exigency Mr. McCleave is thinking about?

Hon. Mr. McRUER: I think Mr. McCleave has a point. Even in the county court they are busy. I think it is merely procedural and that it would be done by rules; all this would be filed with the registrar beforehand and then they just come up; it would all be in order before it gets to the judge.

Co-Chairman Senator ROEBUCK: That is what happens in this parliamentary divorce of ours.

Mr. AIKEN: My question is almost supplementary to the one Mr. McCleave has been asking. I think he asked whether Mr. McRuer would see any real objection to a system of reference by the Supreme Court judge of individual questions to a county court judge or family court, with particular reference to custody and plans for the children, or the question of marriage breakdown and the possibility of reconciliation, and this could be reported back at the time of the judgment absolute. Would you see any objection to such a reference, in somewhat the same manner as the reference to a master in other civil proceedings?

Hon. Mr. McRUER: I was rather hoping that if the jurisdiction was exercised by the county court judge, who would be the person to whom it would be referred, it could all be worked out by him pretty well. He is generally the master to whom references are made and it would accomplish that in one bite. After all, if you have a reference it is a delay. The Supreme Court judge refers a

case to the master, but he has no control over the master, as to when he will get on with it and when he will get it back. Sometimes these references go on, they make appointments and so on. I would hope it could be dealt with more directly, Mr. Aiken.

Mr. AIKEN: This would apply as well to the family court, would it, the question of custody? Would you think that preferable?

Hon. Mr. McRUER: I think the county court judge is the best man to handle a custody case, because he can be nearer the people. Family courts do not often handle the question of custody; they do deal with maintenance. I would want to discuss that with people who know a little bit more it, family court judges and so on.

Mr. AIKEN: The reason I raise it is that the family courts do a good deal of work in close cooperation with the children's aid societies, welfare agencies and so forth on a somewhat informal basis, somewhat along the lines of the Official Guardian's report. I think you have answered my question, sir. You feel that it would be better that the whole jurisdiction should go to the county court rather than make it a split effort between an original jurisdiction and a reference?

Hon. Mr. McRUER: Oh, yes.

Mr. OTTO: Mr. McRuer, I was happy to hear you say that what we are discussing is not only the dissolution of a marriage but the dissolution of a family unit. In your comments about children, I take it you are concerned, not only with the material welfare of the children, but also with the whole problem of psychological adjustment?

Hon. Mr. McRUER: Oh yes, and that is very important, Mr. Otto, because as long as the family dispute goes on, with these quarrels about access and everything else, it is upsetting the children, it leaves marks on them for life.

Mr. OTTO: From your long experience on the bench could you comment on the likelihood of the children of a divorced marriage being able to form a satisfactory family unit if they were left parted from the divorced parent early in life?

Hon. Mr. McRUER: You mean the best part of the family unit? I think there are many cases where the parties are divorced and then in a dignified way say, "Now we will work out the best thing for the children", and they are allowed to go on holidays and come back, they work away, they want them to maintain their relationship with the mother and with the father. I think that is to be encouraged very much. But when there is remarriage, that is a different thing.

Mr. OTTO: The reason I ask that is because most of our witnesses and most of the briefs presented have dealt with the parties to the marriage, but we have not had that much on the family unit. I recall reading a report of the Welfare Council, published in about 1953 or 1954, which stated that the children of divorced parents have only one chance in seventeen of forming a successful marriage.

Hon. Mr. McRUER: You mean after they are married?

Mr. OTTO: Yes. More startling than that, it was stated that if the parents had been divorced and one of the grandparents had been divorced the chances dropped to one in thirty-three. The question I have in mind is whether, given the

identical facts in the case of a marriage, you would recommend a different opinion or different solution to a marriage with children compared to a marriage without children.

Hon. Mr. McRUER: I would say only this, that I could envisage some supervision of the welfare of the children after the marriage has been dissolved, so as to minimize the distress that arises out of it; but I do not think in law you can draw a division very much.

Co-Chairman Senator ROEBUCK: I have not heard at all from our various senators, if they have any questions.

Mr. FAIRWEATHER: If senators have any questions I am delighted that they should be asked, but if not I would say that I am interested in the question of domicile. As one who represents an area in the small Province of New Brunswick, where in a good many cases the husband leaves for Ontario or other parts, it has always seemed to me not only cruel but unjustifiable that the domicile follows the husband, no matter whether the reason is that the marriage—that is the fiction we base on it—had been dissolved in every way but judicially.

Hon. Mr. McRUER: Mr. Fairweather, you have raised a very, very important point. I have had to refuse divorces brought in Ontario because of the domicile of the husband. You enquire, "Well, why did he go there?" He may go to Jamaica. I think one of them went to Nova Scotia. He was in the army; he had been here and he was moved. Then you ask, "Has he abandoned the domicile or is he going to come back, or has he just moved because the army found it convenient to move him? Had he been sent to Ontario just for the convenience of the army?" You refuse the divorce and the poor woman would have to walk down to Nova Scotia to recommence her case.

Mr. McCLEAVE: Our rates are cheaper in Nova Scotia.

Mr. McRUER: They will catch on, do not worry.

Mr. STANBURY: Following along the same line, do you think it reasonable that the requirement of domicile be that the court which will have jurisdiction will be the court in the province where the couple separated? It has been suggested that if at the time of the separation the couple lived in New Brunswick, then the courts of New Brunswick should have jurisdiction to grant dissolution of that marriage, regardless of where the parties lived at the time of the commencement of the action. Do you feel that that is a reasonable solution to the domicile problem?

Hon. Mr. McRUER: I would not feel that that was a real solution of it, Mr. Stanbury. Take, for example, a woman from Ontario who marries in Ontario, the couple go to New Brunswick to live, they cannot get along and she has to go back to her parents in Ontario.

Co-Chairman Senator ROEBUCK: Or British Columbia.

Hon. Mr. McRUER: Or British Columbia. The only way she could get a divorce would be to go back to New Brunswick. I think there has to be a better solution than this. It may be that they separated in London, England.

Mr. STANBURY: Your preference then would be that the court in the jurisdiction where the wife has her present domicile should have jurisdiction?

Hon. Mr. McRuer: I think it can be dealt with on residence.

Co-Chairman Senator Roebuck: Sure.

Mr. McCleave: Yes.

Hon. Mr. McRuer: Just leave this domicile question out of it, because domicile is a tricky thing, and a very important thing, since you get into other aspects of domicile. I would think it could be dealt with on residence.

Mr. Stanbury: I am encouraged by that. You are suggesting that the residence of either the husband or the wife could establish the jurisdiction of the courts in that way?

Hon. Mr. McRuer: I would think so. You see, we ran into this difficulty with the war brides; Canadian soldiers married girls in England, came back here and there were a lot of difficulties that arose. It may be that the court would have to have some discretion, I do not know. But I think you have got to break this knot of domicile anyway, because too much hardship arises out of it.

Senator Fergusson: I understand the point the witness makes regarding residence being the easier way of handling this matter, but is there any reason why a woman, whether she is married or not, cannot establish her own domicile in the same way as a man can whether he is married or not?

Hon. Mr. McRuer: You bring up a question on which probably the dominion has not jurisdiction generally. I may say that the Law Reform Commission is at present engaged in a very exhaustive study in Ontario of family law, and they will be coming out with some discussion of the matter of domicile, as to the right of a woman to establish her own domicile and so on.

Senator Fergusson: There are some very distinguished people who disagree on whether the federal or provincial government legislature has the right to deal with this matter; I mean, it is not absolutely decided.

Hon. Mr. McRuer: No.

Co-Chairman Senator Roebuck: We have already done so, have we not?

Hon. Mr. McRuer: I think for some aspects certainly the province could deal with domicile, on wills and things of that sort.

Co-Chairman Senator Roebuck: Now we must draw to a close. Mr. Baldwin intimated that he had a question, and I think we will have to say that is the last. I want to hear from my co-chairman before we adjourn this portion of our afternoon's work.

Mr. Baldwin: I would like to finish up on this question of domicile by asking Mr. McRuer if it would be feasible at all, having in mind what might be in the brief from Mr. Driedger which the senator told us about, to consider whether a national domicile rather than a provincial domicile might not be the answer?

Hon. Mr. McRuer: I think that would require a lot of examination if you are going to have it for all purposes, because domicile comes up with respect to capacity to enter into a contract, it comes up with wills and it comes up with status, as to whether children are legitimate or illegitimate. There are so many different aspects of it that I would certainly not be competent even to give an opinion on it.

Mr. BALDWIN: Might I ask one more question?

Co-Chairman Senator ROEBUCK: Go ahead, Mr. Baldwin.

Mr. BALDWIN: Having in mind Mr. McRuer's vast experience, drawing upon it as a jurist, would he like to venture an opinion on a collateral issue, namely the necessity which presently exists in many jurisdictions of the effects of having to negative condonation, collusion and connivance? In your view, Mr. McRuer, do you think that these add materially? Are they an essential part of the process of dissolution of marriage?

Hon. Mr. McRUER: I will tell you, Mr. Baldwin, in trying the cases I always thought they were sort of pro forma questions; you knew there was nearly always collusion, unless the case was defended, and a great deal of connivance. There are ways of colluding, and I will tell you a story, if I may.

Co-Chairman Senator ROEBUCK: Go ahead.

Hon. Mr. McRUER: We had a very colourful character before our bar at one time by the name of George Walsh who handled a lot of matrimonial cases. A wife and husband had come into his office, told him the facts and so on, and then the husband pulled some money out of his pocket to pay the fee. Mr. Walsh said, "Oh no, I cannot take that. That would be collusion. Go away." Next day the wife came in with the money, so that was not collusion. He told that story himself.

Mr. OTTO: I wonder if I might put a very short question on this very matter?

Co-Chairman Senator ROEBUCK: That will be the last question then.

Mr. OTTO: Mr. McRuer, we heard evidence from an experienced English barrister to the effect that even although the law of England since 1947 has allowed divorce on many grounds, today about 90 per cent are granted on the ground of adultery, even though it is a fact that there was not adultery. Taking into consideration the proof the courts would have to have and the length of time it would take to decide a case on cruelty, alcoholism and all these other grounds, and the very brief time it takes to decide it on the ground of adultery, do you think there would be substantially less collusion if a new law were passed, or do you think most of the divorces would still be on the ground of adultery, even though we may suspect no adultery was committed?

Hon. Mr. McRUER: Well, I do not know, I am sure. In my latter years on the bench I had very few of these motel or bedroom cases; in most of the cases they had been living together for three or four years. It may be that they did not choose to bring suspicious cases before me but waited for another judge! If the marriage has broken up and there has been cruelty, separation and so on, you might as well terminate it in as dignified a way as possible, I think, and not drive them to the bedroom. It seems to me that this idea of an offence is repulsive now. It would get away from the matrimonial offence, the old ecclesiastical idea of a matrimonial offence, and get to a dissolution of the marriage. It is better psychology and better for the children.

Co-Chairman Senator ROEBUCK: I would like to state for the record that our statistics show that more than 50 per cent of the cases tried in these parliamentary divorces are common-law propositions, where they are living together as man and wife, although without the benefit of clergy, and that when you examine it carefully there are not more than 5 per cent of the cases where any

substantial suspicion might exist as to that kind of collusion. I say that because I think it is due to our courts not to over-estimate or exaggerate the fraud that goes on, to some extent of course, in these divorce trials.

Now I would like to hear from my co-chairman, Mr. Cameron.

Co-Chairman Mr. CAMERON: Mr. Chairman and members of the committee, it is my pleasure and honour to extend, through you, Mr. Chairman, our thanks to Mr. McRuer for appearing here today and giving us the benefit of the many years he spent as Chief Justice of the Supreme Court of Ontario.

He is very, very interested in the problems that we are dealing with. He comes here as a volunteer witness because he believes sincerely in the ideas and thinking that he has accumulated over the years, with particular reference, of course, to the concurrent jurisdiction of the county courts, the care, custody and maintenance of the children.

I am sure we will all benefit very much from what he has told us and from his experience, and on behalf of the committee, through you, Mr. Chairman, I would like to thank Mr. McRuer most sincerely for being here with us today.

Co-Chairman Senator ROEBUCK: We have another delegation, as I have already intimated, from a very important institution in our country, the National Council of Women. We have before us two members who are representative of that association, and in view of the type of presentation which they propose to make—they are making it as a team—may I take the liberty of introducing them both at once.

First I would like to introduce Mrs. Underhill, Beth Lorraine Rowlin Underhill. She is Chairman of the Laws Committee of the National Council of Women. She comes from London, Ontario, and she is a third generation Canadian. I welcome her on that ground alone; I am a fourth generation Canadian. She is a member of the First St. Andrews United Church in London, Ontario.

She was educated at Havergal College, Jarvis Street, Toronto—so was my wife—Loretto Abbey, University College and Osgoode Hall in 1937, and called to the Bar of the Province of Ontario on September 19, 1940.

She was married to Mr. Frederick E. Underhill on July 24, 1937, and they have five children, which I think is important.

She is a partner with her husband in the law firm of Underhill & Underhill of London. She is a member of the Middlesex Bar Association, the Canadian Bar Association, the Ontario Women's Law Association and the London Women's Lawyers Association.

There was a time when the profession of the law was a special preserve of the male of the species and of the well-to-do. That time is fortunately passed and today we lawyers are pleased to learn from our sisters at the bar.

There are many associations to which she belongs, but the three that I think are worth mentioning are: the London Council of Women, in which she is Chairman of Laws; the Ontario Provincial Council of Women, and the National Council of Women of Canada, in which she is also Chairman of Laws.

The other lady whom I would like to introduce is Miss Margaret E. MacLellan. She holds a B.A. Honours Degree in Philosophy, English and History from the University of Toronto. She is a former combines investigation officer in the Federal Department of Justice at Ottawa.

She is Vice President of the National Council of Women of Canada, being elected in June, 1964; a representative of the Joint Planning Committee C.A.A.E.; alternative representative to the Technical and Vocational Training National Advisory Committee, Department of Manpower; Immediate Past President of the Canadian Federation of University Women, having served on the national executive continuously since 1950; a member of the Nominating Committee for the 1966-67 triennium; a member of the International Committee of the Legal and Economic Status of Women of the International Federation of University Women, elected in 1959; a member of the Canadian delegation to the Third Commonwealth Conference on Education, held in Ottawa in 1964; a member of the Women's Advisory Committee to the Canadian Highways Safety Council; member of the Women's Advisory Committee of Expo-67; member of the Committee for the Equality of Women in Canada—we are interested in that; actively interested in the corrections field; a founding member, 1951, and later President, of the Elizabeth Fry Society of Ottawa, now serving on the board of directors and Chairman of the Research and Public Action Committee of the Elizabeth Fry Society at Ottawa; former Chairman of the Ontario Council of Elizabeth Fry Societies; member of the National Executive Committee of the Canadian Corrections Association, 1961-64; accredited representative of the International Federation of University Women to the second United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in London, England, in August, 1960; she attended the International Criminological Conference at The Hague in 1960 and Montreal in 1965; she has visited women's prisons in Canada, the United States and Europe.

I think I may say, as I said before, we have before us on this occasion two very experienced women, and we will listen with a very great deal of interest to what they have to tell us.

Senator FERGUSON: Mr. Chairman, may I suggest that even before the witnesses speak to their brief they might give the committee some idea of the number of women the National Council of Women represents?

Co-Chairman Senator ROEBUCK: Yes. Mrs. Underhill, will you answer that question?

Mrs. F. E. Underhill, Chairman, Laws Committee, National Council of Women of Canada: Thank you, Mr. Chairman and members of the committee. The National Council of Women is, in effect, the forum of women throughout Canada, established 74 years ago by Lady Aberdeen. There are 55 local councils of women and seven provincial councils of women, as well as 20 nationally federated organizations. The Council of Women comprises in excess of 700,000 women and persons.

The appendix at the back of the brief details the list of organizations comprising the Council of Women.

The purpose of the Council of Women basically is, very broadly, the betterment of our Canadian way of life. Our chairmen prepare briefs which are studied throughout Canada, comments are made upon them and public opinion is so formed. It is as a result of this public opinion that the resolutions are formed and brought to the local, provincial and federal level.

The council is deeply concerned with the environment of every citizen in order that equal opportunity be provided for his education and his economic and social development. We are deeply concerned about the laws of divorce, and have been for some time. Is not that right?

Miss Margaret E. MacLellan, Vice President, national Council of Women of Canada: That is certainly true. May I just add a little footnote to the history? Our distinguished founder of the National Council of Women of Canada, Lady Aberdeen, was instrumental in organizing, not only the National Council of Women of Canada but the International Council of Women. I happened to be down in the archives a few weeks ago going through some papers of the council when I came across a letter written by Lady Aberdeen, in which she said that she was studying a resolution concerning divorce, which dealt particularly with the question of domicile and the effects upon children. She had referred it to a judge and lawyer, and she was deeply concerned about it. The date of that letter was April 30, 1895. So you can see that the National Council of Women of Canada has been interested in the question of divorce over a long period of years. As a matter of fact, there has been very little change in our divorce laws for over 100 years in Canada, as you are well aware by this time.

Mrs. UNDERHILL: I might add that for the last ten years a study has been made throughout Canada, through the more than 1,400 groups, on the various aspects of divorce, and we have come to some conclusions. Basically they are these. Our present divorce laws encourage perjury; they foster common-law relationships; they cause untold suffering to children, to society, and unnecessary expense to women and to your pockets, the public purse. Our divorce laws do not recognize the dignity of women, and they are not in the public interest. Our divorce laws are unjust, they are antiquated and, what is much more important, they are not worthy of our Canada.

Basically it would seem most logical if there are grounds for divorce the reasons for divorce should be the same. Well, they are not. The ground for divorce in most of our provinces, as you know, is adultery, and the reason for divorce is the breakdown of marriage. This can be aggravated by lack of communication between the husband and wife, cruelty, incompatibility, alcohol, money arguments, sex practices, and we are at a loss to understand why in a young country our government is not completely honest and does not recognize the fact that the grounds for divorce that it provides have little, if anything whatsoever, to do with the true basic reason of the breakdown of a marriage.

Miss MACLELLAN: I think that points up the reason why there is a very great need for more research into the whole problem, so that we can establish bases on which the question of whether or not there has been a complete marriage breakdown may be determined.

Mrs. UNDERHILL: We feel very strongly that many aspects that go into the breakdown of marriage should be studied. It is in the public interest that the sanctity and importance of marriage be maintained and that it be protected. Our society revolves round it, but if a marriage is dead—and there is no other more dead than a dead marriage, except perhaps a dead romance—then certainly it should be terminated.

In order to terminate a marriage today, as you know, many resort to perjury. Surely a law that encourages perjury—which means lack of respect for the law, which can be again engendered in our children, because they are not blind—is not good legislation. We ought to do away with our present form of legislation.

Miss MACLELLAN: We are now dealing with paragraph 9, on page 2 of our brief, where we discuss the question of the economic aspects of divorce. As we say, a law is unjust when the wealthy can afford the relief offered by legislation and the poor cannot. To be specific, the cost of divorce is beyond the purse of many persons who have the grounds for divorce. As a consequence, the lack of money required to institute the legal process to obtain a divorce has caused many couples to live common-law. The cost of divorce, we maintain, should be within the reach of all seeking divorce; however, to accomplish this there is a possibility that a new divorce court structure will have to be initiated. Our conclusion there is that surely release from a dead marriage should be available to all regardless of their purse.

Mrs. UNDERHILL: If I may comment on that, speaking not as an expert but possibly somebody who reads the divorce bible *Power*, in 1858 the Matrimonial Causes Act was passed, which was well before the enactment of the British North America Act, but at that time divorce in its every aspect was in the department of the federal government, and certain aspects of divorce now are in the area of the federal government.

That being so, the federal government has done very little over the last hundred years to make changes. However, it is in their power, and were the federal government to amend or legislate on divorce jurisdiction—as in the bankruptcy act in which they have set up bankruptcy courts—why could not the federal government have divorce courts arising out of their own legislation? I am well aware of the fact that this is very contrary to what we have at the present moment, but if it can be done with bankruptcy courts why cannot we do the same in the area of divorce? I submit that it is well worth some consideration.

Miss MACLELLAN: We are now commenting on paragraphs 10, 11 and 12, on page 3, where we deal with the question of common-law marriage and the effect it has upon the children, because, after all, it is the children who suffer. More important, living in common-law engenders lack of respect for the law and the marriage state. Our conclusion there is that surely legislation which belittles respect for the marriage state and the law requires amending.

The combined effect upon children of an unhappy marriage and unjust and antiquated divorce legislation cannot be denied. The psychological effect upon the child caused by the impact of quarrelling, lack of communication, insecurity, inability on the part of the parents to obtain a divorce and living common-law shows itself in failing marks at school, need for more child psychologists, emotionally disturbed child centres, increased staff for child protection agencies, detention homes and juvenile courts, as well as untold heart-break. This in turn is reflected in increased cost to the taxpayers, who must pay for these added facilities. Society as a whole suffers because our moral standards have slipped.

Surely it is in the public interest to amend a law which causes undue suffering to children, unnecessary burdens on the taxpayer and resultant moral decline.

In paragraph 12 we do deal with the question of domicile, but since we deal more specifically with it in our recommendations I will pass over that for the time being and just take a look at our conclusion on page 4. Surely a law that encourages perjury, fosters common-law relationships, causes untold suffering to children, to society, unnecessary expense to women and to the public purse and does not recognise the dignity of women, is not in the public interest. Such a law is unjust, antiquated and not worthy of Canada.

Mrs. UNDERHILL: We some recommendations which are the result of study. The first recommendation is that we regret that due to the structure of the British North America Act it is impossible to have unanimity on every area of marriage and divorce.

One of the matters of concern is the age at which a person is allowed to marry. There are two types of medicine, preventive medicine and curative medicine. Now, divorce is not a disease; it is a symptom of a disease, and we can prevent a divorce if we start at the other end of it and have mature young people marry. Marriage is not for immature persons. As you know, every province has a different age at which they allow young people to marry with and without the consent of their parents. It is our submission that at the next provincial-federal meeting the subject of the age at which young people be allowed to marry should be brought up and discussed; not only that, but that some conclusion be reached, which we hope would be the same age.

The Council of Women put in the age of 21 years. We submit that the minimum age for marriage without consent of parent should be 21. Perhaps you would look around at some of our young people. As a mother of five I can tell you what the moods of the 16s are. The 18 year-old is pretty well all wilderness, the 19 year-old falls in love several times, the 21 year-old is beginning to get her head screwed on; by the time they are 24 they are mature and see our point of view as well as their own.

Marriage is a contract that extends to the next generation; it is not for children, and accordingly this very unrealistic figure, which many people will say is old-fashioned and ridiculous, we have put in because it is a talking point. If we had put in 18 years of age people would have said, "Oh yes, that is very interesting" and not gotten round to it. But in a provincial-federal discussion, with a recommendation of 21 years of age they will seriously consider the fact of maturity, and perhaps set a younger age, but it is our submission that across Canada there should be an age set for marriage at which people are mature.

Miss MACLELLAN: If I could just add a comment concerning the minimum age for marriage with the consent of the parents, to us the fact that child marriage is condoned in Canada in several of the provinces is a shocking state of affairs. As you probably know, in five provinces in Canada the minimum age for marriage for a girl, even without proof of pregnancy, is 12. Now, no mother, and I think no father, can really believe that a child of 12 is mature enough to take on all the responsibilities of marriage. Surely there is a better solution than that.

I am digressing a bit, but I think this point is important. This is another factor which prevents Canada from signing and ratifying the United Nations

convention on the minimum age of marriage, age of consent and registration. We would, therefore, particularly like to see the minimum age of marriage made uniform throughout all the provinces. I think this question has been referred to the Committee on Uniformity of Legislation. This in itself would go a long way to eliminate the causes that lead to divorce, because it is a well known fact that a great proportion of teenage marriages end fairly quickly in divorce. This, Mr. Chairman, is a factor that we would particularly want to stress.

Co-Chairman Senator ROEBUCK: Have you any statistics in connection with it?

Miss MACLELLAN: I have seen statistics but I have not any here to quote, and having formerly been a statistician I do not like to do any guesswork on it.

Mrs. UNDERHILL: We are of the opinion that we need some preventive medicine on the subject of divorce, and this is one area where we can start.

Miss MACLELLAN: On page 5, in paragraph 15 we point out that the present law of domicile as it pertains to divorce causes hardship, expense and loss of dignity. You will be familiar with the definition of domicile as spelled out in paragraph 16.

In paragraph 17 we draw your attention to the Divorce Jurisdiction Act, RSC, 1952, Chapter 54, which states:

A woman who has been deserted by and has been living apart from her husband for a period of two years and is still living apart from him may sue her husband for divorce in the province of their matrimonial domicile.

The hardship caused by this has been dealt with earlier this afternoon, and it was a very fitting prelude to our recommendation (a) in paragraph 18. We recommend:

Amendment to the Divorce Jurisdiction Act to allow petition for divorce to be filed in the province in which the husband and wife were resident at the time of their separation rather than filing the writ in the place where the husband is domiciled.

We point out that this recommendation would require only a very slight amendment to the Divorce Jurisdiction Act, and it would alleviate the present unsatisfactory situation. It is not a solution; it is merely a stop-gap.

Co-Chairman Senator ROEBUCK: May I ask here, would it not be better to give to the wife the same rights as are possessed by the husband, rather than making her go to where the separation took place although she may reside many, many miles away from there?

Miss MACLELLAN: We agree with you, and Mrs. Underhill is going to deal with that point.

Mrs. UNDERHILL: We concur completely. We do think a little bit of surgery is necessary. This was a stop-gap. We concur with your conclusion. We believe, sir, that every person ought to have their own domicile.

As you know, in 1961, before the Uniformity of Legislation Committee, the matter of domicile was discussed and agreement was reached. In that agreement it was stated that every person should have their own domicile—and, of course, a woman is a person. Presupposing a woman did have her own domicile, then she could sue for divorce in the place where she was.

Co-Chairman Senator ROEBUCK: You are referring to domicile for divorce purposes, are you not?

Mrs. UNDERHILL: Yes, I am.

Co-Chairman Senator ROEBUCK: We have no jurisdiction beyond divorce. We could not give domicile, or even recommend it as far as this committee is concerned, for all purposes.

Mrs. UNDERHILL: This is for divorce purposes. We would also like a recommendation from you that the model draft uniform domicile act be reconsidered.

Co-Chairman Senator ROEBUCK: Your model draft?

Mrs. UNDERHILL: No, not our model draft.

Miss MACLELLAN: The model draft proposed by the Commission on Uniformity of Legislation.

Mrs. UNDERHILL: The 43rd Council in 1961. They produced this draft, that every person would have their own domicile, the domicile of a person would be that of their province. We would like two things. First, as far as divorce is concerned we would like a woman to have equal rights with her husband with respect to domicile; secondly, we would like the committee to recommend that this matter be discussed at the federal-provincial conference.

Senator FERGUSON: Mr. Chairman, may I ask if the witnesses have a copy of that draft?

Mrs. UNDERHILL: Yes, I have it with me.

Senator FERGUSON: Could you distribute it?

Mrs. UNDERHILL: I have not got copies to distribute, but I have a copy of it with me.

Co-Chairman Senator ROEBUCK: We can put it in the record.

Senator FERGUSON: As a matter of fact, I have plenty of copies to distribute if you would like to have them, although they are a little marked.

Mrs. UNDERHILL: I have a copy.

Co-Chairman Senator ROEBUCK: It will go in the record.

Mrs. UNDERHILL: The grounds for divorce in Canada recognize only the physical aspect of marriage and completely distort the sexual relationship by making it a basis of divorce. It seems to us that marriage is basically the complete union of a man and a woman intellectually, emotionally and physically, so that they are stronger together as a unit than either one of them is alone. Surely this is much more than a sexual matter. It involves the intellect, it involves the mind, it involves activities.

The ground of adultery for divorce completely degrades a marriage. There are many reasons for marriage breakdown. It would be dreadful to be married to somebody who was unclean, uncouth, cruel, insane, who had deserted you and you had no idea where he was, and yet there is no adultery and so you have a marriage.

Accordingly, we would like our government, first to recognize the reasons for a marriage and from those reasons devise grounds for divorce. Usually, if you want to achieve anything you put a nail on the wall to hang your hat on, and the National Council of Women has made some suggestions regarding the amendment of our divorce laws.

Miss MACLELLAN: The amendment that we submit for your consideration is a resolution adopted at the annual meeting of the Council of Women in June, 1966. You will find it at the bottom of page 7. Our recommendation is that:

The Government of Canada amend the Matrimonial Causes Act to widen the grounds of divorce to include insanity, cruelty, and desertion as well as adultery, these amendments to be accepted by each province at its own option.

The amendment of the Matrimonial Causes Act, which is a federal statute, includes grounds of divorce. As we have pointed out in paragraph 21, while some of the provinces will not entertain any amendment to the present grounds for divorce within its borders, we would hope that in time there could be uniformity of divorce legislation throughout Canada, and that any changes made in the legislation could be acceptable to each province at its own option.

Co-Chairman Senator ROEBUCK: That is what you would like?

Miss MACLELLAN: Yes, that is what we would like. We submit that this amendment of the Matrimonial Causes Act would be a simple and effective way of putting into effect these amendments that we propose, which is the recommendation that we make.

Mrs. UNDERHILL: As far as that recommendation is concerned, we thought very seriously about which statute could be amended and which would be acceptable. The federal government could draw up a statute, as it did in 1952.

Co-Chairman Senator ROEBUCK: The Divorce Jurisdiction Act?

Mrs. UNDERHILL: The Divorce Jurisdiction Act. However, if this old statute, which was strictly federal, were amended, then we would be dealing with that alone, we could put in the option clause, which they could take or not. In other words, it would be a federal—

Co-Chairman Senator ROEBUCK: We are going to accept what responsibility we have. I cannot speak for all the other members of my committee, of course, but we are not going to take any half-way measures. I think I can say that on behalf of the committee.

Mr. McCLEAVE: Hear, hear.

Mrs. UNDERHILL: Good, good.

Co-Chairman Senator ROEBUCK: We will have the courage to take what steps ought to be taken on our own, with our courage in our hands.

Mr. McCLEAVE: And maybe our lives! May we ask questions now?

Mrs. UNDERHILL: Please do.

Co-Chairman Senator ROEBUCK: The brief is finished.

Mr. McCLEAVE: I have three questions. I see that the theme of provincial option runs through quite a number of the resolutions in your addendum. Presumably the addendum will be printed as part of the proceedings, as an appendix.

Co-Chairman Senator ROEBUCK: Yes, certainly.

Mr. McCLEAVE: Was this because of difficulty from any particular delegation at your National Council meetings? That is, did the group from one province say that they would prefer to have it on a provincial option basis rather than have one law covering all Canadians?

Mrs. UNDERHILL: We have no council in Quebec, but we do have the Montreal Council, which makes presentations to the Quebec Government. They are very aware of the influence of thinking in that province, and we were of the opinion, because they are wilful and strong, that it was virtually impossible to get a resolution through our National Council without the option in it, which would allow some province to opt out if it so wished.

Mr. McCLEAVE: The thought just struck me, Mrs. Underhill, that there may be a great deal of juggling around and a new field of perjury opened up in connection with the law of domicile if they found they could not get a divorce in one province and had to invent a residence or the like in another province to bring an action. This is one of the great difficulties I see in breaking it down province by province.

Mrs. UNDERHILL: May I counter that, sir, if I may?

Mr. McCLEAVE: Yes, certainly.

Mrs. UNDERHILL: I entirely concur that there may be perjury. On the other hand, I firmly believe that we are all, men, women and children, Canadian persons and are entitled to our own domicile. The domicile of origin—I am digressing but I will come right back to it—can work hardship in many cases, and I think it preferable that each person has his own domicile. I do not mean take a chance on perjury. Let us not. On the other hand, that might happen to be a by-product.

Mr. McCLEAVE: Would you extend this concept of domicile to the English war bride or to somebody who has come to Canada from abroad? If your recommendation were taken at its full face value their domicile would be England, France, Italy or some other country, not necessarily Canada.

Mrs. UNDERHILL: In our family, our son Frank married an Israeli girl, a Yemeni girl. Speaking quite frankly, she is an individual and a person. Pre-supposing she left my son and returned home, I think she would be entitled to her own domicile. She is a person; they are equal people. Yes.

Mr. McCLEAVE: You mean she would be entitled to launch the action in some other land?

Mrs. UNDERHILL: I am not quite up on Israeli law. I was trying to equate it with something in my own family. Yes, I think that would be my thought.

Mr. McCLEAVE: My other question is this. You have suggested three extra grounds in your brief, and no doubt these have all been discussed by your National Council. Other grounds have been suggested to us besides those specifically mentioned by your council, such as drunkenness, drug addiction and criminality. You do not object to these other grounds, or would you say that those you mention are the only extra three that should be considered?

Mrs. UNDERHILL: These are the three extras that have been passed on by resolution of our council, and accordingly we are presently bound by those. I am certain that that would not be the feeling of the individual council women, because the breakdown of marriage can be caused by many irritating habits; you can spread that very broadly.

Miss MACLELLAN: If I could add to that, I would think that is negative thinking, or it would be negative thinking on the part of our members if any of us objected strongly to the widening of those grounds. These are just specified ones that met with approval when this was drafted. By the time it gets up to the

National Council it has been down to the local councils for probably a year or more and I would say our thinking has broadened in the meantime.

I think I can speak, certainly for myself and Mrs. Underhill, and probably for the majority of our members, in saying that the complete marriage breakdown seems a reasonable overall umbrella, if you like, and that that should be the basic criterion for divorce. But these matrimonial offences, spelled out with whatever degree of detail you would want—although I hope they would not be too many or too limiting—in any revised legislation could be, and may very well be, contributing causes to the complete breakdown, either individually or a combination of them.

Mr. McCLEAVE: Put another way then, you did not consider those grounds and reject them?

Mrs. UNDERHILL: No.

Miss MACLELLAN: No, they were not considered.

Mr. OTTO: Mr. Chairman, ladies, I put it to you that practically speaking we now have divorce with consent of both parties. That is to say, although the grounds for divorce are adultery, I think any practising solicitor will tell you that it is almost impossible to get a divorce on those grounds on circumstantial evidence if the case is well defended. In the case you mentioned, of a common-law relationship, surely the other party knows that the spouse is living in common-law, but there is no action to dissolve the marriage, so there are other reasons.

What I am saying is that for all practical purposes today, not necessarily with collusion—because if Dr. Kinsey is right just about every North American male and female has grounds for divorce, if admitted—what you really have to do is divorce with more or less mutual consent. I think your suggestion was—and do not think for a moment that I am not in favour of reform; I am in favour of great reform in this respect—that in the case where the marriage has broken up one of the parties should be entitled to get a divorce more or less on the ground that they are no longer married.

Co-Chairman Senator ROEBUCK: *De facto*.

Mr. OTTO: Or are you suggesting that the divorce be limited? Upon evidence of other than criminality, which is self-evident, say alcoholism or cruelty and so on you would have a great deal of expense, just as much expense as in other cases, and the burden of proving it by evidence would be just as difficult if defended. In your remarks about the bankruptcy court are you suggesting a sort of administrative process by which one party can unilaterally present certain facts and say, "On this basis I am entitled to a divorce without proof"?

Mrs. UNDERHILL: First, my thought is to have a divorce court set-up as opposed to the procedure now. Divorces can clutter up the courts. For example, in London there were fifty on the list at the last assizes. There is a sufficient volume of them that it might be advisable and expeditious, as well as more efficient, to put them into a court of their own and let the Supreme Court judges get on with the business that their ability fits them for. That is the first reason.

Secondly, let us come down to the point of divorce by consent. I think you made a statement about every couple and I too will make a statement about every couple. I have never known a marriage that was born in heaven. You can

get married, and I know that it takes three or five years to get a workable combination. In other words, you work towards unanimity; it does not come, it is mutual understanding.

Mr. OTTO: I have no argument with that. In fact, you have made a very pertinent point.

Mrs. UNDERHILL: Bearing that in mind, if you have, as you put it, divorce by consent, there will be those who are not willing to push through the initial barriers, although admittedly sometimes the initial barriers cannot be pushed through. If the couple have not made a genuine effort, they should not be divorced. Therefore there must be some other criterion than the fact that they both say, "Come on, we've had enough of this."

Mr. OTTO: In other words, unilaterally one should be able to say this rather than mutual consent?

Miss MACLELLAN: It should not require mutual consent? Is that what you are suggesting?

Mr. OTTO: I am saying that at present, to obtain a divorce on the grounds of adultery one party says to the other, "Let's get a divorce. I'll provide you with the grounds." This is mutual consent.

Miss MACLELLAN: Yes, and that is bringing in the element of a guilty party too.

Mr. OTTO: Yes. Let us say it was a case of cruelty. The easiest way would be for one party to say, "Let's get divorced. I will give you grounds of cruelty." But if one party does not agree, then he or she will defend cruelty, which will become common-law equity, which will be very difficult to prove.

Mrs. UNDERHILL: We would certainly preserve the plaintiff-defendant system.

Mr. OTTO: You are just changing the technique of getting divorce rather than the substance of it?

Mrs. UNDERHILL: I would think you change the technique, but I am not too sure. Again, one should not speak unless one is certain. There comes a point when both parties are of the opinion that a marriage is completely unworkable, in which case perhaps the marriage should be open to scrutiny too.

You have the world to work with and a world of ideas submitted by other people. I know it must be unilateral. There are some cases in which divorce by consent is worthy of consideration after scrutiny.

Co-Chairman Senator ROEBUCK: Are there any other questions?

Mr. OTTO: Mr. Chairman, I had not quite finished, because this is a very profound subject that the ladies have mentioned. I believe you said that marriage was a contract, and I think this is the substance of your whole presentation.

Mrs. UNDERHILL: It is.

Mr. OTTO: I heartily agree. There is one item that disturbed me. You set the age limit for marriage as the age of maturity. Now, Alexander was 20 or 21 when he conquered the world. How old was William Pitt when he was Prime Minister?

Co-Chairman Senator ROEBUCK: Twenty-three, was not he?

Mr. OTTO: How would you define the age of maturity? Would you arbitrarily say 21?

Mrs. UNDERHILL: I believe that a person is more likely to be mature at 21 than at 17 or 18. There are those who are not mature at 35, but they are a minority.

Miss MACLELLAN: We specify in our brief that that should be the minimum age for marriage without consent.

Mrs. UNDERHILL: Yes. It is a talking point.

Mr. OTTO: I can think of persons who should not be allowed to marry with consent at the age of 45 because they do not reach the age of maturity. I do not know where you would put the limit on that. You say—and this is what you are standing by—that there is a greater likelihood of young people being mature at the age of 21 than at the age of 17 or 18?

Mrs. UNDERHILL: Yes.

Mr. OTTO: Surely you must give some credence to the whole philosophy of life today, that as times change—and they can change very rapidly as education standards and experience change—young people can be very mature. I will put it to you in this way. In some parts of the world today, India and elsewhere, children get very mature at the age of 14 or 15.

Mrs. UNDERHILL: But we are living in Canada, sir.

Mr. OTTO: Again, our whole situation may change. You may not always have our young people in Yorkville and elsewhere beating bongo drums. This is a fact. Are you suggesting that we arbitrarily set an age limit despite all the circumstances presently with us?

Mrs. UNDERHILL: Mr. Otto, you are doing precisely what we want the provinces to do when they come together to discuss it. From that will come an age which is far sager than anything we could suggest, but which would be likely to be more realistic than the 12, 14, 15 and 16 years old that they have at the moment.

Mr. OTTO: I am trying very hard to go through with the argument to George Orwell who wrote 1984.

Co-Chairman Senator ROEBUCK: Our time is running out. Does anybody else wish to ask any questions?

Mr. BALDWIN: I have just a couple of questions. One or two of my colleagues here were ungallant enough to suggest that when a person got to the age of complete intellectual maturity he might not want to get married! With regard to the first point Mr. Otto was discussing with Mrs. Underhill, I assume the position Mrs. Underhill is taking is that each marriage licence should not come with a perforated rain check attached.

Mrs. UNDERHILL: That is right, sir.

Mr. BALDWIN: I want to deal with the question of domicile for a minute. You were here when I raised the question of national domicile with Mr. McRuer. I did this deliberately, because this goes back to one of the points you made, the objection of some of your people from some of the provinces to widen the grounds for divorce.

We know—and it is a matter of fact—that the governments of certain provinces have seen fit not to invest the courts with the power to grant dissolution of marriage. They cannot, of course, interfere with the grounds which the federal government have the right to say shall be those on which a decree is granted.

I have raised this question of national jurisdiction because I suggest this is a way in which you can avoid the question of domicile through perjury. If there is a national domicile, if it is feasible for the federal government to say that for the purposes of marriage domicile shall consist of the residence of either party in any part of Canada, this would permit people from any province in Canada to get a divorce so long as they establish what would be construed as residence in any other province. Does this have any appeal? Have you given this any thought?

Mr. OTTO: Domicile is only an issue for the commencement of the action.

Mr. BALDWIN: Domicile is only internal so far as provincial considerations are concerned. This is my point, and this is why I raised it with Mr. McRuer.

Mrs. UNDERHILL: Your point is that as far as divorce is concerned domicile shall be construed to be that of Canada?

Mr. BALDWIN: That is right.

Mrs. UNDERHILL: Bearing in mind that domicile has an effect on numerous other aspects of our life, while what you suggest would be excellent as far as divorce is concerned, I think it would be better to have a conclave and have them all lined up.

Mr. BALDWIN: I premise this enquiry, Mrs. Underhill, on the belief that when we receive from Mr. Driedger, the Deputy Minister of Justice, the brief which he previously indicated he would present, and which the chairman said will be presented, it might go to the extent of pointing out that there is ancillary to the granting of divorce in Canada the right to deal with questions of maintenance, alimony and custody of children, in which case, of course, some of your doubts might be answered, if his brief does go that far.

Co-Chairman Senator ROEBUCK: Now I think it is time that we closed. We have had a wonderful presentation, and I want to call on my co-chairman for a word or two to close the meeting.

Co-Chairman Mr. CAMERON: Mr. Chairman and members of the committee, I think you would expect me to extend our thanks to Mrs. Underhill and Miss MacLellan for their wonderful team effort today. They assisted each other and co-operated together, and they have put their case across in a very dramatic fashion. We will study your brief, ladies, we will read in the minutes of proceedings what you have said, and I can assure you that it will bear good fruit in the future. Thank you very much.

The committee adjourned.

APPENDIX "26"

Office of The Deputy Minister of Justice and
Deputy Attorney General of Canada

DEPARTMENT OF JUSTICE

Ottawa 4, December 28, 1966.

Dear Senator Roebuck:

In your letter of October 20 you asked for my views on two additional points as follows:

- (a) whether Parliament has jurisdiction with regard to judicial separation, and
- (b) whether Parliament has jurisdiction with respect to alimony, custody and maintenance and division of property of divorced persons and their families.

I have now given some consideration to these problems and am able to put my views before you. I should like to state at the outset, however, that the views hereinafter expressed are not in any sense to be regarded as the views of the Government or any member thereof. They are merely my own personal opinions which I offer for such assistance as it may be to your Committee.

Before dealing with your questions I think it is important to bear in mind the fundamental nature of marriage and divorce from a legal point of view. A marriage creates a new legal status between the parties thereto. At the moment of marriage new rights and obligations between the parties thereto arise, and at the same time a pre-existing right is extinguished. Thus, there arise the obligation to support and the right to consortium; at the same time, the pre-existing right to marry is lost. These are some of the essential legal characteristics of a marriage; without them, the marriage status would not exist.

A divorce *a vinculo matrimonii* also changes the legal status of the parties; it destroys the legal status created by the marriage and restores the parties to the status they had before the marriage. At the moment the divorce takes place, the rights and obligations inherent in the marriage cease and the parties are thereafter free to re-marry.

Coming now to your first question, you may recall that I did touch upon this when I appeared before your Committee. I said at that time that having regard to the nature of a decree of judicial separation it was reasonable to conclude that Parliament's jurisdiction extended to both divorce *a vinculo matrimonii* and judicial separation. I might now add to that observation that a judicial separation is in reality a divorce without the right to re-marry. The legal status created by the marriage has been extinguished, but the status enjoyed by the parties thereto immediately before the marriage has not been fully restored. I would therefore consider that the expression "marriage and divorce" includes judicial separation, because the latter deals with the legal status of married persons and

the effect of a judicial decree on that status. Putting it another way, one might say that the greater includes the less; if Parliament can say that pre-existing rights are fully restored, it can also say that they are only partially restored.

Dealing now with your second question, as I have indicated, jurisdiction to make laws in relation to "divorce" is in essence jurisdiction to make laws for the alteration of the legal status created by the marriage; the jurisdiction therefore extends to the abolition of the rights and obligations created by the marriage and the restoration of pre-existing rights. As I have already indicated, I think it must follow that these rights and obligations can be terminated in whole or in part.

It is the husband's duty to maintain the wife. If the marriage is dissolved, that obligation normally ceases because the relationship of husband and wife no longer exists. For the reasons I have indicated, I think that Parliament is competent to define the extent to which a dissolution of marriage alters the rights and obligations inherent in the marriage and therefore could provide for a continuation of the obligation to support. The remarks of Lord Atkin in *Hyman v. H.* (1929) A.C. 601, would support this line of argument. He there said at pp. 628-9:

"The necessity for such provisions is obvious. While the marriage tie exists the husband is under a legal obligation to maintain his wife. The duty can be enforced by the wife, who can pledge his credit for necessities as an agent of necessity, if, while she lives apart from him with his consent, he either fails to pay an agreed allowance or fails to make her any allowance at all; or, if she lives apart from him under a decree for separation, he fails to pay the alimony ordered by the Court...

When the marriage is dissolved the duty to maintain arising out of the marriage tie disappears."

This view is also supported by the remarks of Crocket, J. in *McLennan v. McLennan* (1940) S.C.R. 335, and by the British Columbia Court of Appeal in *Rousseau v. Rousseau* (1920) 3 W.W.R. 384.

The same reasoning would apply to maintenance and custody of children. During marriage the husband is under a duty to maintain and provide for the education of the children of the marriage, and the husband and wife have joint custody. These are rights and obligations that arise out of the marriage relationship. A divorce, which terminates the marriage relationship, obviously interferes with these rights and obligations, and in my opinion Parliament's jurisdiction in relation to divorce would include jurisdiction to prescribe the extent to which these rights and obligations are to be abrogated or continued. In the *Reference re Adoption Act* (1938) S.C.R. 398, the Supreme Court of Canada upheld provincial legislation, but at page 402 Chief Justice Duff left the door open to federal legislation when he said that

"We are not concerned with any ancillary jurisdiction in respect of children which the Dominion may possess in virtue of the assignment to the Dominion Parliament by section 91 of the subject of Marriage and Divorce."

The Division of property between divorced persons (apart from the question of support or maintenance), as well as such matters as marriage settlements, dower, homestead rights, the right of married women to own property and sue in

their own names, etc., may well stand on a different footing. These matters do involve rights and obligations between husband and wife, but they seem to me to relate more to the property and civil rights of the parties to the marriage than to their legal status as married persons. They could vary from time to time and from jurisdiction to jurisdiction and a particular rule is not necessary or essential to constitute a marriage.

The provinces of course have jurisdiction over property and civil rights. Since Parliament has exclusive jurisdiction over marriage and divorce, it would seem to be clear that the provinces could not define the status of marriage or divorced persons and therefore could not prescribe the rights and obligations constituting a marriage or the extent to which the rights and obligations created by the marriage shall be abrogated or continued by a divorce. However, generally speaking, their jurisdiction over property and civil rights would include the matters mentioned in the preceding paragraph as well as the welfare of the people of the province. The provinces could therefore make provision for the support of its residents, whether they be single, married, divorced, children or adults. Provincial legislation dealing with property and civil rights, and not being legislation *qua* marriage or divorce, would no doubt be valid. If, however, any particular provincial law should clash with a federal law, then, under the normal rule, the latter would prevail.

I was also asked by the Special Assistant of your Committee to clarify the comment I made when I appeared before the Committee to the effect that at the time that Prince Edward Island was established there was no divorce law because the Divorce and Matrimonial Causes Act of England was not enacted until 1857. What I had in mind, of course, was that the English Divorce and Matrimonial Causes Act did not become the law of Prince Edward Island because the Act was passed after Prince Edward Island established its own legislature in 1773. Between 1773 and the year 1883, when Prince Edward Island enacted its own Divorce Act, the law of Nova Scotia would have applied because Prince Edward Island was originally part of Nova Scotia. However, I believe there was in Prince Edward Island no court with divorce jurisdiction between 1773 and 1883, so that the substantive law of divorce that was carried forward into Prince Edward Island had no practical effect. As I indicated earlier, rules of procedure were not promulgated in Prince Edward Island until 1945 so that between 1883 and 1945 the Prince Edward Island divorce law was not in practice being applied.

I hope that the foregoing clarifies all of the additional points that have been raised. If I can be of any further assistance to your Committee, please let me know and I shall do my best to accommodate you.

Yours truly,
(Sgd.) E. A. Driedger.
Deputy Minister.

The Honourable A. W. Roebuck,
The Senate,
Ottawa, Ontario.

APPENDIX "27"

BRIEF

for presentation to the

SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS

ON

DIVORCE

by

THE NATIONAL COUNCIL OF WOMEN OF CANADA

190 Lisgar Street,
Ottawa 4, Ontario.

December, 1966.

INTRODUCTION

1. The National Council of Women of Canada, which has the privilege of presenting this submission, comprises fifty-five (55) Local Councils of Women, seven (7) Provincial Councils of Women (consisting of more than 1800 federated societies) and 20 nationally organized societies in Federation.

2. Now in its 74th year, the Council was founded in 1893 by Lady Aberdeen, wife of the Governor-General of Canada, and incorporated by Statute of Parliament of Canada in 1914.

3. The object of the Council as stated in the Act of Incorporation is to serve the highest good of the family and of the state; in order to further its objects, the Council functions through 13 Standing Committees, namely: Arts & Letters, Economics, Education, Films, Health, Housing & Community Planning, International Affairs, Laws, Migration & Citizenship, Public Safety, Radio & Television, Social Welfare and Trades & Professions. The policy of the Council is based on resolutions adopted at the annual meetings following several months of study and discussion by the federated organizations.

4. It will be of interest that every aspect of divorce has been the subject of study, discussion, resolution and action by The National Council of Women since 1895, and in 1963 at the annual meeting in Banff, the National Council of Women passed the following resolution that:

"The National Council of Women of Canada request the Federal Government to establish a Royal Commission forthwith to enquire into and report on the laws of Canada affecting the dissolution of marriage."

This resolution was presented to the Prime Minister of Canada and Members of the Cabinet in February 1964. It is encouraging that a Special Committee of the Senate and House of Commons has been empowered to make a study of Canadian divorce legislation. This presentation is submitted in the hope that the information contained herein will assist the Committee in its consideration of the matter.

PREAMBLE

5. The National Council of Women of Canada is concerned with improving the environment of every citizen in order that equal opportunity is provided for his educational, economic, social and cultural development—without regard to race, creed, or sex.

6. The divorce laws of Canada are unjust. They are also harsh and hypocritical. They promote perjury. It is a fact that, if a law is unjust, it will be either broken or barely tolerated. In either case, unnecessary and incalculable suffering will result.

7. It is a fact that, the *grounds* for divorce in Canada and the *reason* for seeking divorce in Canada are not the same. The ground for divorce (except for certain provinces) is adultery; the reason for divorce is the complete breakdown of the marriage, which may be aggravated by problems of communication between husband and wife, religion, incompatibility, money, alcohol, cruelty and sex. We are at a loss to understand why the grounds allowed by our Government for the dissolution of marriage and the reason for the dissolution of that marriage are at complete variance.

Surely a law that gives relief to a dead marriage should base the grounds for divorce on reality.

8. Legal marriage is the basis of our society. It is in the public interest that the sanctify and importance of the marriage relationship be maintained and protected. When a marriage is dead, it is logical that the parties will seek to terminate it, in spite of the fact that the grounds for divorce required by the government may not exist. In order to be freed of the marriage contract, frequently one party to the marriage must perjure himself.

Surely a law that encourages perjury is not good legislation.

9. A law is unjust when the wealthy can afford the relief offered by legislation and the poor cannot. To be specific, the cost of divorce is beyond the purse of many persons who have the grounds for divorce. As a consequence, the lack of money required to institute the legal process to obtain a divorce has caused many couples to live common-law. The cost of divorce should be within the reach of all seeking divorce; however, to accomplish this, there is a possibility that a new divorce court structure will have to be initiated.

Surely release from a dead marriage should be available to all regardless of their purse.

10. A law is unjust when it encourages persons to live common-law. The children suffer; they live in an illegal state and the social and psychological effects thereof, as well as the basic insecurity caused thereby, influence every aspect of their life. More important, lack of respect for the law and the marriage state may be engendered and developed.

Surely legislation which belittles respect for the marriage state and the law requires amending.

11. The combined effect upon children of an unhappy marriage and unjust and antiquated divorce legislation can not be denied. The psychological effect upon the child caused by the impact of quarrelling, lack of communication,

insecurity, inability on the part of the parents to obtain a divorce and living common-law shows itself in failing marks at school, need for more child psychologists, emotionally disturbed child centres, increased staff for child protection agencies, detention homes and juvenile courts, as well as untold heart break. This is reflected in increased cost to the tax payers, who must pay for these added facilities. Society as a whole suffers because our moral standards have slipped.

Surely it is in the public interest to amend a law which causes undue suffering to children, unnecessary burdens on the tax payer and resultant moral decline.

12. While in certain instances interpretation of the word "persons" may vary, the Privy Council on October 18, 1929 decided that women were "persons" for the purpose of appointment to the Senate. However, every person in Canada should be entitled to his or her own domicile; the law discriminates against the married woman. She is not a person having her own domicile; the domicile of the married woman is that of her husband. This causes great inconvenience, because if a wife wishes to sue her husband for divorce it must be done in the province in which he is domiciled (the exception to this is the Divorce Jurisdiction Act, 1930, c. 15, s. 11. See Addendum 2). The husband may establish a domicile in another province and this becomes the domicile of the wife and only there can he be sued for divorce. This inconvenience and financial burden to the wife is unnecessary. The lack of recognition by the government that each party to a marriage is a person and, therefore, should have his or her own domicile, is unjustifiable and results in loss of dignity in the status of married women.

Surely a law that encourages perjury, fosters common-law relationships, causes untold suffering to children, to society, and unnecessary expense to women and to the public purse, does not recognize the dignity of women is not in the public interest. Such a law is unjust, antiquated and not worthy of Canada.

RECOMMENDATIONS

13. I. Throughout Canada Society is based on the institution of marriage. It would be logical to have uniformity of marriage laws; however, the British North America Act (Section 91) granted to each provincial government the right to legislate on the solemnization of marriage in its province, and to the federal government (Section 92) the right to legislate on certain other aspects of marriage. Therefore, complete uniformity of legislation is unlikely.

14. The breakdown of marriage may be due to persons entering into marriage at too young an age. While provincial statutes vary as to the age a person may marry within its boundary, generally speaking, the provincial statutes prohibit (except under certain circumstances as when necessary to prevent illegitimacy of offspring) the issuing of a licence to marry or the solemnization of marriage where either party is under a certain age, usually sixteen (16) years. Standards of living and educational demands for employment have changed since these age limits were set by the provinces. Times change and legislation becomes outdated.

We submit that the minimum age for marriage without consent of parents be twenty-one (21) years of age for both sexes.

This will require complete co-operation by federal and provincial governments.

15. II. The present law of domicile as it pertains to divorce causes hardship, expense and loss of dignity.

16. The domicile of a person is where he calls "home". It is the place in which he intends to establish permanent residence. On marriage the domicile of the wife becomes that of the husband. The law of domicile affects many aspects of our life, including taxation, citizenship, etc.; accordingly, domicile in its various aspects is under the jurisdiction of both federal and provincial governments.

17. According to existing federal legislation, a petition for divorce must be filed in the province in which the husband is domiciled. This causes undue hardship and expense because an errant husband may change his domicile. (The exception to this is under the Divorce Jurisdiction Act, R.S.C. 1952, Chapter 84, "A woman who has been deserted by and has been living apart from her husband for a period of two years and is still living apart from him may sue her husband for divorce in the province of their matrimonial domicile.")

18. To alleviate the hardship which the enforced two-year waiting period often imposes on a deserted wife, we recommend:

- (a) *Amendment to the divorce jurisdiction act to allow petition for divorce to be filed in the province in which the husband and wife were resident at the time of their separation rather than filing the writ in the place where the husband is domiciled.*

19. The above recommendation would require only a slight amendment to the Divorce Jurisdiction Act and would alleviate the present unsatisfactory situation. Nonetheless we believe that every man and woman in Canada should be entitled to his or her own domicile. However, the law discriminates against the married woman. Her domicile is that of her husband. Such discrimination is not justified. In 1929 the Privy Council decided that for the purpose of appointment to the Senate, the word "persons" should include women. Surely, for the sake of the dignity of every resident of Canada, this interpretation that women are persons should be adopted into every aspect of Canadian Law without reservations. We recommend further:

- (b) *The law of domicile should be amended to recognise that a woman is a person and, accordingly, her domicile shall be her own and not follow that of her husband.*
- (c) *Domicile, as far as divorce is concerned, shall mean the domicile of either party.*

20. III. The grounds for divorce in Canada recognise only the physical aspect of marriage and distort the sexual relationship by making it a basis of divorce. The true cause of marriage breakdown and desire for divorce is basic incompatibility. The present legislation completely ignores this fact; the grounds for divorce are based on a premise that is narrow and may be false. The divorce laws are flouted by the public because the grounds for divorce (mainly adultery) are narrow. It is not recognised by the government that insanity, cruelty and desertion destroy a marriage equally as much, or more than adultery.

21. Since it may be that some provinces will not entertain any amendment to the present grounds for divorce within its borders, any change in legislation should be acceptable to each province at its own option.

22. Accordingly, we submit for your consideration a resolution adopted at the annual meeting of the National Council of Women in June 1966, that:

The Government of Canada amend the Matrimonial Causes Act to widen the grounds of divorce to include insanity, cruelty, and desertion as well as adultery, these amendments to be accepted by each province at its own option.

ADDENDUM 1

Resolutions adopted by the National Council of Women of Canada

(1) 1961—*For study*

Divorce Law

(Submitted by Windsor Council and Ontario Provincial Council)

WHEREAS, The Provincial Council of Women of Ontario consider the present Divorce Law by which adultery is the chief ground for divorce to be antiquated, no longer realistic and in the result degrading;

THEREFORE the Provincial Council of Women request the National Council of Women to study the broadening of the grounds for obtaining divorce so that these grounds will be patterned after the more recent legislation of the United Kingdom (known as the Matrimonial Causes Act).

(2) 1963—*Resolution Adopted*

Dissolution of Marriage

WHEREAS, The laws dealing with the dissolution of marriage (i.e. divorce and annulment) are narrow, outdated and illogical, and consequently invite continued fraud upon the courts and Parliament; and

WHEREAS, The special committees set up in recent years in the Senate and the House of Commons to study these laws and recommend changes indicate that the need and desire for change is recognized across Canada; and

WHEREAS, The deliberations, findings and recommendations of a Royal Commission on the subject would acquaint the public with the evils of the present situation and provide an objective and nonpartisan basis for amending the law; therefore

RESOLVED, That The National Council of Women of Canada request the Federal Government to establish a Royal Commission forthwith to inquire into and report on the laws in Canada affecting the dissolution of marriage.

(3) 1963—*Resolution Adopted for the attention of Local and Provincial Councils*
Uniformity of Marriage Laws

WHEREAS, The legal age for marriage without parental consent varies from province to province; and

WHEREAS, In several provinces a marriage licence can be obtained without any physical examination; and

WHEREAS, The mobility of Canada's population makes it desirable to have more uniformity in regulations with respect to marriage requirements; therefore

RESOLVED, That The National Council of Women of Canada ask Provincial Councils to undertake a study of the marriage laws of their respective provinces with a view to approaching the legislatures of their respective provinces to:

(1) set the minimum age for marriage without consent of parents at 21 for both sexes, and

(2) that a health examination be mandatory before a marriage licence is issued and that the results of such examination be made known to both parties.

(4) 1964—*Uniformity of Marriage Laws*

The subject was studied by Provincial Councils of Women and resolutions were presented to the respective Provincial Governments.

(5) 1965—*Resolution Adopted*

Divorce and the Law of Domicile

WHEREAS, Existing federal legislation provides that petition for divorce must be filed in the province in which the husband is domiciled; and

WHEREAS, This legislation may entail serious hardship for a wife who may wish to petition for divorce but whose husband has a distant domicile; therefore

RESOLVED, That The National Council of Women of Canada request the Government of Canada to amend the Divorce Jurisdiction Act in such a way that a petition for divorce may be filed in the province in which husband and wife were resident at the time of separation rather than having to be filed in the place where the husband is domiciled.

(6) 1966—*Resolutions Adopted*

The Law of Domicile

WHEREAS, Domicile is a matter under both provincial and federal jurisdiction; and

WHEREAS, The present legislation pertaining to domicile results in many inequities; and

WHEREAS, A woman is deemed to be a "person" and should have, as a right, her own domicile; and

WHEREAS, In fact, a woman on marriage, automatically assumes the domicile of her husband; and

WHEREAS, A draft model statute on the law of domicile was approved by the Conference of Commissioners on Uniformity of Legislation in Canada in 1961; therefore

RESOLVED, That The National Council of Women of Canada recommend to the Government of Canada immediate consideration to the enactment of the draft statute on the law of domicile which was approved by the Conference of Commissioners on Uniformity of Legislation in Canada at the proceedings of the 43rd Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada in 1961; and

RESOLVED, That The National Council of Women of Canada request Provincial Councils of Women and the Montreal Council of Women to urge their respective provincial governments to consider for enactment the draft statute on the law of domicile which was approved by the Conference of Commissioners on Uniformity of Legislation in Canada at the Proceedings of the 43rd Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada in 1961.

Divorce

WHEREAS, Grounds for divorce under the Matrimonial Causes Act are harsh and antiquated causing many social problems (common-law unions, emotionally upset children and lower moral standards); and

WHEREAS, The Federal Governmen has sole jurisdiction to amend the Matrimonial Causes Act to widen the grounds for divorce; and

WHEREAS, Every province in Canada may not wish to widen the grounds for divorce within its boundaries; therefore

RESOLVED, That The National Council of Women of Canada request the Government of Canada to amend the Matrimonial Causes Act to widen the grounds of divorce to include insanity, cruelty and desertion as well as adultery, these amendments to be accepted by each Province at its own option.

ADDENDUM 2

CHAPTER 84

An Act respecting jurisdiction in Proceedings for Divorce.

SHORT TITLE

- Short title.
1. This Act may be cited as the *Divorce Jurisdiction Act*. 1930, c. 15, s. 1.
- Married woman deserted and living apart for two years may commence proceedings for divorce.
2. A married woman who either before or after the passing of this Act has been deserted by and has been living separate and apart from her husband for a period of two years and upwards and is still living separate and apart from her husband may, in any one of those provinces of Canada in which there is a court having jurisdiction to grant a divorce *a vinculo matrimonii*, commence in the court of such province having such jurisdiction proceedings for divorce *a vinculo matrimonii* praying that her marriage may be dissolved on any grounds that may entitle her to such divorce according to the law of such province, and such court has jurisdiction to grant such divorce if immediately prior to such desertion the husband of such married woman was domiciled in the province in which such proceedings are commenced. 1930, c. 15, s. 2.
- Jurisdiction of court.

ADDENDUM 3

NATIONALLY ORGANIZED SOCIETIES

Federated with The National Council of Women of Canada.

1. Canadian Association of Hospital Auxiliaries
2. The Canadian Dietetic Association
3. Canadian Dominion Council of the Mothers' Union
4. The Canadian Federation of Business and Professional Women's Clubs
5. Canadian Federation of University Women
6. Family Planning Federation of Canada
7. Canadian Home Economics Association
8. Canadian Woman's Christian Temperance Union
9. Girl Guides of Canada
10. The Hadassah-Wizo Organization of Canada
11. The Health League of Canada
12. The Lyceum Club and Women's Art Association of Canada Inc.
13. National Council of Jewish Women
14. Queen's University Alumnae Association
15. The Salvation Army in Canada
16. Ukrainian Women's Association of Canada
17. The Ukrainian Women's Organization of Canada
18. The Board of Women of the United Church of Canada
19. The Victorian Order of Nurses for Canada.
20. Young Women's Christian Association of Canada

PROVINCIAL AND LOCAL COUNCILS OF WOMEN

1. Alberta: Calgary, Edmonton, Red Deer.
2. British Columbia:
Burnaby, Chilliwack, Comox Valley, Dawson Creek, Fort St. John and District, Kamloops, Kelowna, Nanaimo, New Westminster, North and West Vancouver, Trail District, Vancouver, Vernon and District, Victoria, White Rock and District.
3. Manitoba: Brandon, Dauphin, Portage la Prairie, Winnipeg.
4. New Brunswick:
Fredericton and Area, Moncton, Sackville, Saint John.
5. Nova Scotia:
Halifax, New Glasgow, Stellarton, Truro, West Pictou, Westville, Yarmouth.

6. Ontario:

Brantford, Chatham, Georgetown, Hamilton, Kingston, London, Niagara Falls, Orillia, Ottawa, Owen Sound, Peterborough, St. Catharines, Toronto, West Algoma, Windsor.

7. Saskatchewan:

Moose Jaw, Regina, Saskatoon, Swift Current, Yorkton.
Montreal, Quebec.
St. John's Newfoundland.

APPENDIX "28"

Brief submitted to the Special Joint Committee of the
Senate and House of Commons on Divorce
by

Ray A. Graves, Esq.,
602 Central Avenue, Saskatoon, Saskatchewan. Canada.

Messrs Chairman, Ladies and Gentlemen:

I am one of untold thousands anxiously awaiting divorce reform. I am 33 years old and my two daughters are presently 7 and 12 years of age respectively. My wife has not lived at home with us for almost 4 years. This is an awfully long time for two girls to be without a mother. It is very difficult for a father to teach girls the duties and responsibilities of a wife and mother without there being someone for them to follow as an example. Fortunately, I have always been able to hire good housekeepers and this certainly helps a great deal. However, my girls are of an age to realize that this is not a normal home atmosphere.

Approximately four years before she left, my wife started losing interest in her home and family. For the last two years prior to leaving she was under periodic psychiatric care and even spent some time in hospital in an effort to help her regain her lost interest in her family. Doctors are achieving marvelous results with psychiatry but are not yet "batting 1000". It is almost impossible to help someone if that person does not want the help. That is precisely my wife's case.

For the last twelve months or so that she was home, she would threaten to leave and go to the west coast whenever something didn't suit her, even to the point of packing her luggage several times. I made tentative arrangements for a housekeeper to care for the children, twice, before she actually left. When she finally made up her mind to leave, she voluntarily signed a separation agreement giving her consent to my having sole custody of our children.

Since she left, I have been supporting her which, along with having to hire a housekeeper, is a serious drain on my finances. This will become more serious as my children grow older. My wife now works when she feels like it and appears to be able to hold down a job if she wants to. The amount of support was incorporated in the separation agreement and she feels entitled to the money, even though she has been working and it is a hardship on her family.

The position my marriage is in, is thus: There is every reason for its dissolution except that recognized by the existing laws. We are married to each other in the eyes of the law only. We live approximately 1500 miles apart and have seen each other once in the past three years. Someone would have to do a lot of talking to convince me that a marriage exists.

This is one case where there is no consent or collusion and there is also no divorce. I could place the custody of my children in jeopardy if I were to (under the existing laws) provide the grounds for divorce and my wife has refused to do so. One reason is that she is afraid that the court would not order alimony under such circumstances. As a result, she is preventing our girls from possibly having a stepmother. This, in my case, is the most serious aspect. The existing law certainly allows one partner to be exceptionally vindictive.

I do not intend to suggest a "model set" of grounds for divorce as the briefs you have already heard are very adequate in this regard. However, when drawing up the legislation, you might find the following helpful to bear in mind.

At present, in order to obtain a divorce, the following minimum must be present:

- Consent
- Collusion
- Money

All in large quantities!

The new legislation should face up to facts and allow people who are engulfed in an unworkable marriage to have it dissolved for that reason. There is nothing wrong with two people telling a judge they can no longer live together, for various reasons, and being granted a divorce.

The extremely high expense of divorce is serious to many people and entirely out of reach for many.

Word the legislation so that custody of children cannot be used as a "club"—this is very important.

I believe that most separated people believe very strongly in marriage and are prepared to work hard to make a new marriage work out. It is an accepted fact that a high proportion of second marriages are happy. This possibility is presently being denied many thousands of people due to the existing law.

Bear in mind, the Catholic Church does not expect non-Catholics to follow their teachings. This is an important consideration. I, as a Protestant, will be ever grateful to them for this attitude.

I certainly favor the marriage breakdown concept because this is what actually happens. Now two people live together happily for several years and then all of a sudden decide to divorce. The actual breakdown in my marriage

covered several years. The new laws should be patterned as close as possible to the conditions. It is impossible for 'offense' laws to be so patterned.

From your committee questions, one soon gains the impression you are all extremely concerned about the number of unworkable and unhappy marriages. Make the new laws so that people in such a marriage can at least have the possibility of a happy marriage. Legislation in itself has never forced anyone to live 'happily ever after'. This is what the existing law attempts to do but fails miserably.

Our society is based and patterned on the married couple. A separated person is often in a dilemma because he or she is neither married or single. The results are many and often not at all pleasant.

I submit these remarks with all the respect your high office commands. If, in some cases, my terminology does not suggest this, I ask your indulgence.

If any members have questions, I will be most pleased to hear from them. I will answer all communications promptly.

Thanking you for this opportunity.

Respectfully,
Ray A. Graves.



First Session—Twenty-seventh Parliament
1966-67

PROCEEDINGS OF
THE SPECIAL JOINT COMMITTEE OF THE SENATE
AND HOUSE OF COMMONS ON
DIVORCE

No. 13

TUESDAY, FEBRUARY 7, 1967

Joint Chairmen

The Honourable A. W. Roebuck, Q.C.

and

A. J. P. Cameron, Q.C., M.P.

WITNESSES:

His Honour P. J. T. O Hearn, Judge of the County Court, Halifax, N.S.
Professor J. J. Gow, Faculty of Law, McGill University, Montreal,
Quebec.

APPENDICES:

- 29.—Brief by His Honour Judge O Hearn.
- 30.—Brief by Professor J. J. Gow.
- 31.—Brief by The National Farmers Union.
- 32.—Brief by Federated Women's Institutes of Canada.

ROGER DUHAMEL, F.R.S.C.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1967

MEMBERS OF THE
SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS
ON DIVORCE
FOR THE SENATE

Hon. A. W. Roebuck, Q.C., Joint Chairman

The Honourable Senators

Aseltine	Connolly (<i>Halifax North</i>), Flynn	
Baird	Croll	Gershaw
Belisle	Denis	Haig
Burchill	Fergusson	Roebuck—(12).

FOR THE HOUSE OF COMMONS

A. J. P. Cameron, Q.C. (*High Park*), Joint Chairman

Members of the House of Commons

Aiken	Forest	McQuaid
Baldwin	Goyer	Otto
Brewin	Honey	Peters
Cameron (<i>High Park</i>)	Laflamme	Ryan
Cantin	Langlois (<i>Mégantic</i>)	Stanbury
Choquette	MacEwan	Trudeau
Chrétien	Mandziuk	Wahn
Fairweather	McCleave	Woolliams—(24).

(Quorum 7)

ORDERS OF REFERENCE

Extracts from the Votes and Proceedings of the House of Commons:
March 15, 1966:

"On motion of Mr. McIlraith, seconded by Mr. Hellyer, it was resolved—that a Special Joint Committee of the Senate and the House of Commons be appointed to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either House;

That 24 Members of the House of Commons, to be designated by the House at a later date, be members of the Special Joint Committee, and that Standing Order 67(1) of the House of Commons be suspended in relation thereto;

That the Committee have power to engage the services of such technical, clerical and other personnel as may be necessary for the purpose of the inquiry;

That the Committee have the power to send for persons, papers and records, to examine witnesses, to report from time to time, and to print such papers and evidence from day to day as may be ordered by the Committee, and that Standing Order 66 be suspended in relation thereto; and

That a Message be sent to the Senate requesting Their Honours to unite with this House for the above purpose, and to select, if the Senate deems it so advisable, some of its Members to act on the proposed Special Joint Committee."

"By unanimous consent, on motion of Mr. McIlraith, seconded by Mr. Hellyer, it was ordered—That the order of the House of Monday, February 21, 1966 referring the subject-matter of the following bills to the Standing Committee on Justice and Legal Affairs, namely:—

Bill C-16, An Act to provide in Canada for the Dissolution of Marriage (Additional Grounds for Divorce).

Bill C-19, an Act to provide in Canada for the Dissolution and the Annulment of Marriage.

Bill C-41, An Act to amend the British North America Acts, 1867 to 1965, (Provincial Marriage and Divorce Laws).

Bill C-44, An Act to provide in Canada for the Dissolution of Marriage.

Bill C-55, An Act to provide in Canada for the Dissolution of Marriage.

Bill C-58, An Act respecting Marriage and Divorce.

Bill C-79, An Act to amend the Dissolution and Annulment of Marriages Act (Additional Grounds for Divorce).

be discharged, and that the subject-matter of the same bills be referred to the Joint Committee of the Senate and the House of Commons on Divorce".

March 16, 1966:

"By unanimous consent, on motion of Mr. Stewart, seconded by Mr. Byrne, it was ordered—That the subject-matter of Bill C-133, An Act to extend the grounds upon which courts now have jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief, be referred to the Special Joint Committee on Divorce".

"By unanimous consent, on motion of Mr. Stewart, seconded by Mr. Byrne, it was ordered—That the subject-matter of Notice of Motion No. 11 be referred to the Special Joint Committee on Divorce."

March 22, 1966:

"On motion of Mr. Pilon, seconded by Mr. McNulty, it was ordered—That a Message be sent to the Senate to acquaint Their Honours that this House will unite with them in the formation of a Joint Committee of both Houses to inquire into and report upon divorce in Canada, and that the Members to serve on the said Committee, on the part of this House, will be as follows: Messrs. Aiken, Baldwin, Brewin, Cameron (*High Park*), Cantin, Choquette, Chrétien, Fairweather, Forest, Goyer, Honey, Laflamme, Langlois (*Mégantic*), MacEwan, Mandziuk, McCleave, McQuaid, Otto, Peters, Ryan, Stanbury, Trudeau, Wahn and Woolliams."

LÉON-J. RAYMOND,
Clerk of the House of Commons.

Extracts from the Minutes of the Proceedings of the Senate:

March 23, 1966:

"Pursuant to the Order of the Day, the Senate proceeded to the consideration of the Message from the House of Commons requesting the appointment of a Special Joint Committee of the Senate House of Commons on Divorce.

The Honourable Senator Connolly, P.C., moved, seconded by the Honourable Senator Roebuck:

That the Senate do unite with the House of Commons in the appointment of a Special Joint Committee of both Houses of Parliament to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either House;

That twelve Members of the Senate, to be designated at a later date, act on behalf of the Senate as members of the said Special Joint Committee;

That the Committee have power to engage the services of such technical, clerical and other personnel as may be necessary for the purpose of the inquiry;

That the Committee have the power to send for persons, papers and records, to examine witnesses, to report from time to time, and to print such papers and evidence from day to day as may be ordered by the Committee, and to sit during sittings and adjournments of the Senate; and

That a Message be sent to the House of Commons to inform that House accordingly.

After debate, and—

The question being put on the motion, it was—
Resolved in the affirmative."

March 29, 1966:

"With leave of the Senate,

The Honourable Senator Beaubien (*Provencher*) moved, seconded by the Honourable Senator Inman:

That the following Senators be appointed to act on behalf of the Senate on the Special Joint Committee of the Senate and House of Commons to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, namely, the Honourable Senators Aseltine, Baird, Belisle, Bourget, Burchill, Connolly (*Halifax North*), Croll, Fergusson, Flynn, Gershaw, Haig, and Roebuck; and

That a message be sent to the House of Commons to inform that House accordingly.

The question being put on the motion, it was—
Resolved in the affirmative.”

May 10, 1966:

“Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Roebuck, seconded by the Honourable Senator Croll, for the second reading of the Bill S-19 intituled; “An Act to extend the grounds upon which courts now having jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief”.

The question being put on the motion—

In amendment, the Honourable Senator Connolly, P.C., moved, seconded by the Honourable Senator Hugessen, that the Bill be not now read the second time, but that the subject-matter be referred to the Special Joint Committee on Divorce.

After debate, and—

The question being put on the motion, it was—
Resolved in the affirmative.”

J. F. MACNEILL,
Clerk of the Senate.

MINUTES OF PROCEEDINGS

TUESDAY, February 7, 1967.

Pursuant to adjournment and notice, the Special Joint Committee of the Senate and House of Commons on Divorce met this day at 3:30 p.m.

Present: For the Senate: The Honourable Senators Roebuck (*Joint Chairman*), Belisle, Burchill, Denis, Fergusson, Flynn, Gershaw and Haig—8.

For the House of Commons: Messrs. Cameron (*High Park*) (*Joint Chairman*), Baldwin, Brewin, Honey, MacEwan, Mandziuk, McCleave, McQuaid and Ryan—9.

In Attendance: Peter J. King, Ph.D., Special Assistant.

The following witnesses were heard:

His Honour Judge P. J. T. O Hearn, Halifax, N.S., J. J. Gow, B. L., Ph.D., LL.D., (Aberd.)

Briefs submitted by the following are printed as Appendices:

29.—His Honour Judge O Hearn.

30.—Professor J. J. Gow.

31. The National Farmers Union.

32.—Federated Women's Institutes of Canada.

At 5.45 p.m. the Committee adjourned until Thursday next, February 9, 1967 at 3:30 p.m.

Attest.

Patrick J. Savoie,
Clerk of the Committee.

THE SENATE
SPECIAL JOINT COMMITTEE OF THE SENATE AND
HOUSE OF COMMONS ON DIVORCE
EVIDENCE

OTTAWA, Tuesday, February 7, 1967.

The Special Joint Committee of the Senate and House of Commons on Divorce met this day at 3.30 p.m.

Senator Arthur A. Roebuck and Mr. A. J. P. Cameron (*High Park*), Co-Chairmen.

The CO-CHAIRMAN (*Senator Roebuck*): Honourable senators and members of the House of Commons, since we have a quorum I will without delay introduce the first witness in the person of Peter Joseph Thomas O Hearn, born January 2, 1917, third son of Walter Joseph Aloysius O Hearn, K.C., and Catherine Mahony at Halifax, Nova Scotia. Educated College Street Public School; Saint Mary's Collegiate; Saint Mary's College, B.A., 1937; Dalhousie University, Education Certificate, 1938, McGill University, post-graduate work in education 1938-39; Dalhousie University, LL.B. 1947. Admitted to Nova Scotia Bar August 15, 1947; practised law with Fielding and O Hearn 1947-1950, Fielding, O Hearn & Vaughan 1950-55, and in his own name until made Judge of the Metropolitan County of Halifax, March 22, 1965. Appointed Assistant Prosecuting Officer of Halifax 1950, Prosecuting Officer 1956. Queen's Counsel, January, 1963.

Lieutenant 2nd Canadian Medium Regiment, R.C.A. (later it became 2nd HAA Regiment R.C.A.) 1940-42 in Canada and in England. Invalided out 1942, discharged from Camp Hill Hospital 1944.

Organized the Legal Aid Service of the Nova Scotia Barristers' Society in 1950 and was the first local director 1950-53. Member of the Council of the Society and various committees 1951-4, 1955-8, including chairmanship of the Legal Research Board for several years. Bar Society solicitor 1959-65.

President, Nova Scotia Division, Canadian Red Cross Society, 1956-8; President, Archdiocesan Union of Holy Name Societies 1958-60; President, Children's Aid Society of Halifax, 1963-5; President, Charitable Irish Society of Halifax 1965; author of *Peace, Order and Good Government—A New Constitution for Canada* (1964, MacMillians, Toronto) and various articles in legal and other periodicals. Lecturer in criminal procedure Dalhousie Law School, 1958 to date.

Married Margaret Mary McCormick, daughter of Joseph B. McCormick and Margaret Ann McNeil, September 8th, 1944. One son, Peter Kevin.

Member of the Catholic Charities Committee and the Ecumenical Commission of the Archdiocese of Halifax.

Members of the committee, this is our witness, and a personal friend of our esteemed member, Mr. Robert McCleave.

His Honour Judge Peter Joseph Thomas O Hearn, Judge of the Metropolitan County of Halifax: Honourable senators, members of the House of Commons,

members of the committee: When my office supplied this biographical sketch of me I did not expect to have it inflicted upon you in its entirety; I felt it might easily be condensed into the first three names read to you by your distinguished Chairman; for I have had those names rubbed into me, once by Mr. Alect Hart, who is, I believe, a Vice-President of the Canadian National Railways, who commented "What a bunch of Mickey names!"

I am taking a rather unusual stand on the subject before you today. As a Roman Catholic I think it is one that is in keeping with the attitude of the Church, or at least in large part. Some gentlemen present who belong to my faith may conceivably take a different point of view, for the reason that what I am advocating is a matter of policy and has nothing to do with doctrine or dogma.

What is the best policy in dealing with divorce and kindred subjects in Canada? I should like to take you through the draft bill I have prepared, and I may say at once that the main point is that the court best suited to handle the problems arising from the conditions giving rise to divorce is the Family Court; and my contention is that in considering the problem of divorce we should regard it as forming part of a unified field.

Family law is an entity which unfortunately is split between two jurisdictions, provincial and federal, and it will take a good deal of jigsawing to get the parts dovetailed properly; but I am quite sure that the efforts which this committee is so conscientiously making towards the solution will provide the leadership that will help the provinces to play their part.

I have had the interesting experience of going through the reports of this committee supplied to me through the courtesy of Mr. Savoie, and I find mentioned in those reports every idea that I have brought forward in my brief; but I do not believe that in any of the material so far presented to you the topic I am concerned with has been dealt with to the same extent as I have discussed it.

I am under the impression that Senator Roebuck, in discussing the representations made by the Rev. Mr. Michael, suggested that perhaps the public were not quite ready to accept the concept of marriage breakdown as the governing principle of divorce. I suggest with deference that it is more difficult to convince people of the efficacy of the Family Court in relation to divorce, though in my opinion it is more important. The history of law indicates that courts by and by invent legal opportunities to do what they think is substantial justice.

I am not denying the fact that grounds are important; I think they are; but the main thing is to get the problems into court and deal with them, not in relation to principles or right and wrong but with a view to settling a social and personal problem resulting from a conflict between two personalities.

With your permission, Mr. Chairman, I will briefly go through the proposed Act.

The first time these Courts are mentioned is in section 2, where "Family Court" is defined, and the definitions indicate in some cases a provincial court set up as a family court as such, as in British Columbia, in Ontario, to some extent, though not completely covered by family courts, and in Quebec, *la cour du bien-être social*. In Nova Scotia we are beginning to experiment with it. This is the court that handles this type of problem generally—family disputes, juvenile cases and such matters—and the proposal is to put all problems concerning the status of marriage within the jurisdiction of this court.

I hear a rumour, from fairly reliable sources in Quebec, that there is a move on foot in that province, to refer to these courts all family matters including

judicial separation, and this is a logical move. Such courts are, if I may quote from the brief, "constantly deciding questions of the utmost importance concerning the status and welfare of individuals. They use techniques of investigation and conciliation that have proved effective in helping families to achieve stability. They deal with the social problems well and with the incidental legal problems well enough."

Some people might be inclined to keep their fingers crossed on the reflection that in some provinces the function is performed only by Justices of the Peace.

Two things to be considered in weighing the proposal are that, first, that the day of the non-professional, non-lawyer judge in Canada is past, and that in due course, reasonably soon, I believe, all judges will, have some training at least, so that if they are not trained in law they will certainly be trained in the particular field in which they will have to make decisions. The second thing to be considered is that there is always some way of correcting any legal mistake they make. This is fairly easy under our process of appeal and the prerogative writs we have.

Going through the various briefs submitted to you, I notice that suggestions of this nature are contained in the testimony of the Rev. Mr. Michael of the Seventh Day Adventist faith, and the views submitted by the Anglican Diocese of Huron, and the brief submitted by the Social Service Department of the Anglican Diocese of Nova Scotia; and a particularly good submission is that contained in the submission of the Family Association of Edmonton, which covers the point very well.

There are a great many correspondences between what I have submitted and what is contained in the report of the commission appointed by the Archbishop of Canterbury to look into the problems of divorce and the attitude of the Church of England in relation thereto, which report appeared under the title *Putting Asunder*, and Mr. Brewin refers to it consistently in his questioning.

I find myself in almost total agreement with this point of view and so I may be repeating much of what you have heard. I do take issue, however, with one or two points in it. There is a discussion of the family court method of handling divorce; it is covered extremely well and I would refer you to it.

There may be some constitutional problems here. I think case law is in favour of the power of Parliament to impose this jurisdiction on provincial courts, and Mr. Driedger in his evidence comes to the same conclusion.

The other matters in the definition section are merely technical points and I do not think I will weary you with them. On the application of the law, you have heard some evidence as to whether it should be trans-Canada. My point of view is that family law is part of property and civil rights, and the provinces have differences in culture and approach that should be taken into account, and they have the right to consider whether divorce should or should not be in effect in their jurisdictions.

I have provided a device for opting out, with a little bit of "shotgun" effect, because it has to be done positively; that is, the legislature has to do something to get out from the thing. If you leave it the other way, the tendency will be negative: they will never adopt it. Possibly, while I have made this provision apply to all parts of the Act, it would be sufficient if it applied only to section 8 and 9, which deal with divorce and separation.

In the brief I have given some material that indicates the purpose for which the Fathers of Confederation incorporated marriage and divorce within the exclusive powers of Parliament; and from my reading of the B.N.A. Act the

power over marriage and divorce would seem to be something equivalent to the United States full faith and credit clause: that is to say, these particular sections of the Act were designed to make sure that divorce decrees and orders would have the same effect throughout Canada. They would not suffer from any problem of recognition.

And, of course, divorce was taken from the provincial parliament in order to relieve the Province of Quebec of the rather thankless task of refusing divorces to the English-speaking Protestant minority, and the equally repugnant task of granting them.

I have suggested in the brief that this power should be given back to the province constitutionally, an idea that I got from Senator Pouliot, and I notice that in several sessions Mr. Prittie has introduced a bill, which would be valid constitutionally under the 1949 amendment, to make it a concurrent power subject of legislation. This is one of the bills referred to you, incidentally.

There are several matters dealing with marriage which perhaps I should discuss, because I have alleged that the law of marriage in Canada is not satisfactory. One matter is the age at which marriage may be solemnized. In that regard I do not see any bills submitted at this session, but I note that Mr. Matheson did introduce a bill to make the age 16 for men and 15 for women in previous sessions. The age I propose is 18, which, I believe, has the support of *Putting Asunder* and of the Canadian Congress of Women.

Putting Asunder brings out the fact, without supporting documentation, that statistically there is a high correlation between young marriages and divorce.

One of my duties as a County Court Judge is to perform civil marriages, and I perform about 90 percent of the civil marriages in Nova Scotia, between 80 and 90 percent, and a great many of them are what are called "shotgun" marriages. We sympathize with these people because, as you know, such marriages have but a poor chance of surviving when young people find themselves in that box; and the younger they are the more easily are they cozened into this type of marriage.

I am submitting therefore that the minimum age of 18 is realistic. Some people suggest that there should be provision for exceptional cases; but they are really thinking of shotgun marriages, and any marriage of that sort is not an auspicious way of starting married life. There is no real excuse for shotgun marriages in this day and age when social services are available to deal with the adoption of children and the problem of illegitimacy, which unfortunately is not primarily for this committee. I would be happy if it were, judging by the attitude the committee has shown in carrying out its investigation.

Illegitimacy, I believe, will disappear as a legal concept in the reasonably near future, and the welfare people are striving constantly to get rid of the difficulties incident to it.

Co-Chairman Senator ROEBUCK: There are only, or should be only, illegitimate parents.

Judge O HEARN: Yes; no illegitimate children, only illegitimate parents. The other matters in section 4 are, I think, pretty well routine.

The mention of potency and impotence brings the law more or less up to date. The provision dealing with consanguinity puts the restrictions on a minimal basis in the interest of public policy and they are more or less in line with those set in the time of Henry VIII, which have been the law ever since.

In the matter of affinity, which is the relationship a man acquires to his wife's relatives, and the other way round with the wife, this seems to me to be an impediment that has no real civil meaning. It has no secular meaning at all, and

while possibly it derives to some extent from the Roman idea of decency, the main basis is religious and it is unmeaning to those who do not share that particular sentiment. I recall bringing it up with Dr. Hardie at Pine Hill Divinity School and he did not know what it was until I gave him the definition, and he recognized it.

What I have suggested is that affinity be done away with as a civil disability; but there is provision for keeping it as a religious disability for those who have these religious scruples. This is in a further section.

The provisions on voidable marriages are a little radical in that they reduce void marriages to a minimum: those that are barred by public policy or those that have some social significance.

The purpose of this is to make some use of the distinction between void and voidable marriage. Void marriages can be attacked by anyone; but voidable marriages can be attacked, and impotence can be attacked only in the lifetime of the parties. This of course is not on all fours with the Canon Law, either Anglican or Roman Catholic, who are in accord on this matter; but the effect will be to enable people who have conscientious scruples about marriage to do something about it, while giving other people no right to interfere.

Section 5 (2), which deals with religious impediments, is actually modelled to some extent on the provision of the Civil Code of Quebec which allows the impediments to have their force, but I have restricted it to the effect in the religion in which the marriage takes place, because in the history of this particular aspect of marriage there was an attempt to prevent the marriage of Roman Catholics in another church with the implication that a person is not free to change his religion, and of course this would not be tolerable in this country.

Section 5 (3) deals with a technical problem and it tries to work out a particular situation.

Section 5 (4) deals with approbation and this is an extension of the scope of the existing law. Approbation, as a matter of fact, is not recognized by Roman Catholic Canon Law. I am told on good authority. The people who have got into a bad marriage that can be cured can affirm it instead of having to go through it again. This may be a little restrictive on some people but it seems to me to be a sound principle.

The Co-CHAIRMAN (*Senator Roebuck*): They can always go through the ceremony again in any province if the previous one is absolutely void.

Judge O HEARN: This is not necessary. They can affirm it now. It seemed to me a reasonable principle that where you have entered into a contract which is invalid for some reason, and subsequently you can revive it by conduct that can be recognized in ordinary law as a good ratification, and it has the same basis in the existing marriage and divorce law.

With regard to nullity suits, I have made some slight change in the general principle, with the provision that a voidable marriage can be challenged only by a party in the lifetime of the parties; provision for allowing people with an interest to void a bigamous marriage or one which is void for non-age while they are under age, would still remain. This is necessary because property rights get involved here. But I have put in a qualification which may appeal to you, that once a marriage ceases to be void and becomes voidable, then it can not be challenged because the integrity of the marriage should be preferred to any pecuniary claim. In other words, public policy would favour the marriage rather than a property claim.

Section 6 (4) is pretty well the existing law.

Section 6 (5) brings in the question of jurisdiction.

The general basis of jurisdiction in matrimonial suits is domicile of the parties, which is equivalent to domicile of the husband in most British countries. That is because such domicile is recognized or alleged to be recognized internationally as having exclusive jurisdiction over status. Actually this recognition is not very widespread outside the British Commonwealth. In many countries there is nationality or citizenship or residence as the basis; but as long as it exists you have to pay some attention to it. It has been suggested, and actually this was the genesis of this brief, in discussion with Mr. McCleave, that there be Canadian domicile, and I have attempted to incorporate it here in some cases. But even if you have Canadian domicile you have to have some court provisions, and that is what subsections (5) and (6) tend to provide.

In nullity suits the residence of the parties or of the respondent is sufficient, but the residence of the petitioner only is not sufficient, and if the respondent has not a domicile this puts the petitioner in a bit of a bind. The bringing in of Canadian domicile would solve that problem in some cases but not in all. However, I believe that the subsection would solve a great many cases, while leaving some still hanging as a matter of international recognition.

Section 6 provides that a woman who is a party to a void marriage may have a domicile separate from the man, and a woman who is a party to a voidable marriage may require a separate domicile from the man if the marriage has not become valid and they have ceased cohabitation as man and wife.

That seems reasonable. There is a bit of legal contradiction involved here but it is really a verbal one and is nothing that should get in the way of the court in solving the matter.

Sub-section (7) merely provides an expeditious and rational way of proving the religious disabilities mentioned in the previous article.

Sub-section (8) provides that the children of a void or voidable marriage are to be deemed legitimate. This is an advance on the present law, where the children of a void marriage are generally construed to be illegitimate. I do not think there is much more I can say about it. It is really a matter of internal effect, whether you feel it should be so. There is a possible constitutional difficulty here because of the conflict between civil rights and property on the one hand and marriage and divorce on the other, but I think it can be phrased to a certain extent to deal with the effect of a decree of nullity, making it a limited decree rather than a full one, which I conceive to be at least arguable as being within the domain of Parliament.

Coming to the meat of the matter, which is judicial separation and divorce, I have divided the process into two stages. I am requiring judicial separation to precede divorce in every case, and Mr. Driedger put it well in his testimony. He said judicial separation is divorce without the right to remarry. What I am trying to do is to isolate the right to remarry to a later stage so that it can be determined on its merits.

Mr. Driedger was somewhat cautious in giving his opinion that jurisdiction over judicial separation was within the competence of Parliament. I have no caution at all about that. I think it is so plain that it could hardly be dealt with by the province, notwithstanding the fact that it is dealt with by some provincial laws in its aspect of property and civil rights.

Now the great change I recommend with respect to judicial separation is that it become part of the exclusive jurisdiction of the Family Court that has been mentioned. Judicial separation is obviously a situation where the special

agents and techniques of the court are most needed and most likely to succeed. Divorce is likely to be too late a stage, for when survival of the marriage is impossible the effectiveness of the Family Court process will be negligible.

As to grounds for separation, which are dealt with in subsection (2), I think these represent something of a consensus. They are those which, in my experience in dealing with domestic cases—and that experience has been fairly broad, though for personal reasons I have never had a divorce practice—are the kind that trigger people into separating, whatever may be the ultimate background of the separation.

I do not see any benefit in requiring people to wait after separation for a three-year period, or any period.

The Co-CHAIRMAN (*Senator Roebuck*): Hear, hear.

Judge O HEARN: What I should like to see in this respect is that if they are likely to break up they get into the hands of people who can do something for them in the way of reconciliation, looking after the children, making sure of proper maintenance, and things of that kind; and while this may not be an integral part of Family Court procedures, it could be adapted to the Family Court, or in any of the courts now handling divorce or judicial separation.

This approach seems to have wide support among those who have studied the matter. Mr. Justice Walsh had some comment on it, Mr. Justice Migneault, the Catholic Charities Commission and the Anglican Diocese of Huron.

There are those, however, who seem to think that compulsory reconciliation processes are not worth very much. I am prepared to admit that what people do under compulsion is not as effective as what they do voluntarily, but in a great many fields it does work to some extent, though of course not quite as much as we should like. We have a probation service, which is a sort of reconciliation of a person to society, and this works under compulsion and does a fairly good job. Frankly, I do not share the view that compulsory conciliation is useless. *Putting Asunder* takes the position that it should not be made compulsory, but that before the merits of a judicial separation case are gone into the parties should be asked whether they have made any attempt at reconciliation, or consulted any professional advisers, and if the court is not satisfied with what has been done the matter should be adjourned to give the parties an opportunity to seek counselling. This is a fancy way of say, "We are going to compel you to do it", but in a great many cases it would succeed.

In the brief I take issue with judicial separation or divorce for insanity. Incidentally, in the quotation from More's *Utopia* there is a misprint which I shall draw to Mr. Savoie's attention. That is by the way. In my opinion this ground, which of course was been accepted in England, does not meet the test of frustration, which is the one on which I would base the dissolution of marriage. I cannot see that it amounts to anything different from physical illness or incapacity which sometimes renders the parties incapable of living together as man and wife, often to such an extent that they cannot even communicate. In these circumstances, to my mind, there are still some of the ends of marriage that can be met should be met. However, I am not making a major point of this. It seems to be a popular ground, and I can see the point of view of people who advocate it.

Divorce by consent has raised its querulous head, and I believe you have a brief from one person who was very blunt about this. We have judicial separation by consent in most places. It is very easy in most common law provinces to achieve a separation that gives the parties most of the benefits of a judicial decree—not all but most of them.

On the basis that judicial separation should precede divorce, why could not this be one of the ways of achieving judicial separation? I could see some force in this if it involved the parties getting together in conciliation processes at an early stage of the estrangement. Unfortunately, I think there are arguments against permitting this to have judicial effect as a judicial separation leading to divorce. I am submitting that there are public interests, interests of the family, of the children, of society itself, that argue against permitting judicial separation except for social and serious reasons.

We all know of people who go through a series of marriages and divorces and have very little concept of what marriage should mean and the kind of generosity of spirit it calls for to be successful. Their approach to marriage is on a very low physical plane. I am not decrying the physical side of marriage, but that is not a sufficient basis for marriage.

Section 8 (3), (4), (5) and (6) deal with more or less technical matters, and so does (7).

As I have mentioned, section 9 deals with the idea of Dissolution of Marriage and it is so phrased that judicial separation would be requisite and a year would have to pass before the parties could approach this stage. I think this structure isolates the idea of permission to remarry. You get the substance of divorce except for this in judicial separation, and by isolating it you can look at the idea itself. Why should people who have failed in one marriage have permission to remarry? I am not saying you should not answer 'yes' to the question, but at least it is a question that should be asked; and this structure permits you to ask it.

This is one of the points on which I would take issue with *Putting Asunder*. They go on the basis that once a marriage is dead it should be disposed of and got out of the legal picture. I do not think they have analyzed the matter far enough. They repeat this attack several times. But why should it be got out of the picture? Obviously, if the inability to remarry is going to cause positive evil to the parties, there is some case for saying, let us get it out of the picture. But most of the evils that arise from broken marriages are disposed of reasonably effectively by judicial separation.

You have of course what is called common-law marriage, which is very common in breakdowns; and this entails the business of legitimating children. I think that the legitimating of children is a very worthy cause, but I do not like this way of doing it, especially with young children who start life with the disabilities and stigma that such a phrase connotes.

The idea of regularizing the very stable relationships that sometimes are achieved in common-law marriages has a great deal to be said for it, and I think this is the kind of situation where permission to remarry should be considered. I would ask you to look at subsection (2) of section 9, which I have divided into two parts; and the second part, which I am not stressing too much though it should be given consideration, is that there should be a proper brake on the marriage-divorce merry-go-round. And this is the kind of brake I suggest.

After considering the matter and going through the phrasing, which incidentally I had to do over the weekend, not having had a chance to do it before, it seemed to me that it might be reworded, and I suggest it might be more acceptable in somewhat this form:

The court applied to may grant a decree dissolving the marriage, if satisfied beyond a reasonable doubt—

The words "beyond a reasonable doubt" are not necessary, but I thought I would put them in.

—that the marriage has broken down completely and irremediably so as to be substantially frustrated; but the court shall not grant such decree where it is satisfied that neither of the parties has the maturity, generosity and other elements of character and capacity needed to marry again with a reasonable possibility of success.

The CO-CHAIRMAN (*Senator Roebuck*): It would be difficult to find anyone who could make that determination.

Judge O HEARN: It would be a difficult finding in the first divorce, but if you had people coming back after three or four there would not be very much difficulty about it. On the basis of frustration, that is, a breakdown that is irremediable and that frustrates all the ends of marriage, that is a very sound ground for the dissolution of a marriage, and I do not need to urge it because it has been urged by so many people.

Adultery seems to me to stem, as a ground, from a misunderstanding of Chapter 5 of St. Matthew. The Jewish law provided it, and it has been a millstone around our necks for centuries.

I think that fairly well covers my submission. I believe I have outlined two significant differences between my position and that of *Putting Asunder*. They say that frustration should not be a basis for breakdown of marriage, but I suggest that an examination of *Putting Asunder* reveals that breakdown in itself is not a sufficient answer because they are forced to admit that mere breakdown as the only basis for dissolution, without any consideration of culpability, would lead to injustices—the injustice of the grossly guilty party getting a decree.

The other issue, I take it, is the suggestion that it is necessary to get rid of a dead marriage simply because it is dead. That is the legal effect of it.

The CO-CHAIRMAN (*Mr. Cameron*): Thank you, Judge O Hearn. It is our custom for members of the committee to direct to the witness such questions as they would like to have answered, and I believe that Mr. Honey has a question.

Mr. HONEY: I have two questions, and I would not like to have it inferred from the one I am about to put to the judge that I intend anything in the least disrespectful of the ability of County Court Judges; but I am wondering whether His Honour has seriously considered the many ramifications that flow from the dissolution of marriage—property rights, rights of inheritance, and so on. Having regard to all these matters, does Judge O Hearn still feel that the Family Court should be given the jurisdiction he proposes?

Judge O HEARN: Yes; because actually what you have in the ordinary course is a very routine procedure. It takes twenty minutes to hunt through them, so that the operation is as simple in outline as a traffic case—bang, bang, bang, just like that.

Mr. HONEY: My concern is that there may be many of these problems which would not be apparent to the Family Court Judge and the County Court Judge but which a Supreme Court Judge would seize on immediately: domicile may be one such problem, or residence, or whatever term we might decide to use. Such things might not come home with their full force to someone who might not even be trained in the law. He might not grasp the significance of some of the legal points that are involved in divorce; and, as far as I am concerned, before the members of this committee could accept Judge O Hearn's recommendation they would need to have some assurance of the qualifications and training of the Family Court Judges that were to be appointed.

Judge O HEARN: I do not know how you could get any assurance respecting the qualifications and training of any judge. This is a matter that is determined in a mysterious way, and speaking from the experience of my encounters with the Bench, both before and after I came to it, I find it is a mixed breed. You might have trouble even with someone with legal training if you were dealing with domicile and residence, but a lawyer who deals with such matters all the time, even if he is not a very good lawyer, gets to know the specialty pretty well and will become expert enough in it; and if he makes a significant mistake there are always courts of appeal.

I can see your point of view and I know that people approach this question with doubt, but I do not share your idea of the judicial ability of the hierarchy in Canada. I do not think it is as profound as that.

Mr. HONEY: One more question, Your Honour, with respect, and that is with regard to your suggestion that the minimum age for marriage might be made 18 years.

Judge O HEARN: Yes.

Mr. HONEY: Would you provide for judicial leave, under certain circumstances, for the marriage to take place at a younger age?

Judge O HEARN: I have handled that sort of thing under the Solemnization of Marriage Act, and the request is sometimes made for permission to marry without the parents' consent under 21, and it is workable; but I do not see any justification for it under 18. What possible emergency could there be, except pregnancy, which would justify it? And that is the kind of thing that does not justify it.

Mr. HONEY: I would be inclined to agree with you in generalities, but I have a particular experience in mind where, in a case of pregnancy, the girl was 17, and there was a great deal of urging brought to bear, with the result that consent was given, the marriage was solemnized, and it has worked out very well. If in these given facts your suggestion had been in force and the minimum law was 18, that marriage would not have taken place. It may be an exception to the rule Your Honour has mentioned, but there are exceptions; and in that particular case, after a great deal of persuasion, I was able to prevail upon the parents to have the marriage take place. My judgment, after many years, has been vindicated because it has worked out very well. My point is that if we had no means of taking care of such unusual cases hardships might follow.

Judge O HEARN: I have no comment on that except that I think it was exceptional. The general rule is that such marriages do not work very well. In my opinion, 18 is about the minimum you can conceive of as a successful age.

Mr. HONEY: Would you have any objection to a provision for judicial consent?

Judge O HEARN: Oh no, I just think it is weakening the thing, but it does not matter that much, really.

Senator BURCHILL: Who establishes the family courts?

Judge O HEARN: The province does, and has done so in a great many instances. There is nothing to prevent the Parliament of Canada from establishing its own court on that line under section 101, I believe.

Senator BURCHILL: But it would have to be established in the provinces.

Judge O HEARN: There should be provincial courts. The provinces are doing this kind of work in closely related fields and are building up a staff of professional judges who have training in family law and they are the logical

courts, I suggest, to handle it. There is no doubt Parliament can give jurisdiction.

Sénateur BURCHILL: Are they in existence in many provinces?

Judge O HEARN: In British Columbia, Ontario and Quebec. In Nova Scotia, family courts are just being instituted on a province-wide scale. The province of New Brunswick has, Manitoba has. British Columbia has one court called the Family and Children's Court designed to cover the whole province and which is set up on a good organizational basis. Prince Edward Island and Saskatchewan, no; Alberta and Newfoundland, yes. In Newfoundland it is handled by Magistrates. It is called Family Court.

Senator FERGUSSON: Does Judge O Hearn think it is unreasonable and unworkable that married women should have the same right to domicile as married men?

Judge O HEARN: I do not think it is at all unreasonable. The difficulty is to have it internationally recognized. The trouble with domicile is that the concept has grown up not is our own domestic law but internationally. Once it becomes real it will be recognized.

Senator FERGUSSON: It is not recognized internationally as it is in the Commonwealth. Throughout the world there are countries that have different rules regarding domicile and they are not in accordance with what we have in Canada or in most Commonwealth countries.

Judge O HEARN: The principle of separate domicile is a little inconsistent with the common law view of the unity of marriage which gives the husband the right to select the marital home; but possibly that is on its way out.

Senator FERGUSSON: The Council of Women, when they appeared before this committee, suggested that the age should be 21. Do you consider that unreasonably high?

Judge O HEARN: At this stage in history, yes. To get it up to 18 will be hard enough.

Mr. RYAN: Have you envisaged some standard form of judicial order of separation, from which possibly a judge would have discretion to deviate in individual cases? In other words, the Family Court order would be an individual order made in each case by the judge.

Judge O HEARN: I should think that would be determined according to the exigencies of the situation in the provinces. What I contemplate is that this matter of procedure would be determined by Rules of Court, made in the province, as to variation. But variation in what respect? In the conditions of the separation?

Mr. RYAN: Yes. In Ontario separation varies. There are different periods set out for separation. There are trial separations for three months or six months, more frequently than for one year, which is a long time.

Judge O HEARN: In Nova Scotia the practice is not to put in a time period. Temporary separation by agreement is left undefined so that we do not have a problem.

Mr. McCLEAVE: It would be partially covered by Rules of Court and partially by the demands of the particular case.

Mr. RYAN: Have you considered the advisability of having the actual divorce dealt with by the Supreme Court but having the Family Court record, with the evidence and the whole background of the case, sent up to the higher tribunal, instead of having the divorce heard formally in family courts that deal with wife

beating and that sort of thing? Perhaps I could ask you this question: Do you think the formality of the higher courts has had some deterrent effect on divorces?

Judge O HEARN: Formality in procedure is not a strengthening factor in handling family problems. I think the big deterrent has been money: you can see it in the divorce statistics in Canada.

Mr. McCLEAVE: And the amount of legal aid required in cases in the United Kingdom.

Judge O HEARN: In my opinion the Supreme Court and the assize courts are not properly equipped to handle the problems that arise. The judges have neither the time nor the outlook. Once you get it before a judge who is dealing with contracts you are dealing with another case of legal rights and wrongs.

Mr. McCLEAVE: I would quarrel with you in that pronouncement if I had time.

Judge O HEARN: I know that the judges do try to put heart and soul into it, but they have not the proper machinery. Even with the best will in the world to help these people, the Supreme Court Judge has not the time, the facilities nor the outlook to deal properly with domestic problems.

Mr. BREWIN: Are you convinced that the family courts across Canada are in a position to handle an assignment of this kind?

Judge O HEARN: Whatever their defects, and I am not blind to them, they would do a better job than is being done now by the Supreme Court. They have people trained in welfare work who can help to find out what is going on and conduct the reconciliation process.

Mr. BREWIN: I wish to ask Judge O Hearn a question on a point which has been raised by way of comment or at any rate by an interjection on the part of Senator Roebuck. The language of the proposed section 9 (2) is: "The court applied to may grant a decree dissolving the marriage, if satisfied beyond a reasonable doubt (a) that the marriage has broken down completely and irremediably, and (b) that one of the parties, at least, has the maturity, generosity and other elements of character and capacity needed to marry again with a reasonable possibility of success."

Only the Deity could be expected to determine "beyond a reasonable doubt" whether any person had the characteristics here set out. We have all witnessed many marriages that gave promise of success but failed to live up to expectations, and vice versa. Isn't this asking a judge to make a finding about a subjective matter far beyond the capacity of mortal man to determine, judicially or otherwise? I should think it would be a source of acute embarrassment to the court to be called upon to make a solemn finding that neither X nor Y was capable of mature and generous behaviour, or had "other elements of character and capacity needed to marry again".

Judge O HEARN: Judges have an unlimited capacity to believe they can decide any question of fact.

Mr. BREWIN: But this is more than a matter of fact; it is something subjective.

Judge O HEARN: On consideration I have changed the wording so that it is not "beyond a reasonable doubt" but only "where it appears". The judge would not refuse a decree where the facts warranted it. When you get down to brass tacks on the thing, it would never be refused on the first divorce, but it is not hard to recognize people who get on the merry-go-round for second or third divorces: they show they have no idea what marriage is all about.

Mr. McCleave: Since the judge has often asked me questions in my time, this is a chance for me to strike back. Your Honour, the suggestion about the provision of officers and other trained help to assist the family courts would mean in effect that it would be largely up to provincial initiative to ensure the effectiveness of reconciliation procedures and hope for their success, would it not?

Judge O HEARN: I think that is pretty well true. Possibly, if this device were adopted, you would find people knocking at the door in Ottawa asking for more and more money. The provinces have shown a great deal of initiative in getting into the family court business.

The Co-CHAIRMAN (*Senator Roebuck*): I would like to thank the Judge for getting down to things definite. We have had a good deal of theory presented to us in our hearings; but, sir, you have actually phrased the law that you advocate. For the first time we have had that done for us and we thank you for it. It did not have your name on it, Your Honour, and I thought it was Mr. McCleave that had drawn it, and I was amazed at the industry of the man and I wondered why he had been keeping something from me until the next day, after I had read this, I found it was not Mr. McCleave at all but Judge O Hearn.

Well, it is a magnificent piece of work, a very great piece of work. It conveys to us in practical form many ideas that have been rather nebulously talked about in the past and I am sure it will be of great assistance to us.

I do not know that we can adopt all the suggestions you have made, because you must remember and bear in mind that this is a Joint Committee of the Houses of Parliament and we are instructed—and this is our charter—to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either house.

We have had various bills, with the exception of that recently introduced by Mr. Brewin, referred to us, all on divorce, and I think that is all; but whether we have before us the whole marriage question is doubtful—or such matters as domicile in general. I think we should avoid that like poison because it is full of difficulty. But I wonder if we have not already touched it in the Divorce Jurisdiction Act. We have broken the usual international rules without any difficulty for a number of years, and I wonder if we could not avoid the question of domicile by simply allowing the deserted wife to sue where she resides. We need not change her domicile or give her domicile, but the right of action, as we have in the Divorce Jurisdiction Act.

There are many things I might mention. I will not go through them all but I would like to say something about the tribunal.

I am sure, sir, you will not take offence when I say I have a good deal more confidence in the County Court Bench than I have in the Family Court.

Some MEMBERS OF THE COMMITTEE: Hear, hear.

The Co-CHAIRMAN (*Senator Roebuck*): I see I meet with favourable response from others on the committee. Somebody has said we have some atrocious courts and some very good ones; and we have some atrocious officials in the family courts as well. Perhaps, Your Honour, you read what the former Chief Justice of Ontario said to us—the recent Mr. Justice McRuer, now retired—in which he described the joint jurisdiction between the High Court, the Supreme Court and the County Court. He would not prevent anyone moving an action in divorce to the Superior Court but he placed responsibility largely on the shoulders of the County Court.

I grant you that many County Court Judges are very much overloaded while some of them are not. It might be that we would have to appoint a few more

County Court Judges. But would it not be better to take one step at a time? First, County Court jurisdiction; and as time goes on and the family courts become more efficient than they are now—they are new—we might take the further step of transferring to them a little later on.

It seems to me we should not immediately take so tremendously long a step as to transfer it entirely from the Supreme Court to gentlemen who are made officials of the family courts.

There was some question about the age of marriage and I would like to point out that really the vital thing in connection with this marriage question is the children. When you question the age of parents, really the question you ask yourself is: What about children and their right to be married in the legitimate way?

It is true we could change the rules with regard to legitimacy. I fancy that is provincial and beyond our powers, and if you prohibit marriage until even 18 you will just perhaps increase the difficulty that presents itself to us now of a very large number of so-called common-law marriages and an unfortunate number of so-called illegitimate children, although I did like your statement with regard to illegitimate children: there are none such; there are and should be only illegitimate parents.

With regard to compulsory conciliation, I may say this. In every case that we in Parliament have tried since I have been Chairman of the Standing Committee on Divorce, and that is now 13 years, we have asked the question whether there is any possibility of reconciliation, and the fact is that by the time the parties come to our court—I do not know very much about the courts in general, but this is certainly true of the cases that have come before us—the marriage is gone and conciliation either voluntary or compulsory is a dead letter. That has been our experience.

Then the question about remarriage. Why should someone who has made a failure of one marriage be allowed to make a second marriage?

Here again is the question I would ask on behalf of the children of the marriage: What about the children? To prohibit people from marrying does not prohibit them from living together and producing children.

You have raised a great many points, Your Honour, and you have done so in a most practical way. You have rendered a real service to this committee in our difficult task, and may I ask you, on behalf of the committee, to accept our thanks. Let us not overlook the fact that the judge has travelled a very long distance and given of his time and “home work” in order to assist us in our work. Thank you, Your Honour.

Mr. RYAN: May I endorse what our Co-Chairman has said in appreciation of Judge O Hearn’s address.

The Co-CHAIRMAN (*Mr. Cameron*): It is now my duty to introduce Professor J. J. Gow of the Faculty of Law of McGill University, Montreal.

I will quote the biographical sketch I have here: J. J. Gow, B.L., Ph.D., LL.D. (Aberd.)—Gale Professor of Roman Law, McGill University; Advocate of the Scottish Bar; Barrister and Solicitor of the Superior Courts of the States of Victoria and Tasmania.

Professor J. J. Gow (*Faculty of Law, McGill University, Montreal*): Messrs. Chairmen, I must thank the members of the committee for the opportunity that has been given me in coming here today and saying something to you.

I confess to a feeling of considerable discomfiture because first of all, unlike the distinguished witness who has immediately preceded me, I claim no expertise in matters of family law. I am both by training and inclination a commercial lawyer. I recall Mr. Justice Walsh saying much the same when he testified before this committee. Although on occasion I have had to earn my bread by appearing on behalf of a petitioner or a respondent in a matrimonial cause, and to that extent I am acquainted with the stark fact of unhappiness which occurs in most marriage breakdowns, I cannot lay claim to any expertise in the very difficult matters which are being investigated by your committee.

It was only by accident that, towards the end of December at McGill University, then celebrating the centennial of the Quebec Civil Code, I happened to write a paper entitled *The Problems of Matrimonial Relief*.

The paper took the form it did for two reasons. First of all, the very technical and difficult law of Quebec concerning the separation of parties to a marriage, the effects upon the children, particularly in regard to maintenance and property rights, and the impact or lack of impact of the Marriage Act of 1963 upon the law of Quebec: all had been dealt with in a very thorough manner by Mr. H. E. Walker in his lecture given in McGill University in 1965 entitled "The Problems of Disintegrating Marriage".

In his very admirable essay he deals in great detail and thoroughness with the very technical and difficult problems which arise in Quebec by reason of the fact that divorce *a vinculo* is not recognized in that province. And this brings me to the second reason for preparing this paper, Problems of Matrimonial Relief, in the manner in which I did.

It seemed to me there was in Quebec, as far as I could see, a conspiracy of silence concerning this profound social problem of the breakdown of marriage, and indeed almost, one might say, ignorance of the existence of this committee and the very important work it is doing, which I believe should and must affect all Canada from coast to coast.

Whilst I am open to correction, on going through the record of evidence which has been heard before this committee I think I am substantially right in saying there has been little rush from persons or bodies in Quebec to come and testify before you in comparison with the wealth of carefully thought-out and, I am sure, very valuable evidence you have received from almost every other province in the country. And, of course, the evidence given by His Honour Judge O Hearn is a striking example of what is being done by persons and organizations in many parts of the country.

In this paper I attempted to do two things. The first one was intended to provoke controversy by asking the question: Why is the remedy commonly called divorce not known to the law of Quebec, or at least not recognized and acted upon in that province?

This required a little historical investigation; and clearly, without going into detail, the answer given by one Loranger in his *Commentaires sur le Code civil du Bas-Canada*, published in 1879, was that in New France, when the French were in control of the country, the doctrine of the Council of Trent that the sacrament of marriage was indissoluble was not received with too much acclaim because in France itself the civil powers were not prepared to concede sovereignty in these matters to the Church. But, Loranger said, after the English came the subordination of the Church in family matters to the civil powers ceased to be and supremacy was given to the Church because, he said, "if it had not been given the impact upon us of the Protestant civil power could have been disastrous to the French Canadian nation".

Later commentators such as Mignault, and much later in the century other commentators, simply took the view that codes of law of divorce did not exist and could not exist, and some even went so far as to say that the power given to the Parliament of Canada to legislate in this matter could not be recognized by them.

Well, of course, you have heard today one witness who is a Roman Catholic, and I believe you heard the other day, from the Catholic Women's League, evidence that although personally they did not believe in divorce, that was a far cry from saying that their personal beliefs should prevail over the law of the land. And in my paper I said that whatever might be the justification given by French Canadian commentators for denying a law of divorce in Quebec, it could no longer be thought it was required to protect the integrity of the French Canadian nation. Today in the Province of Quebec, with control over education, they cannot reasonably fear inimical legislation on the part of Protestants.

Then I suggested that an investigation should be made of the facts. What is the position in Quebec? How many men, women and children are living in varying degrees of unhappiness or discomfort from lack of remedy? How many, for example, come to Ottawa to obtain dissolution of marriage by resolution of the Senate? To what extent, so far as the Quebec Civil Code is concerned, does the prohibition of divorce result in concubinage or the common law *de facto* marriage? It appears that there is a considerable amount of concubinage, particularly in large industrial centres such as Montreal.

The second line which I took in this paper was to draw the attention of my audience—perhaps I was somewhat impertinent in this—to the existence of this fact and the very great debate which is going on in the forum and particularly as to the rationale of divorce.

Should divorce be based on what is called the theory of offence by one spouse? Should it be based on what is called breakdown of the marriage, or should there be some compromise remedy available on the ground of offence or on the ground of breakdown?

At the end of the paper I put some questions—not the questions of an expert but simple questions; and I hope I am not too unknowledgeable a lay person in this field. I put these questions: What are the consequences of broken marriage upon the parties, upon the wife particularly, upon the children?—What are the social effects of a parentless family, the motherless family or the fatherless family? And then there was a final word or two upon the nature of the divorce tribunal and its jurisdiction, upon which you have heard a great deal from Judge O Hearn this afternoon.

My paper was essentially one designed for a Quebec audience and intended, I hoped, to initiate some thinking about, and some discussion of, this problem of the family in relation to the breakdown of the marriage. It so happened that there was at that meeting a considerable amount of discussion. There were papers other than mine given there, and I shall refer to them in a moment. But it brings me to a matter discussed before this committee not so long ago. I think it is in Volume 1, page 577, of the printed proceedings of your committee where a representative of the Baptist Association was testifying before you.

Some suggestion was made in the course of the evidence as to representatives from each of the provinces being heard by the committee. I do not recollect seeing the name of Quebec mentioned there. I should say this—

The Co-CHAIRMAN (*Senator Roebuck*): We have invited the Attorney General of Quebec to be here.

Professor Gow: I see that, yes. There is at the moment going on in Quebec a revision of the whole Civil Code. This revision is proceeding in a certain way, taking certain categories of the law, for example contract or torts, property and so on; and I know that one committee of that body is or will be dealing with family law; and whilst I am not a member of it and have no official connection with it, this body is bound to deal with the effect upon the family and the incidental rights of the children and of the wife of, for example, a divorce granted by resolution of the Senate.

I think that the persons concerned with the revision of the Quebec Civil Code are sufficiently conscious of the duty which lies upon them, both to the community in which they live and to the law which they profess to revise, that they must somehow or other seek to put an end to this somewhat unnecessarily wasteful and very often distressing state of affairs.

This is bound to bring them into contact with the question of divorce; and whilst I do not know what they will do, what they will recommend, I do know there are moves now going on in Quebec, because of the great changes taking place in that province, that willy-nilly force those concerned with the law to grapple, and come to terms, with the problem that confronts this committee. In other words, to come back to the expression of opinion given to this committee very early in its life by Mr. Justice Walsh for one, it would be well worth this committee's while to consider the recommendation of legislation which would apply to Quebec. On the other hand, I think it was Dr. Ollivier who took the opposite view that there ought to be no imposition of legislation on the Province of Quebec because, in his view, that would offend the religious beliefs of the bulk of the population in that province.

I am not so sure that Dr. Ollivier is right or necessarily substantially right. In other words, I am not certain that upon investigation he would find that Quebec is monolithic in this respect, as it is not monolithic in many other respects; and there is evidence before this committee to which I have already alluded, for example, the Roman Catholic Church: whilst it could not positively advocate a law of divorce, it might not oppose it. Of course, I do not know, but I think there is evidence to suggest that as a reasonable inference.

I have said that perhaps Quebec is not monolithic in this matter; perhaps Dr. Ollivier in his evidence was attaching too much importance to the force of religious belief.

At the meeting at which I gave the paper, "Problems of Matrimonial Relief", I had the good fortune to have associated with me Professor Elton, Professor of Sociology at York University of Ontario. He is a distinguished sociologist who had earlier in his career been a member of the staff of McGill University and, as well, of the University of Montreal, and therefore well acquainted, both as a human being in residence and as a professional sociologist, with that province. He gave a most interesting paper on the relation between, for example, divorce and the changes taking place in the Province of Quebec today.

It was his thesis that at one time, in the little world which was Quebec, the unit which he called the extended family—that is, the family of mother, father and children, but the nucleus surrounded by grandparents, aunts and uncles and the like—served a very important social function. It was an economic unit and also a moral unit who gazed upon the hierarchy of authority, with the father at the apex.

With the coming of industrialization, however, the breakdown of rural life, the radical change both in our way of earning our bread and in our manners and customs, this extended family has gone. Now the family unit consists of mother

and father, frequently each out seeking to earn income to support the children; and furthermore the children were living in an era when the choice of marriage was dictated by the notion of individual freedom and romantic love.

This means that for all sorts of reasons the change from a romantic notion of marriage based upon so-called love to the fact that the mother and father occupy equal positions in the family unit itself means that the incidence of unstable marriages is very much greater, unstable marriages in a time when the individual feels that he has a right to happiness. If the law denies him that right to happiness by refusing to permit him to obtain a divorce and live apart, or choose another wife, then either he will ignore the law or his generation, as soon as it comes into power and can exert political leverage, will change the law.

As I have said, Elton is a sociologist, and he predicts that the generation coming into power in Quebec is almost on the point of changing the law; and, of course, there is a coincidence between what he says and the fact that the Civil Code of Quebec is under considerable revision in all its parts.

At the same meeting a paper was given by my distinguished French colleague, Professor Beaudoin, dealing with the setting up in Quebec of a new structure of family courts. The interesting thing is that Professor Beaudoin—the paper was in French—described very much what Judge O'Hearn was pressing upon you this afternoon: that is to say, what he calls a family tribunal which would deal with all matters relating to the family, upon the same theory as that of Judge O'Hearn, that the family is a unit: you cannot break it up and send the children to one court and the parents to another court, and so on and so forth.

He advocates one tribunal which should have the status of a Superior Court having full jurisdiction over all matters relating to the family, and there is little doubt that steps will be taken soon, in Quebec at least, to plan at least the structure of family courts.

This is also consistent to some extent with what is happening in the United Kingdom. There of course an extremely powerful commission was set up one or two years ago, and about six months ago they published a report in which many topics were discussed, one of them the breakdown theory of marriage, another the setting-up of, if you like, a family division of the High Court of Justice—and in a sense, although we all have our different views, the family is just as important a matter of judicial concern as is the case of a contract or torts.

Messrs. Chairmen, I came here under somewhat false pretences, my purpose being to suggest, I hope not disrespectfully, that perhaps this committee might consider more particularly some of the changes going on in Quebec and realize, as I am sure they do, that there are in that province many lawyers who are giving considerable attention to these matters.

Whilst I would not have the impertinence to suggest that I would know how to solve particular difficulties, I am by no means persuaded that perhaps some working compromise might not be found binding to your committee.

Thank you very much.

The CO-CHAIRMAN (*Senator Roebuck*): You are not here under any false pretences, Professor Gow. I for one am very much interested in what is going on in Quebec, and in the thinking that is taking place in that very important province. The meeting is open for questions.

Senator FLYNN: Since I am from Quebec, I think I shou'd say a few words. Generally, I am in agreement with Professor Gow, but when he says that in the Province of Quebec there is lack of interest in this committee, while that may be true I would describe the attitude as one of indifference, because, outside the

large centres of Montreal and Quebec City, one hundred percent of the population belong to the Catholic faith, and that makes the problem merely theoretical.

I know, however, the problem is acute in Montreal and in the region of Quebec City. It seems to me we might find ground for agreement with Quebec if we did not try to solve all the problems which are incidental to those which have been referred to us by Parliament but restricted the questions of marriage and divorce to their essentials.

If we try to solve all the incidental problems, which pertain mostly to property and civil rights, we may have a direct impact on the system which is being reformed and which is still very much a live issue in Quebec.

Perhaps Professor Gow would like to comment on my suggestion that, whatever the grounds for divorce might be, we may expect eventually that if in any province, including Newfoundland—because Newfoundland, in many respects, is in the same category as Quebec as far as divorce is concerned—the legislature is not given jurisdiction over divorce, the Exchequer Court of Canada might have jurisdiction to grant decrees of divorce.

It would not solve the whole problem but at least, at the beginning, the provincial legislature could just provide that a divorce, like an annulment of marriage, would entitle the other spouse to certain rights, mainly those that are provided for putative marriages in Quebec, and possibly for the support of the spouse, as provided in our judicial separation.

That is my view of the problem. I do not know whether it is in complete accord with what the witness has said.

Professor Gow: What Senator Flynn says represents the only practicable political solution. Whilst I imagine it is possible for the Parliament of Canada to legislate on incidental matters concerning divorce, matters which would attach to property and civil rights, I confess that in that respect the members of this committee are better judges than I on the possible repercussions. I am reasonably confident that the solution the senator has indicated is probably the one which will come about, provided dissolution of marriage is made available within the provincial legislature and the courts will work out the pros and cons to ensure the civil and property rights of the people of Quebec.

Senator FLYNN: Speaking of the evolution of society in Quebec, and also the law, the religious authorities are now in agreement that some form of civil marriage should be arranged. At present, only officers of the various religious faiths are empowered to perform marriages. The Catholic Church is in agreement that there should be some provision to appoint officers like judges, or welfare courts, mayors for instance, to celebrate marriages in a purely civil ceremony.

Professor Gow: I understand that the Quebec Code Revision people are recommending the same thing. There are changes taking place.

Mr. RYAN: I wish to commend Professor Gow on his presentation; it is excellent. At this time I do not wish to ask questions, particularly pertaining to the Province of Quebec, but I would ask Mr. Gow to say how far he would go in implementing his remark that he would like to see a superior family court in each province deal with all family matters. What would you consider "all family matters" to be, Mr. Gow?

Professor Gow: All family matters as given in the paper comprise such things as—

Mr. RYAN: What page?

Professor Gow: It is not in mine. I am referring to Professor Beaudoin's paper in which he said that this tribunal would be divided into several sections and would take notice of, for example, the break-up of the family, the abandoning of children, wife desertion, juvenile delinquency, alimentary obligations, custody of children, separation as to bed and board, divorce, ill treatment of children, custody of and right of access to children, division of the community of property: in other words, he covers every aspect of family life.

Mr. RYAN: There are such matters as wife beatings, drunken husbands, and so on.

Professor Gow: Those would be included. He emphasizes "*mauvais traitement aux enfants*" but he does not say anything about the matters you have mentioned.

Mr. RYAN: I thought you had in mind a sort of specialty court to deal with these other matters that clutter up the court. What would your thinking be along that line?

Professor Gow: I have not thought about this to any great extent. My thinking, in so far as it has any weight, is this: that we should certainly recognize in our court structure the importance of this unit called the family. They are setting up a Division of the High Court or Supreme Court to deal with the very difficult psychological and personal problems which this family unit creates, which tribunal would have the ability to call upon social workers and the like, with possibly special training for judges. But these are just random thoughts. One of the unfortunate facts about divorce is that it creates almost as many problems as it solves, and the incidental problems, so far as the children are concerned, are of grave concern to the nation.

The Co-CHAIRMAN (*Mr. Cameron*): That concludes the questioning, and I presume, Senator Roebuck, you will thank our distinguished visitor.

The Co-CHAIRMAN (*Senator Roebuck*): Yes. It is a privilege to perform this function of thanking the witness, for our thanks are surely his due.

It is indeed beneficial to us who live in other provinces, who do not speak the French language, perhaps do not belong to the dominant church of the French community to hear something from a well-informed source about conditions in the Province of Quebec. Mr. Gow has thrown light upon what to us is a shadowy scene, and I am delighted to know that a leavening change is taking place in that province.

I think it should be noted that Quebec is not the only province in which there is reason for change and in which change is being discussed and talked about. Other provinces have different problems, but they all have problems, and the spirit of inquiry and change is abroad from one coast to the other.

I was particularly interested, Mr. Gow, in this brief that you have submitted to us, and on the very first page I found a thought that had not struck me so forcibly before. We in the Province of Ontario are continually reminded that under the Civil Code of Quebec marriage can be dissolved only by the natural death of one of the parties; for while both parties live it is indissoluble.

Well, that is what has been told us right along and you, sir, have pointed out that that phrase has been torn from its context, because in the Civil Code there are other provisions as well such as the prohibition of polygamy, and I fancy the definition you would give, sir, is not a particularly technical one. Marriage may be with the benefit of clergy, but we have a great many of them, *de facto* marriages, that are not celebrated in that way; and we have found that insistence upon the continuance of marriages that are dead brings about marriages that are not regular and so, in a sense, polygamous.

The code permits the annulment of marriages contracted without the free consent of the parties, contracted in error, and annulments for manifest impotence, consanguinity, affinity within certain degrees, the fact that the parties have not attained the required age, and a number of other such reasons.

Professor Gow's submission throws to a certain extent a different light upon what seemed to us to be a very narrow and dogmatic provision in the Quebec Code. It is not nearly so strict as it would look to us in the way in which it has been cited to us by others. And so, Professor Gow, right through your brief you have given us a good deal to think about, and we thank you for it. We thank you for coming here and spending your time, giving us of your professional knowledge and helping us in the difficult task that lies ahead of us. Thank you, sir.

The Co-CHAIRMAN (*Mr. Cameron*): There being nothing more before the committee, we will adjourn.

The committee adjourned.

APPENDIX "29"

November 28th, 1966

Robert McCleave, M.P., Esq.,
House of Commons,
Ottawa, Canada

Dear Mr. McCleave:

Many, if not most, people have strong views on marriage and divorce and I am no exception. As a Roman Catholic, I am wholeheartedly committed to the principle that sacramental marriage, at least, is indissoluble and that all marriage is best approached on that principle in the interest not only of society but of the persons concerned. That is, monogamous, indissoluble marriage is best suited to the dignity and welfare of men and women.

In a critical approach to any idea, it is quite legitimate to take into account the bias of its proponents, who may be misstating the facts, concealing evidence or sliding over contrary indications, but bias does not justify discrediting the rational force of the argument itself because of the person who uses it. On the other hand, the considered view of such a large part of mankind, especially of the Western World and, in particular, of Canada should not be treated lightly or disregarded as merely religious prejudice.

Nevertheless, the dissolution of marriage is an established fact of modern life and it is likely to be with us in some form for a considerable time hence. Such being the case, without admitting the validity of a civil dissolution of marriage, Catholics should do what they can to make the divorce laws more just and more humane. As expressed by a well-known Jesuit writer, Rev. Francis Canavan,

There are sound reasons, therefore, for resisting the lowering of legal moral standards. None the less, the law must in the long run reflect the beliefs of the people, because it ultimately depends on their consent. When the moral consensus that has supported a law in the past breaks down to a sufficient degree, the law must change or become a dead letter. (Catholic Mind, April, 1966, p. 53)

The attached memorandum and draft Act on marriage and divorce is an attempt to improve the law in those elements that my experience suggests are deficient. While we know each other well enough, it is only fair that I should outline that experience. Despite the fact that I have avoided divorce practice (more on ethical grounds than religious ones—so many divorces involve some fraud on the court) I am familiar with divorce law and with the practice here. As a lawyer, judge, former prosecuting officer, former director of the N.S. Bar Society's Legal Aid Clinic and active member of the Halifax Archdiocesan Catholic Charities Committee, as well as being former president of several societies with welfare functions, such as the Nova Scotia Division of Red Cross, the Children's Aid Society and the Charitable Irish Society of Halifax, I have been in almost daily touch with domestic problems since I was admitted to the Bar.

I firmly believe that our approach to those problems is too legalistic and abstract and that both bench and bar tend to treat divorce too much as a privilege to be paid for, such as limited liability, rather than as a human problem. After all, a lawyer who engages in divorce practice, under present conditions, with the object of saving as many marriages as possible will not have

much divorce practice. By a process of natural selection, the barristers who are most efficient in getting divorces will tend to get the bulk of the business. They are not to be blamed for this but it is not a happy situation for marriages that might be saved. We need to adopt the approach that has had some success in meeting other domestic conflicts. I am submitting the attached memorandum to you, not only because you are M.P. for Halifax but because you have had to deal with these problems yourself and have shown a truly humane concern for them.

Yours sincerely.

P. J. T. O Hearn.

Brief to the Special Joint Committee of the Senate and
House of Commons on Divorce by

P.J.T. O Hearn, Judge of the County Court, Halifax, N.S.

MARRIAGE AND DIVORCE

DIVORCE in Canada is dealt with by the wrong courts, by the wrong judicial techniques and is granted on the wrong grounds. Divorce is a serious personal matter to the parties involved but its public importance derives from its impact on society. Broken homes lead to maladjusted personalities, unhappy children, economic disabilities, a certain social disintegration, sometimes to crime. A second marriage after a divorce can re-establish family life on a renewed basis but the traumatic effect of the separation is often not completely cured, especially in children. Divorce is a remedy for personal problems but it, itself, is a social problem.

It is not really a legal problem. There are interesting legal problems that arise in divorce cases but the only important point is to make sure that the judgment in any matrimonial suit is recognized generally and not only in the law district of the court that pronounces it.

Marriage can be considered apart from divorce but divorce cannot be considered apart from marriage. The committee should take the opportunity that is afforded it in examining divorce law to try to reach a rational scheme for both marriage and divorce that would go far to satisfy the just complaints of everybody.

It might be objected that to do so would raise questions likely to distract Parliament from the needed divorce reform and likely also to rouse controversy that would imperil the reform. This is not really probable if the needed reforms of marriage law are accepted by the committee. They are much more likely to win adherents to the divorce reform and it seems improbable that a satisfactory divorce reform can be effected while ignoring those aspects of marriage law that presently cause dissatisfaction, especially if they contribute to divorce.

A concrete proposal is attached in the form of a draft Act and this memorandum is framed as an explanation of the draft because it is the experience of the writer that, in dealing with such a topic, a draft such as this enables people to get at the real meat of the thing in aspects that are important but that are likely to be overlooked in a discussion confined to principles.

1. PURPOSE

The long title states that the Act is designed, not only to amend, but to restate the law respecting marriage and divorce. The committee is considering fundamental revision of the approach to divorce law but divorce is dependent upon marriage and cannot itself be divorced from that topic. Moreover, both the law of divorce and the law of marriage are in an unsatisfactory state in Canada. The objections to the present divorce law have been well canvassed before the Committee but there are aspects of marriage law that are unhealthy or unjust in their operation and that contribute to the number of unsatisfactory marriages and hence to the number of divorces sought.²

2. DEFINITIONS

It is usual to defer consideration of definitions to the end of a bill, but the definition of 'family court' is relevant to the complaint that the wrong courts handle divorce cases. The courts named in the definition are, in every instance, the ones named by provincial statutes or territorial ordinances to deal with family matters. In some places they are staffed by justices of the peace who may not be lawyers. This should not be an objection to giving them jurisdiction in matrimonial suits, however, as they are charged under provincial legislation with deciding questions of equal social and legal importance and of equal difficulty. These include, in addition to juvenile offenders, such matters as neglected children, maintenance and wardship. In many instances, where the court is designated as the family court or social welfare court, the court handles all family legal disputes except judicial separation, nullity and divorce. Such a court is constantly deciding questions of the utmost importance concerning the status and welfare of individuals. They use techniques of investigation and conciliation that have proved effective in helping families to achieve stability. They deal with the social problems well and with the incidental legal problems well enough. In each case there is some means of getting any really difficult legal problem before a court of appeal.

In contrast, divorce courts handle cases without any investigatory staff and without social welfare techniques much in the same way as the winding up of a company might proceed. Indeed, many marriages are dealt with in less time and with less care than a contested trial for speeding. The divorce courts usually have the same judicial personnel as the superior courts of the provinces and move about in like manner, on assizes. This means that an individual case gets its day in court as a legal action but none of the care that such a social problem requires. A judge on circuit is rarely disposed to adjourn such a case for further inquiries or conciliation procedures, even if it is legally possible. The tempo and procedure of the superior courts is well enough designed for deciding strictly legal questions but it is quite inappropriate for the settlement of broken marriages or other domestic problems.

A transfer of matrimonial suits to the family courts is the rational solution: to try to adapt the practice of the superior courts to the techniques of the family courts would only create confusion in the superior courts. Since Parliament has jurisdiction over Marriage and Divorce it can impose such jurisdiction on provincial courts.³

The 'family court' is defined here to consist of all the social welfare, family or juvenile courts of the province, as the case may be, as a single court, although the individual courts of which it is composed may have limited territorial jurisdiction. This is analogous to the way in which the Family and Children's Court of British Columbia is set up and seems best suited to deal with questions

of domicile in federal law while leaving the allocation of the business among the courts to provincial regulation.⁴ The spelling of the names of the courts is that used in the Act or ordinance that establishes the court.

The other definitions are designed to avoid excess wordage. It avoids circumlocution to include void or voidable marriages within the meaning of 'marriage'. 'Matrimonial suits' are also called 'matrimonial causes' in the law but 'suit' is equally appropriate to a claim for relief and is less ambiguous. 'Petitioner' etc., are defined to include 'plaintiff' etc., because in some provinces divorces are sought in actions rather than by a petition. The latter is chosen as having a wider meaning and as being suitable where the parties make a joint claim (such as is contemplated here in nullity suits) where the action form is not suitable.

3. APPLICATION

The application of the Act retroactively would validate some marriages and invalidate others. This has an alarming sound but the most probable effect in each case would be to satisfy the parties involved. The further provisions of the Act would restrict intermeddling by other parties to a much greater degree than is now the case and making the Act retroactive would enable those who now have the problem of a civilly valid, religiously invalid, marriage or *vice versa* to solve that problem, something that is now difficult or impossible to do.

3 (2) Application to Provinces

Should the law of marriage and divorce be uniform throughout Canada? The *Confederation Debates* in the pre-Confederation Province of Canada Parliament reveal that the Fathers of Confederation were well aware of the profound differences in outlook that the predominant religious and national groups held on these topics and had no wish to disturb those views.⁵ They were also aware of the impact of marriage law on provincial society especially in the reserved provincial field of property and civil rights and they had no wish to disturb that.⁶ The expressed intention in giving marriage to the central parliament was to ensure recognition of marriages throughout the country⁷ and the expressed intention in giving divorce to the central parliament was to relieve the legislature of Quebec of the repugnant dilemma of granting divorces or refusing them to the minority in that province⁸ and to make divorce difficult⁹.

On this ground, I have proposed elsewhere¹⁰ (following a suggestion of Senator Pouliot¹¹) that the constitution should be changed by transferring jurisdiction over 'Marriage and Divorce' back to the provinces and that the federal government should have, instead, a more general power to regulate the recognition of the laws and judicial decrees of the provinces in other provinces and territories, a power for which there is some need in any case. Nevertheless, to hand power over marriage and divorce back to the provinces, where it rationally belongs, would require a constitutional amendment, a matter that, in this case, should receive the consideration of the provincial governments; this would be time-consuming and might inhibit reform, which is pressing. Constitutional reform is the best solution but the proper concern of the provinces with the social and economic effects of marriage and divorce can be dealt with to a reasonable extent by excluding any provisions that a province finds objectionable from having force in that province. It is not a complete solution because it does not permit a province to adopt any reform other than the one passed by Parliament.

As long, however, as Marriage and Divorce is a class¹² of federal jurisdiction it would seem desirable for the Parliament of Canada to fulfill its function by enacting the best law that can be devised for the Canadian scene and it is

reasonably likely that the only strong objections to a reform of the law of marriage and divorce throughout the country would be to the introduction of divorce in those provinces where the courts do not provide it.

Newfoundland and Quebec would, no doubt, wish to exclude the divorce provisions and other provinces might find the reformed grounds for divorce unacceptable. Quebec might also want to exclude the provisions respecting judicial separation, as the Civil Code deal with that topic in a way that is similar to the draft but not quite the same.¹³

Subsection (2) of s. 3 is designed to do two things:—(1) It will require a provincial legislature to consider the topic and act within a reasonable time if it wishes to exclude the reform, a responsibility that most legislatures would be tempted to put off if the reform required any positive action on its part; (2) The law will not come into force and then be excluded: if it did, it would reveal any existing repugnant law and this would not be revived by the exclusion. The legislature would not be able to re-enact it as it would be within the exclusive jurisdiction of the Parliament of Canada.

4. CAPACITY TO MARRY.

At common law, a marriage by a man under fourteen years or a woman under twelve years was voidable, void if either was under seven. The Quebec *Civil Code*, Article 115, provides that a man cannot contract marriage before the full age of fourteen years nor a woman before the full age of twelve years. With present social welfare services there does not seem to be any need for a boy and girl to get married to give their child a name, a most unfortunate way to begin married life in any case. Marriages at too young an age are likely to be unstable and the suggested age of eighteen is hardly mature enough to ensure against many ill considered marriages. There is some control over these through provincial licensing provisions under the power over Solemnization of Marriage, but the provincial restrictions are easily got round and they cannot deal with non-age as an absolute incapacity. In 1929, Great Britain adopted sixteen years as the minimum age for marriage, an age that seems ludicrous for marriage in today's world.¹⁴

The requirement that the parties be able to understand the nature and obligations of marriage is something that applies to all contracts and all legal act. As commonly interpreted it does not require any great intelligence, but the incapacity can arise from mental deficiency or insanity. Temporary causes, such as intoxication, affect intention and consent, rather than capacity, and are dealt with in s. 5 (1) (a).

Potency (the capacity to have sexual intercourse) was formerly considered an essential part of the capacity to marry but now the lack of it is considered to render a marriage voidable only and the draft deals with it in that context (s. 5 (1) (c)). That is, even though one partner is impotent, the parties can treat the marriage as valid and strangers are not allowed to challenge it.

4 (2) Consanguinity

Consanguinity (relation by blood) as an impediment is expressed in subsection (2) according to the current law which is derived from a statute of Henry VIII (1540).¹⁵ It is the rule accepted by the Anglican communion but it does not cover some impediments recognized by the Roman Catholic Church and, probably, some of the Eastern churches.¹⁶ Subsection (2) of s. 5 will reconcile the differences between civil and religious views, but only if consanguinity as a secular incapacity is limited to the extent set out in subsection (2).

4 (3) Affinity

Affinity is a relation that exists between a person and his or her spouse's relatives. It has been dealt with in a small way by the *Marriage and Divorce Act*, R.S. 1952, c. 176, but it does not seem to have any social function as a secular impediment to marriage and should be eliminated as such on that ground. It is unjust to Jews and those others, Christians or not, who do not recognize affinity as an impediment. Its operation as a religious impediment is saved by subsection (2) of section 5.

4 (4)(5) Void Marriages

The law has gradually approached the view that a marriage should be absolutely void only where it affects a public interest or is socially harmful. The public and social interest in avoiding bigamous and incestuous marriages is obvious and the like interest exists in avoiding marriages by those who are too young or who are too incompetent mentally to know the nature and obligations of marriage. The public interest will disappear, however, when the first spouse dies or the party becomes of age or sane, and in such cases the remaining objections to the marriage are private ones and should render it voidable only.

5. VOIDABLE MARRIAGES

The primary distinction between void and voidable marriages is that void marriages are absolute nullities but the parties to a voidable marriage may elect to treat it as valid or even make it valid. The election may, in some cases, be limited to the innocent party.

Clause (a) and (b) of s. 5 (1) merely spell out the intent now required by law for marriage and the necessity for a free and unmistakable consent¹⁷. Clause (c) deals with impotence, already mentioned under s. 3. It is expressed in very general terms but in accord with the tenor of the existing law.¹⁸ It does not deal explicitly with the case where two people find they cannot have sexual intercourse with each other although one or both might be able to have it with others, but this seems now well established as implied in the notion of impotence.

In Great Britain, other grounds have been added by statute¹⁹, such as venereal disease or pregnancy by another man at the time of marriage, as well as insanity not necessarily affecting the capacity to understand required by s. 4 (1) (b). Wilful refusal to consummate the marriage is also included in the British statute but, where it does not afford evidence of lack of proper matrimonial consent or impotence justifying avoidance of the marriage on one of those grounds, it would seem more appropriate to treat it as a ground for dissolution, because it is subsequent to the solemnization.

5 (2) Religious Impediments

Subsection (2) is designed to favour freedom of conscience by permitting the parties to choose the rules of any religious denomination to govern their marriage, subject to the basic requirements set out in the Act, rather than by imposing the rules of a particular denomination on all marriages.

It was not the intention of the Fathers of Confederation to disturb the beliefs, practices, rites or rights of the peoples of Canada in relation to religious marriage²⁰ but, in fact, since the Reformation, the impediments and incapacities recognized by the Church of England and none other have had the force of law in British Dominions where the common law prevails. In Quebec, however, Article 127 of the *Civil Code* enacted a more liberal regime, whereby the other

impediments recognized by the various denominations were recognized also for civil law purposes, and this enabled the adherents of those religions to follow their consciences in the matter: the question of a marriage that was valid by civil law but religiously invalid could arise, but rarely. Subsection (2) is similar in effect to the Quebec law. Marriage is still, for most of mankind, a contract governed by religious ideas and rules. The statute law deals with it in the manner it does only because the statute was intended to impose religious uniformity.²¹ In a pluralistic society this is not appropriate and the Quebec solution is preferable, as it meets the demands of most consciences.

The Quebec law has been applied, however, to try to prevent the marriage of Roman Catholics in another church²² with the implication that a person is not free to change his religion and this is not acceptable in our society. In subsection (2), this problem is resolved by making the rite in which the marriage is solemnized the determining factor.

Since religious impediments are included in the draft to protect individual freedom of conscience and not, as formerly, to uphold the beliefs of a particular denomination, there seems to be no reason to permit anyone not a party to challenge the marriage on such grounds: i.e., they should render the marriage voidable, not void.

5 (3) Multiple Ceremonies

Questions about validity may arise in a marriage where there are two or more religious rites or one or more religious rites and a civil ceremony. If no enacted solution is given, the courts, considering s.5 (2) and the rest of the Act, would probably conclude, quite properly, that a marriage is valid if valid under the rules relating to any of the solemnizations. The objection to this is that it is a restraint on conscience. When people go through two (or more) religious ceremonies as part of the process of getting married it is usually because they consider religion quite important and differ on the subject. In the instant case, therefore, at least one party could have the problem of a marriage valid at law but invalid in conscience and this should be resolved in favour of freedom of conscience. Analogous reasons apply in the case of a dual civil and religious ceremony: the parties usually go through a civil ceremony to secure legal benefits while the contemporary religious ceremony is for reasons of belief and conscience.

The reasons do not apply where the marriage ceremonies are not substantially contemporary: the parties would go through a later form of marriage usually to validate a marriage that they feel is defective in some aspect and their intention would therefore be to validate.²³

5 (4) Approbation

Marriages are voidable because they were entered into without the necessary intent or consent or under fundamental mistake as to the identity of the other party or the nature of the transaction. Such a marriage can therefore be entered into by the parties when they have the requisite knowledge and intent and are free to consent. This may be done at that point simply by a tacit consent called approbation, i.e., continuing to live together as man and wife freely and with full knowledge of the nature of the marriage and its defects. In canon law approbation was assumed in some cases after a specified time, but the common law treats it as a question of fact in each case²⁴. The courts can usually manage this satisfactorily and since the marriage is a matter of public record with civil effects and since 'All legal presumptions are in favour of the validity of a marriage'²⁵ it does not seem unreasonable to put the onus of repudiating the

marriage on the parties when they are free to do so and know that it is voidable. Until now, non-age (i.e., being under 14 or 12 years of age) has been treated as rendering a marriage merely voidable²⁶ so that there is no break in continuity of the law in applying subsection (4) to such a case.

6. NULLITY SUITS

Who may sue to avoid a marriage? The first part of subsection (1) states the existing law but the second part limits intervention to the spouses and to their joint lifetime. The second half is now the rule in cases of impotence²⁷ but it seems reasonable and just that no one not a party to the marriage should be able to attack it if it can be affirmed by a party.

People with an interest in attacking a marriage would include a partner in a second marriage entered into while the first was apparently still subsisting (i.e. not dissolved or declared null) who, under the subsection, could sue for a declaration that the other marriage, if void, was a nullity or, under subsection (2) could sue for a declaration that his own marriage is valid. Those who might acquire money or property if a marriage is invalid would also have an interest in attacking it but, if the marriage is not contrary to public policy, the integrity of the marriage should be preferred to any pecuniary claim.

The law provides adequate means for incompetent people to bring suits so that there seems to be no need to allow others to do it on their behalf expressly.

6 (2) Suits by Parties

The concept of the 'guilty party' is not appropriate to nullity suits unless one party has really done something he should not have done, e.g., used force or deceit, misrepresented his identity, or entered the marriage with an improper intent. Subsections (3) and (4) deal with such cases. In other instances it seems proper to allow both parties to sue for an annulment. Subsection (2) also allows a suit for a declaration of validity, a remedy that is not now available everywhere²⁸ except through indirect action, as in a suit for restitution of conjugal rights. The latter action has been dropped as repugant to the principle that the courts will not interfere in the intimate details of domestic life or attempt to regulate them. The action for restitution of conjugal rights at one time formed a basis for a presumption of desertion,²⁹ but there seems no real reason to incorporate it in the reform. The suit for a declaration of validity is a better method of establishing that fact.

6 (3) (4) Wrongdoer Barred

Subsections (3) and (4) are applications of the legal maxim that a wrongdoer is not permitted to take advantage of his wrongdoing.

6 (5) Jurisdiction in Nullity

While a suit for nullity may quite often mean that a possible marriage has broken down and that the special techniques of the family court are appropriate, nullity is more nearly a purely legal question than any other matrimonial question and it impinges on the law of property. It can arise incidently in other litigation about property. It is therefore a question that, in the interest of convenient judicial process, should be triable in the ordinary courts dealing with property claims, and those courts are accordingly mentioned in subsection (5) in addition to the family court.

In most common law countries, the law district of the domicile of the parties is recognized as the one that is competent to make law about their *status* and the courts of that district are recognized as competent to deal with *status*.³⁰ If the

law district of the domicile recognizes the laws or judgments of another law district, those laws or judgments will be generally recognized as determinative of *status*. In Canada, *status*, being a matter of civil rights and property is determined in most cases by the law of the province and for that reason a person domiciled in Canada is generally regarded as domiciled in a particular province. Laws respecting *status*, however, are not exclusively provincial. The Parliament of Canada may, for example, give a special status to seamen, as it has done in the *Canada Shipping Act*.³¹ Laws respecting marriage and divorce also determine the status of people and these are within the exclusive jurisdiction of Parliament. It can determine the court of competent jurisdiction without reference to actual domicile as it has done in the *Divorce Jurisdiction Act*³² and there seems to be no good reason why it cannot determine what is domicile for purposes of marriage and divorce: this seems to be a clear implication from the Privy Council case of *Attorney General for Alberta v. Cook*.³³

There is no problem of recognition if the parties are domiciled anywhere in Canada because the federal law will also be the law of the law district (i.e. province) of domicile and will be entitled to international recognition as such,³⁴ even if the foreign court recognizes provincial domicile only.

In matter of marriage and divorce, Canadian domicile is to be preferred as the governing concept rather than provincial domicile because of the mobility of people in our day, the large number of people who are transferred for business or public service reasons, the frequency of desertions and the difficulty in many cases of determining provincial domicile. These considerations do not apply with the same force to expatriate Canadians because emigration with intent to acquire a new domicile requires more formal legal steps and often involves a change of nationality.

In nullity suits, in addition to domicile, residence of the parties is recognized as giving the courts of a law district competence. Indeed, it is enough if the respondent is resident.³⁵ Subsection (5) is designated to allocate suits on a fair basis to fit in with the recognized bases of jurisdiction. It does not include the case where a petitioner is resident but not domiciled in Canada, and the respondent cannot be found: in such case only a decree of the domicile or recognized by the domicile would appear to be effective for international recognition.³⁶ Subsection (6) may give some relief in these cases.

6 (6) Domicil of 'Wife'

A married woman takes the domicile of her husband, but what of a woman who is not validly married to the man? In England it is considered that she has the same domicile as the man,³⁷ but several of the United States hold otherwise. The reason for upholding only one domicile in this case is so that there will be only one law district competent to determine the status relations between the parties but in the world of today it is hardly possible to achieve such a result. The theorists object to the concept of a separate domicile because it puts the court in a dilemma: to take jurisdiction over the case it has to assume that the marriage is a nullity, the very question to be decided. There is no real problem here. What the court decides in effect is whether the woman is unmarried and whether she has a domicile in the district of the court. If the answer to both is 'yes', the court has jurisdiction to declare nullity. If the answer to either is 'no', the court has not.

Where a woman can acquire a separate domicile she has much more scope to deal with the case where the man has deserted her or where his domicile is uncertain.

6 (7) Proof of Religious Impediments

Without section 6, subsection (7), the courts would call experts in canon law as witnesses and try to apply it themselves when any question of the rules of a religious denomination arose in a matrimonial suit. This is just as undesirable as any other case where a court lawyer tries to understand and apply a strange law, a familiar matter in Canada, and the subsection eliminates most of the problem. The adjective 'competent' will enable the civil courts to confine church tribunals to their proper spheres and ensure that they operate according to the principles of natural justice.

6 (8) Children Legitimate

It seems unjust and repugnant to our ideas that children should be deprived of any rights because of the failures or incapacities of their parents. The only doubt about subsection (8) is a constitutional one. Is it trespassing on matters within provincial jurisdiction? It is expressed so as to limit the effect of a decree of nullity and that should be within the competence of Parliament, except, perhaps, where the nullity is due to a defect in the solemnization of the marriage. This could be cured by supplementary provincial legislation, which would probably follow in reasonable course. The subsection enlarges the existing law. Thereunder the issue of void marriages are illegitimate.³⁸

7. 'JACTITATION' OF MARRIAGE

It happens that a person sometimes pretends to be the husband or wife of another in a way that becomes a nuisance to the other. This is hardly a matrimonial matter unless there is some legal evidence that the parties are married. In the former case, the ordinary courts should be able to deal with it. In the latter case, the appropriate court would appear to be the one that deals with the validity of marriages. Section 7 submits a reasonably efficient way of dealing with both aspects of the matter.

8. JUDICIAL SEPARATION

While judicial separation impinges on and affects the provincial law subjects of property and civil rights it is historically and of its nature a matter of marriage and divorce within the competence of the ecclesiastical courts at common law. Indeed 'divorce' in ecclesiastical law applies only to this remedy, the other being unknown.³⁹ There cannot be any real doubt that the Parliament of Canada has power to deal with it. It should be dealt with in any general restatement of the law of matrimonial suits but it is of particular importance in this draft because it is treated as an essential preliminary to a suit for dissolution of marriage. The reasons for this will emerge.

English and Canadian courts exercise jurisdiction in suits for judicial separation where the parties are domiciled in the law district of the court or either party is resident therein.⁴⁰ The clauses of subsection (1) allocate this jurisdiction among the Canadian courts in what appears to be a just and reasonable manner, on the basis of Canadian domicile (which is not, however, necessary to make the wording effective; i.e., the wording works even if provincial domicile is kept as the rule.)

The great change in subsection (1) is that it transfers jurisdiction to the family court exclusively. Judicial separation is obviously the situation where the special agents and techniques of the family court are most needed and most likely to succeed. Divorce is likely to be too late a stage (one reason for making judicial separation a condition precedent) and the people and processes of the family court may be irrelevant in many nullity suits where the marriage is

legally impossible. To try to do justice to a broken marriage in the austere and impersonal atmosphere of the ordinary divorce court, under the usual procedures and subject to the usual limitations of time and personnel, is not only unjust and impractical but almost absurd. It could only be defended on the view that the questions involved are merely legal and that dealing with domestic disruption is like dealing with a bill of sale or a claim for damages. This is hardly the case.

8 (2) Grounds for Separation

The causes in the draft that justify separation are close to those urged as causes for divorce in the brief of the Canadian Mental Health Association⁴¹ and comprise most of the reasons that people give in our time for separating. The need to show real infidelity by repeated adultery or other sexual misbehaviour has been well established elsewhere and need not be reiterated here. The acts of cruelty or profligacy mentioned are also those used in canon law to justify a temporary separation and accord with common knowledge of the occasions, at least, for separation. As to desertion, there seems to be no real need for requiring a set period of desertion as a condition precedent as it would seem best to get the parties into the conciliation process as early as possible. Moreover, the draft contemplates a year's waiting period after judicial separation before divorce is possible.

There may be other grounds for separation that should be considered, such as insanity. Insanity may lead one of the parties to acts of cruelty, profligacy or crime such as would justify separation under subsection (2) clause (b) but, as the Canadian Mental Health Association brief points out,⁴² insanity in itself is an illness and misfortune. It would be shameful to permit the well partner to leave the insane one in the lurch for this reason alone: There should be positive grounds arising under subsection (2) and insanity in itself should not be a ground for a decree.

Incurable insanity deserves separate consideration. If it exists it certainly frustrates some of the purposes of marriage,—consortium, sexual intercourse and the begetting and rearing of children. It is becoming more doubtful all the time with the progress of modern science that any insanity can be classified irrevocably as incurable. On the assumption that incurable insanity exists, however, the situation is strictly analogous to the case of a husband and wife where one becomes so permanently ill in a physical sense that all the ends of marriage are frustrated. There is still this aspect of consortium, of the mutual love and service of the family society, left: the sound partner can show love and devotion for the other and preserve the family society. This is the true and ultimate fulfillment of marriage, the fulfillment of each partner by love and service to the other, and it is the giving, rather than the getting that makes marriage the great means of making us better human beings. The notion that one might cast off a partner who becomes physically incapable is castigated by Lord Chancellor, Sir Thomas More, in a remarkably modern passage dealing with marriage and divorce in his *Utopia* (2nd English edition, 1556):—

For they judge it a great point of cruelty that anybody in their most need of help and comfort, should be cast off and forsaken, and that old age, which both bringeth sickness with it, and is a sickness itself, should unkindly and unfaithfully be dealt with.

What emerges is that incurable illness, even when it cuts the ill partner off from all contact with the sound one, does not frustrate all the good of marriage. Two of the highest goods remain:—fidelity and outgoing love towards the ill partner.

In the passage just cited from *Utopia*, Sir Thomas More goes on to describe divorce by mutual consent in certain circumstances in terms implying approval, at least for non-Christian marriages. This raises the question 'Should not judicial separation by mutual consent be allowed?'. It is not permitted at present and is expressly forbidden by the Quebec *Civil Code*, Art. 186. But the marriage partners can freely enter into a separation agreement that gives them rights very similar to those given by the decree of judicial separation. Why should they not be permitted to take out a consent decree for judicial separation?

This might have some value of it meant that the good offices of the family court would be automatically called into play. On the other hand, the public interest in upholding the marriage bond, the interests of the children and, in the case of the present draft, the fact that the decree is a necessary prelude to a divorce application, argue against permitting judicial separation except for socially meaningful and serious causes. One of the causes of the discontent with the present law of divorce and disrespect for it is that many have the idea that divorce actions are largely *pro forma* and rarely deal with the real causes of the breakdown. A similar contempt could easily arise for a law permitting judicial separation for any cause or none.

8 (3) (4) Effect of the Decree and Reconciliation

The effect of the decree, as stated in subsections (3) and (4), is in accord with the existing law although the ordinary presumption of reconciliation from resumption of cohabitation may not be conclusive. Does a further matrimonial offence receive the effect of the ones committed before reconciliation? The Courts have rules for dealing with this question which it seems needless to restate.⁴⁴

8 (5)(6) Countersuits and Both Parties to Blame

Quite often in domestic cases both parties are to blame, or the party who starts the action may not have the better cause to do so. Subsection (5) provides for the case of countersuits (rather than putting them in subsection (2) where to do so would require much extra wordage) and subsection (6) permits the court to act where both parties have given cause. The provision forbidding a decree against the wishes of a party who has not given cause is merely an instance of the legal maxim that a party shall not be allowed to profit by his own wrong, a maxim that seems to have a lot of human nature behind it. While today's approach is to try to treat the disturbance of family unity rather than to accentuate matrimonial offences, this is because the curative treatment is productive of results and the penal one is not. The need for real causes before a court intervenes in a domestic society is demanded by the considerations of ordered liberty.

8 (7) Insanity not a Bar

It is made plain by subsection (7) that causes for judicial separation that qualify under subsection (2) are not ruled out because the respondent may not be legally responsible for them by reason of insanity or other incompetency.⁴⁵

9. DISSOLUTION OF MARRIAGE

The draft Act is designed to treat divorce as a social and personal problem rather than a judicial one. The idea of making a judicial separation a necessary preliminary to divorce has many advantages from this point of view. It brings the conciliation procedures of the family court into play in the context of separation rather than dissolution and this will have some psychological effect, even if it is the immediate intent of both parties to go on to divorce. It imposes a waiting period of a year during which the court personnel can not only continue

conciliation procedures but observe the parties and make sure that the separation is irreparable. Waiting periods are a common expedient in this regard but they have been mostly unfruitful because they have been treated as purely juridical devices or, when the King's Proctor was active, they were used to spy on the petitioner to see if he or she were committing adultery. This is not the helpful, human spirit that will help people who have a chance of resuming life together to do so.

9 (1) The Court for Divorce

The same courts are mentioned in s. 9 (1) as in s. 8 (1) although the general rule in the common-law districts of the Commonwealth is that only the court of the domicil of the parties or one recognized by the law of that district has jurisdiction to grant a dissolution.⁴⁶ This concept has suffered great attrition, however, especially in the United States, and the solution proposed is, it is submitted, more just and more convenient than reliance on the rather uncertain notion of domicil. If the parties are domiciled in Canada there is no more problem of foreign recognition under the draft than there is under the present law because the law of Canada will be the law of the domicil, whether it is conceived of as Canada or a single province. If the parties are not domiciled in Canada but reside here, they may well be more interested in a Canadian divorce than one obtained in their domicil, but in such case they should, of course, seek legal advice as to the best jurisdiction for their purposes.

Is the section likely to lead to the establishment in some provinces of divorce mills? This is possible but it does not seem likely, since the jurisdiction is centered on the province where the respondent resides, except in special cases. This would require a more active collaboration of the Respondent than is usual. The great safeguard against the divorce mill, however, should be a properly staffed family court.

9 (2) Grounds for Divorce

Initially, the petitioner will require grounds for a judicial separation. This will ensure that the parties have a serious cause to separate and are not just going through a series of legalized amours. Under subsection (2) the court must then be satisfied that the marriage has broken down completely and irremediably, a ground that there seems to be very general agreement on.⁴⁷ Dissolution can be justified, if at all, only on the basis that the purposes of the marriage cannot be carried out and its good fulfilled—it is frustrated and living together would make the parties worse rather than better human beings. The requirement of proof beyond a reasonable doubt may not be necessary.

The purpose of dissolution, however, is not to separate the parties (whether incidentally, as now, or as a preliminary step, as under the draft) but to permit them to marry again. This is the main effect of a divorce decree. Should divorce be granted in cases where it is obvious that both parties are disqualified by temperament from sustaining a happy marriage? This is not a new idea: some countries will not permit the 'guilty' party to marry again,⁴⁸ presumably on the ground that he or she has shown an unfitness for marriage; but such a divorce may introduce undue complications into other branches of the law without substantial benefit. What is suggested here is that those people who make a career of marriage, divorce, marriage, divorce and so on, obviously do not understand what marriage is about and their marriages only lead to social harm and personal misery.

The only rational answer to this is that one cannot really predict what any human being will continue to be like and that the court could be too easily mistaken about such a question in too many cases to provide any social benefit, quite apart from the injustice such a judgment might inflict on individuals. This

argument, however, is not valid, although the unpredictability of human nature is conceded and even emphasized. Courts are making similar decisions on a probability basis daily and they should be able to cope with this question adequately. Clause (b) says, in effect, that there is no point in wiping out a marriage, although it is broken down, and permitting the parties to remarry unless one, at least, has a hope of a happy remarriage. This does not seem an undue limitation, as it would affect only those who are on the marriage-divorce merry-go-round or who can be classed as psychopathic personalities.

9 (3) Effect of Decree

The effect of the decree of dissolution set out in subsection (2) conforms to the present law, stated in concise terms.⁴⁹

10. Ancillary relief

Guardianship, custody and maintenance clearly fall within the ambit of provincial law when considered by themselves but there is ample law that a court that has jurisdiction in matrimonial causes has jurisdiction to deal with alimony and custody as incidental matters.⁵⁰ This goes far to define the meaning of 'Marriage and Divorce' as a department of the law both for family law and constitutional law, because they must be meant in the same sense in the two fields. There is a case, and a good one, therefore, for treating incidental relief in matters of maintenance and custody as within the jurisdiction of Parliament. The matter is not completely without doubt, of course, but the sounder and safer course should be to include these powers. The rights of the provinces are preserved by giving provincial law overriding effect in subsection (3). It is submitted that this is a reasonable solution to a problem that demands some solution, and the one most likely to be viable.

The courts' powers to deal with custody and maintenance should extend to all matrimonial suits, including those for nullity or a declaration of validity because, once such a case gets in the matrimonial court, the court should be able to deal with all the outstanding questions of this nature between the parties. In England, ss. 16 and 17 of the *Matrimonial Causes Act, 1965* allow the court to make extensive property settlements and such powers are desirable and may be implied in the wording of draft s. 10 (2) (a) and (b). On the other hand, such matters ordinarily are within the exclusive jurisdiction of the provinces and there may be a constitutional difficulty here. Perhaps they should be included on the basis that the powers are incidental and necessary for the proper disposition of matrimonial suits.

11. Appeals

The wording in these sections is modelled in general on the appellate provisions in the rules of the superior courts, which give very wide powers of appeal and which, in their appellate divisions, are the present courts of appeal in matrimonial suits. This is continued. The exception in subsection (1) of orders made by a judge in the exercise of his proper discretion applies only to those traffic directions that a judge is called upon to make in the course of a lawsuit. Even these are appealable if he makes his order on a wrong legal principle.

12. Rules of Court

There are provisions similar to this section in *Criminal Code* S. 424 and they deal with a similar problem: the administration of federal law by provincial courts of a great diversity of constitution. The rule making authority is usually the court itself but, in the draft, several courts will have concurrent jurisdiction in some classes of suit and, except in British Columbia, the principal court given jurisdiction, the family court, does not have the province as the unit, but is

composed of district courts. This complexity seems easier to solve by the provincial government, advised by the attorney general and in consultation with the courts involved.

Overall federal government control is preserved by subsection (4).

13. Acts Repealed

The statutes repealed deal with matters that are all disposed of in one way or another in the draft. This section should not come into force in any province that asks to be excluded from any provisions of the Act to the extent that the present law of the province depends upon the repealed Acts.

NOTES

1. This point is dealt with more fully in the discussion of ss 6(5), 7(2), 8(1) and 9(1) of the draft Act.

2. See the discussion under ss. 4, 5 and 6.

3. There should not be any real constitutional difficulty in granting jurisdiction in matrimonial suits to family courts. The objection would be to conferring on judges appointed and paid by the provinces the jurisdiction of a superior court. Divorce courts as such do not seem to have been recognized as superior courts either by legislative enactment or judicial acceptance, however, although it has been common to have the same judicial personnel for both superior and divorce courts and in some provinces divorce jurisdiction is conferred directly on the superior court. The jurisdiction of most divorce courts in Canada was modelled or remodelled on that of the English Court for Divorce and Matrimonial Causes, (1857), 20 & 21 Vic. c. 85, which was a court of record with many of the powers of a superior court, but it was not declared to be a superior court. The Department of Justice takes an amusingly ambiguous position on this: The Governor General in Council appoints the judges of the divorce courts but when a county or district court judge is appointed a judge of a divorce court the Department will not recognize him as a superior court judge.

4. See draft Act, s. 12 (b) and (e).

5. See the *Confederation Debates*, i.e., *Parliamentary Debates on the Subject of the Confederation of the British North American Provinces*, (Quebec, 1865, reprinted by King's Printer, Ottawa, 1951) pp. 388, 389, 579. Honorable Hector Langevin, Solicitor General East, who piloted the resolution in this aspect, twice read into the record the following written declaration (pp. 388, 579):

The word marriage has been placed in the draft of the proposed Constitution to invest the Federal Parliament with the right of declaring what marriages shall be held and deemed to be valid throughout the whole extent of the Confederacy, without, however, interfering in any particular with the doctrines or rites of the religious creeds to which the contracting parties may belong.

6. Ibid. pp. 388-9, 578-9, 690-2.

7. Ibid. pp. 388, 579.

8. Ibid., Rémillard (on the government side) p. 785.

9. Ibid., Solicitor General Langevin, at p. 389:

We found this power existing in the constitutions of the different provinces, and not being able to get rid of it, we wished to banish it as far from us as possible. . .

After mature consideration, we resolved to leave it to the Central Legislature, thinking thereby to increase the difficulties of a procedure which is at present so easy.

10. *Peace, Order and Good Government* (Macmillan, Toronto, 1964) pp. 5, 44, 158, 170.

11. *Debates of the Senate*, 3rd Session, 24th Parliament, vol. 108, No. 70. p. 1020. See also Mr. Prittie's Bill C-41, 1st Sess. 27th Parl., one of the bills referred to the Joint Committee.

12. See British North America Act, 1867, s. 91, class 26.

13. Code Civil de la Province de Québec, Titre VI.

14. Four hundred years ago, Sir Thomas More, in *Utopia*, suggested 18 as a minimum for women, 22 for men.

15. (1540) 32 Hen. 8, c. 38.

16. E.g., a marriage between first cousins is considered invalid unless dispensed. Under Jewish law a descendant of Aaron must marry a virgin of his own clan (Lev. XXI: 7, 17) and this has been applied by an English court in our time: *Neuman v. Neuman* (alias Greenberg), *Times*, Oct. 15, 1926.

17. See, e.g., *Latey on Divorce* (14th ed., 1952) pp. 18, 19; 19 Halsbury (3d Ed.) 775 & 1240; 38 C.J. 1299 & 55; 55 and C.J.S. 842 & 18.

18. *Ibid.* pp. 19, 353 & seq.

19. *Matrimonial Causes Act*, 1965, 1965 c. 72 s. 9 (U.K.)

20. See note 5 above.

21. See the preamble to 32 Hen. 9, c. 38 (note 15 above).

22. It was so applied in *Bergeron v. Kirklow* 45 R.L.N.S. 370 which was, however, reversed in *Howard v. Bergeron* 71 Que. K.B. 154, 1941 4 D.L.R. 360, on the ground that the Papal decree *Ne temere* is not in force in Quebec, i.e., the religious impediments are frozen as of 1867 and cannot be changed as far as Civil Code art. 127 is concerned except by the Parliament of Canada.

23. See *Yorkshire v. Chalpin*, 1943 Que. K.B. 677 (C.A.)

24. *Latey on Divorce*, pp. 201-2. Roman Catholic canonists, however, do not generally accept the possibility of approbation.

25. *Ibid.* 389-390; *Brown & Watt's Divorce and Matrimonial Causes* (9th ed., 1921) p. 92.

26. *Latey on Divorce*, p. 14 In England a marriage is now void rather than voidable if either party is under 16: see 12 Halsbury (3rd) 224.

27. *Latey on Divorce*, p. 194 & seq.; a different view, similar to that in the draft Act, is stated in 12 Halsbury (3rd) 223-6.

28. Most of the superior courts have express jurisdiction to make a declaratory judgment but some divorce courts do not have this explicitly. In England, the court has express power to make a declaration of the validity of marriage by s. 39(1) of the Matrimonial Causes Act, 1965. See 12 Halsbury (3rd) 223, 289-90.

29. *Latey on Divorce*, p. 186; see *Putting Asunder* (note 47), p. 127, s.29.

30. G.C. Cheshire, *Private International Law* (3rd ed. 1947) p. 146 & seq.

31. R.S.C. 1952, c. 29.
32. R.S.C. 1952, c. 84.
33. 1926 A.C. 444, at pp. 449-50.
34. Cheshire, op. cit. pp. 450-58.
35. Ibid. pp. 493 & seq.
36. Ibid.
37. *Attorney General for Alberta v. Cook* (note 33); Cheshire op. cit. 463-5.
38. *Matrimonial Causes Act*, 1965, 1965 c. 72 s. 11. Even without the limitation to voidable marriages the phraseology used would render illegitimate any child of a void marriage. See, also, 12 Halsbury (3rd) 228.
39. 12 Halsbury (3rd) 214.
40. Cheshire, op. cit, p. 493 & seq.
41. *Submission to the Special Joint Committee of the Senate and House of Commons on Divorce by the Canadian Mental Health Association*, Draft No. 3, November, 1966.
42. Ibid., pp. 7-8 ss. 9 and 10.
43. *Utopia*, Part II, Of Bondmen, Sick Persons, Wedlock and divers other matters.
44. See *Latey on Divorce*, pp. 152-6; 12 Halsbury (3rd) 303, 305-7, 416.
45. See 12 Halsbury (3rd) 292-3, but it must be remembered that insanity is not a substantive ground for divorce in Canada.
46. Cheshire, op. cit. pp. 470 & seq.
47. In addition to the Canadian Mental Health Association (note 41) others that share this view are the 22nd General Council of the United Church of Canada, and the Mortimer Committee appointed by the Archbishop of Canterbury which produced *Putting Asunder: A divorce law for contemporary society* (October, 1966). The submission of the Canadian Bar Association to the Joint Committee of the Senate and House of Commons covers grounds that could be subsumed under this canon. The Mortimer Report makes many suggestions along the line of the present submission, but the text was not available to me when preparing it.
48. E.g., South Africa: see Cheshire, op. cit., p. 491.
49. 12 Halsbury (3rd) 410-11.
50. *Lee v. Lee* 1920 3 W.W.R. 530, 54 D.L.R. 608 (C.A. Alta.); *Brown v. Brown*, (1907) 13 B.C.R. 73 Hunter C.J.B.C.); *Wood v. Wood*, (1884) 1 Man. R. 317 (Man.); *Cumpson v. Cumpson* 1934 O.R. 60, 1934 1. D.L.R. 46 (Ont. C.A.); *King v. King* (1904) 37 N.S.R. 204 (N.S.C.A.); *McNair v. McNair* 1923 2 W.W.R. 46, 1923 2 D.L.R. 465 (Alta. C.A.).

DRAFT

MARRIAGE AND DIVORCE ACT, 1967

An Act to Amend and Restate the Law respecting Marriage and Divorce

SHORT TITLE

1. This Act may be cited as the *Marriage and Divorce Act, 1967*.

INTERPRETATION

2. In this Act,

(a) 'family court' means

(i) in the Province of Ontario, the Juvenile and Family Courts;

(ii) in the Province of Quebec, the Social Welfare Courts;

(iii) in the Province of Nova Scotia, the Family Courts;

(iv) in the Province of New Brunswick, the juvenile courts;

(v) in the Province of Manitoba, the family courts;

(vi) in the Province of British Columbia, the Family and Children's Court of British Columbia;

(vii) in the Province of Prince Edward Island, the county and juvenile courts;

(viii) in the Province of Saskatchewan, the district courts;

(ix) in the Province of Alberta, the Family Courts;

(x) in the Province of Newfoundland, the Family Courts;

(xi) in the Yukon Territory, a police magistrate or two justices of the peace, sitting together;

(xii) in the Northwest Territories, a police magistrate or two justices of the peace, sitting together

(b) 'marriage' includes a void or voidable marriage;

(c) 'matrimonial suit' means any of the suits that are authorized by this Act;

(d) 'petitioner' includes a plaintiff, 'respondent' includes a defendant, 'sue' includes commencing an action and 'suit' includes an action.

APPLICATION

3. (1) This Act shall apply to all marriages whether solemnized before or after it comes into force and whether solemnized in Canada or elsewhere.

(2) This Act shall come into force on the _____ day of _____, 1967, but if, before that date, the legislature of any province resolves that the Act or any provisions of it shall not be in force in that province, the Governor General in Council may issue a proclamation to that effect and thereupon the Act or the provisions in question shall not come into force in that province until the legislature resolves and the Governor General in Council issues a proclamation that they shall be in force: the latter resolution and proclamation may bring into force all or parts only of what is not in force.

CAPACITY TO MARRY

4. (1) No person, male or female, has the capacity to marry unless, when the marriage is solemnized he or she is not then married, is eighteen years of age or more and is intelligent and sane enough to know the nature and obligations of marriage.

(2) No one, male or female has the capacity to marry anyone related to him or her in lineal consanguinity, that is, in the direct line, ascendant or descendant, however far apart in degree; no man has the capacity to marry his father's or mother's sister, his sister, or any descendant of his brother or sister; no woman has the capacity to marry her father's or mother's brother, her brother or any descendant of her brother or sister; consanguinity has the same effect whether it arises through lawful wedlock or otherwise and whether it is consanguinity of the half-blood or of the whole blood.

(3) Affinity does not affect the capacity to marry but it may constitute an impediment to marriage arising under subsection (2) of section 5.

(4) A marriage is void if, when it was solemnized, the parties lacked the capacity to marry each other or either party lacked the capacity to marry.

(5) A void marriage becomes voidable if the incapacity rendering it void ceases.

VOIDABLE MARRIAGES

5. (1) A marriage is voidable if, when it was solemnized,

- (a) either party did not have the intent that it should be monogamous, that it should continue until the death of one of the parties and that the parties should have their conjugal rights;
- (b) either party entered it under duress or fraud; under a mistake as to of the proceedings;
the identity of the other party or under a mistake as to the nature
- (c) either party was incapable of normal sexual intercourse, although not necessarily incapable of engendering children.

(2) A marriage solemnized according to the rite of a religious denomination is voidable if it is void or voidable under the rules of that denomination although it may not be otherwise void or voidable under this Act or under the laws respecting the solemnization of marriage.

(3) Where a marriage, otherwise valid under this Act and the laws respecting the solemnization of marriage, is solemnized according to the rite of more than one religious denomination, or according to the rite of one or more religious denominations and in a civil ceremony, and the parties intend each of the solemnizations to form a part only of a single transaction of marriage dependent upon more than one solemnization for completeness, the marriage is voidable if it is void or voidable according to the rules of any of the religious denominations concerned; but if the parties do not intend the solemnizations to form such a single transaction of marriage, the marriage is valid if it is valid under the rules applicable to any of the solemnizations that alone or together form a single transaction.

(4) A voidable marriage becomes valid if the parties, or the one entitled to sue for a declaration of nullity if there is only one who may do so, freely affirm it, knowing it to be voidable; a party who, knowing a marriage to be voidable, voluntarily continues to cohabit with the other party after a reasonably sufficient time to sue for a declaration of nullity has elapsed, without suing, is deemed to have affirmed the marriage.

NULLITY SUITS

6. (1) Anyone with a sufficient interest may sue for a declaration that a void marriage is a nullity and may question the validity of a void marriage in any legal proceeding but no voidable marriage shall be declared to be a nullity except at the suit of a party or after the death of a party.

(2) Except where it is otherwise provided in this section, either or both of the parties to a marriage may sue for a declaration that the marriage is valid or that, being void or voidable, it is a nullity.

(3) A party to a marriage may not sue for a declaration that the marriage is a nullity on any ground mentioned in clause (a) of subsection (1) of section 5 unless the lack of the required intent was shared by both parties or was that of the other party only.

(4) A party to a marriage may not sue for a declaration that the marriage is a nullity on any ground mentioned in clause (b) of subsection (1) of section 5, if he was a party to the duress or fraud or entered the marriage knowing that the other party was mistaken as to his identity.

(5) A suit under this section may be brought in the trial division of the superior court, in a county court or in the family court of

- (a) the province where the marriage was solemnized;
- (b) the province where the respondent resides;
- (c) the province where the petitioner resides if the petitioner is domiciled in Canada and the respondent cannot be found; or
- (d) any province, if either party is domiciled in Canada but neither resides in Canada.

(6) For the purposes of subsection (5) a woman who is a party to a void marriage may have a domicile separate from the man and a woman who is a party to a voidable marriage may acquire a separate domicile from the man if the marriage has not become valid and they have ceased cohabitation as man and wife.

(7) The decree of a competent tribunal of the religious denomination in question that a marriage solemnized according to the rite of that denomination is valid, void or voidable under the rules of that denomination shall be conclusive evidence of that fact in any court in Canada.

(8) A void or voidable marriage that is declared to be a nullity is a nullity from its beginning except that all children of the union shall be, for all purposes, the children of the parties as if they were lawfully married to each other.

JACTITATION OF MARRIAGE

7. (1) Any person may sue to restrain another person from holding himself or herself out as the husband or wife of the petitioner and for the actual damages of such holding out.

(2) The suit may be brought in any of the courts mentioned in section 6; it may also be brought in any superior court or county court having jurisdiction over the person of the respondent but in that case the court shall stay further proceedings on the suit if satisfied that the parties have gone through a form of marriage at any time unless it has jurisdiction under this Act to determine the validity of the marriage.

(3) A court that orders a suit stayed under subsection (2) may transfer the suit to any court having jurisdiction under this Act to determine the validity of the marriage, whether it is in the same province or not.

JUDICIAL SEPARATION

8. (1) Either party to a marriage may sue for a judicial separation in the family court of

- (a) the province where the petitioner resides;
- (b) the province where the petitioner and respondent last resided together, if the respondent has deserted the petitioner or the petitioner has left the respondent for any cause mentioned in subsection (2) and if the respondent cannot be found; or
- (c) any province, if the parties are domiciled in Canada but neither party resides in Canada.

(2) The family court, after investigating the history of the marriage and the characters of the parties and after such procedures to reconcile them and to assure the welfare of any children of the marriage as it deems proper, may decree a judicial separation of the parties, if satisfied that it is in the interest of at least one of the parties or of the children to do so and that

- (a) the respondent has repeatedly committed adultery or sexually deviant acts with another person or an animal that have not been caused, connived at, consented to or condoned by the petitioner;
- (b) the respondent, by repeated acts of mental or physical cruelty, by leading a criminal or profligate life or by habitual drunkenness or drug addiction, has made cohabitation unsafe or not reasonably tolerable for the petitioner or for the children;
- (c) the respondent has deserted the petitioner by ceasing, without just cause, to cohabit with the petitioner or to provide proper maintenance for the petitioner.

(3) Upon a decree of judicial separation, the right and obligation of each party to cohabit with the other ceases and neither party is obliged to have sexual intercourse with the other.

(4) Where a husband and wife who have been judicially separated are reconciled, the decree ceases to have effect, except as is otherwise provided by valid provincial law, and resumption of cohabitation is conclusive evidence of reconciliation.

(5) The provisions of subsection (2) shall apply to a countersuit for judicial separation by the respondent.

(6) It is not a bar to a judicial separation that both petitioner and respondent have furnished grounds for it if the court is satisfied that it is in the interests of at least one of the parties or the children to grant the separation, but the court shall not grant a judicial separation against the wishes of a party who has not furnished grounds for the separation.

(7) It is not a bar to a judicial separation that a party is mentally ill or incompetent if that party has, in fact, whether intentionally or otherwise, furnished any ground for the separation.

DISSOLUTION OF MARRIAGE

9. (1) A person who has been granted a judicial separation may, when a year has elapsed since the decree, apply to the court that granted the decree or to a court mentioned in subsection (1) of section 8 for the dissolution of the marriage.

(2) The court applied to may grant a decree dissolving the marriage, if satisfied beyond a reasonable doubt

- (a) that the marriage has broken down completely and irremediably, and
- (b) that one of the parties, at least, has the maturity, generosity and other elements of character and capacity needed to marry again with a reasonable possibility of success.

(3) An absolute decree dissolving a marriage is a judgment *in rem* that the marriage is at an end and either party, if otherwise capable, may marry again as soon as the time for appeal has expired or, if an appeal is asserted, as soon as it has been dismissed.

ANCILLARY RELIEF

10. (1) A court in which any matrimonial suit is pending may make such order as may be proper for the maintenance of the parties and for the custody and maintenance of the children until the suit is determined.

(2) A court that declares a marriage valid or a nullity that grants a judicial separation or that dissolves a marriage may, by the decree or by a separate order at any time thereafter,

- (a) provide for the guardianship, custody and maintenance of the children and what access there shall be to a child by the party not awarded custody of that child;
- (b) provide for the maintenance of the female party or, if he is unable to maintain himself, of the male party;
- (c) provide that the female may or may not continue to be known by the surname of the male party;

and the court may change any of the foregoing provisions from time to time if changed circumstances justify it in doing so.

(3) Every provision in every such decree or order concerning guardianship, custody, maintenance, access or surname shall conform to the law of the province for which the court is constituted and may be superseded by the judgment, order or decree of a court having jurisdiction over the matter under the law of the province.

APPEALS

11. (1) Every judgment, decree, order or decision made by a judge, in court or in chambers, in a matrimonial suit, except orders made in the exercise of the discretion that belongs to him by law, may be appealed to the court of appeal for the province.

(2) On appeal, the court of appeal shall have all the powers of the court or judge appealed from, including the power to amend, to hear evidence and to draw inferences of fact; it may make any order that ought to have been made or such further or other order as the case requires and shall confirm, modify or quash the judgment, decree, order or decision appealed from as the justice of the case requires and, if it modifies or quashes, it may order a new trial of the suit or of issues therein.

(3) In this section, 'court of appeal' means

- (a) in the Province of Ontario, the Court of Appeal;
- (b) in the province of Quebec, the Court of Queen's Bench, appeal side
- (c) in the Province of Nova Scotia, the Appeal Division of the Supreme Court;
- (d) in the Province of New Brunswick, the Court of Appeal, otherwise known as the Appeal Division of the Supreme Court;
- (e) in the Province of British Columbia, the Court of Appeal;

- (f) in the Province of Prince Edward Island, the Supreme Court;
- (g) in the Province of Manitoba, the Court of Appeal;
- (h) in the Province of Saskatchewan, the Court of Appeal;
- (i) in the Province of Alberta, the Appellate Division of the Supreme Court;
- (j) in the Province of Newfoundland, the Supreme Court, constituted by two or more judges thereof;
- (k) in the Yukon Territory, the Court of Appeal and
- (l) in the Northwest Territories, the Court of Appeal.

RULES OF COURT

12. (1) The lieutenant governor in council of a province may make rules not inconsistent with this Act or any other Act of the Parliament of Canada to regulate matrimonial suits in the courts of the provinces, including appeals.

(2) Rules made under subsection (1) may

- (a) regulate the sittings of a court or of any division thereof or of any judge of the court sitting in chambers, and the duties of the officers of the court, except in so far as the sittings and duties are regulated by law;
- (b) provide for the allocation of matrimonial suits among the territorial divisions of the province that relate to the courts in question;
- (c) regulate the pleading, practice and procedure in the court;
- (d) provide when and how matrimonial suits for different remedies, including counter-suits, may be combined in one suit or tried together or may be combined or tried together with applications or actions under provincial law for the guardianship, custody or maintenance of a party or of the children;
- (e) provide for the transfer of matrimonial suits between the different courts in the province or between the courts of the province and of other provinces;
- (f) require the parties to submit to pre-trial conferences or examinations by the officers of the court or to mental, psychological or physical examination by a medical practitioner or psychologist designated by the court and to take part in conciliation procedures;
- (g) provide for the assistance to the court of experts in medicine, surgery, psychiatry, psychology, foreign law, canon law or the rules of any religious denomination or family welfare work, as assessors or otherwise (provided that no issue in a matrimonial suit shall be tried by a jury);
- (h) regulate the imposition and amount of costs; and
- (i) regulate appeals.

(3) Rules of court relating to matrimonial suits or any class thereof that are in force in any province shall continue in force except to the extent that they may be amended or repealed by rules made under this Act.

(4) The Governor in Council may make such provisions as he considers proper to secure uniformity in the rules of court in matrimonial suits and to secure the recognition and enforcement of the judgments, orders and decrees in such suits of the courts of a province in other provinces and any provision made under the authority of this subsection shall prevail and have effect as if enacted in this Act.

(5) Rules and provisions made under the authority of this section shall be published in the *Canada Gazette*.

REPEAL

13. (1) Upon the coming into force of this Act in any province, the following Acts will no longer be in force in that province:—

The Marriage and Divorce Act, Chapter 176 of the Revised Statutes, 1952;
The Divorce Act (Ontario), Chapter 85 of the Revised Statutes, 1952;
The Divorce Jurisdiction Act, Chapter 84 of the Revised Statutes, 1952;
The British Columbia Divorce Appeals Act, Chapter 21 of the Revised Statutes, 1952.

(2) No decree of nullity, judicial separation or dissolution of marriage shall be made except in conformity with this Act, in any province where it is in force.

APPENDIX "30"

Brief to the Special Joint Committee of the Senate
 and House of Commons on Divorce by
 J. J. Gow, Gale Professor of Roman Law, Faculty of Law,
 McGill University, 3644 Peel Street, Montreal, Quebec.

PROBLEMS OF MATRIMONIAL RELIEF

If the language of the Civil Code be taken literally, together with the belief that those residents of Quebec who are affected by its provisions on marriage, loyally and meekly obey, then there would be few, if any, problems of matrimonial relief arising within "la belle province" for article 185 is as dogmatic in philosophy as it is curt in expression—

"Marriage can only be dissolved by the natural death of one of the parties; while both live, it is indissoluble."

Yet the Civil Code does not wholly ignore the consequences of original sin, for example,

- (i) *it prohibits polygamy* (arts. 118 and 136)
- (ii) *it permits annulment* of a marriage
 - (a) contracted without the *free consent* of either party (arts. 116 and 148);
 - (b) where one of the parties has contracted under *error* as to the person of the other (art. 148);
 - (c) to which at the time of the marriage one party was apparently and manifestly *impotent*;
 - (d) between parties *related* to each other by *consanguinity* or *affinity* within certain degrees (arts. 124, 125, 126 and 152);
 - (e) contracted before both parties have attained the *required age* of 14 years if male, twelve years if female (arts. 115 and 153);
 - (f) lacking consent of father or mother, tutor or curator, or without advice of a family council, in cases (under majority, insanity) where such consent or advice was necessary (art. 150)
 - (g) *improperly constituted* (art. 156)

(iii) it permits separation *a mensa et thoro* to either spouse on the ground of

- (a) the other's adultery (arts. 187, 188)
- (b) outrage, ill-usage or grievous insult (scil. *saeuita*) committed to him or her by the other (art. 189) and to the wife if the husband refuse to receive and maintain her (art. 191)

Transcending these domestic remedies there is the divorce *a vinculo*, obtainable by those who have the money and the patience, by means of a private Act of the Parliament of Canada. Although the law of Quebec cannot wholly ignore the fact that a "Quebec" marriage has been dissolved by statute, it does its best to turn its back to the whole affair. The consequences of this Nelsonian attitude can be horrific. For the moment, however, my task is to ask whether in this Province there should be provided not only separation *a mensa et thoro* but also divorce *a vinculo* and to suggest, should the answer in principle be in the affirmative, some of the problems which such an answer creates.

Should there be provided in the province of Quebec the remedy of divorce *a vinculo*?

At this stage in the history of Western European and North American civilization, to many it may seem a trifle artless to ask why the law of Quebec does not recognize the remedy of divorce, yet, in order that there be as little misunderstanding as the artificial context of an academic discussion permits the question should be put and demands answers. What the contemporary answers, if any, would be are matters beyond the writer's ken, but some historical answers are available.

There is little doubt that the philosophy of the law of Quebec in the matter of divorce, namely, that marriage is a religious sacrament, is that which prevailed in the greater part of Western Europe from about the 13th century until about the end of the 18th. Under *Roman law*, and throughout the Empire (East and West), marriage was a civil contract with which the state did not interfere. It became a matter of litigation or judicial intervention only when the parties could not agree upon a divorce or the consequent division of property or the future of the children. In short, divorce was by mutual consent or on certain specified grounds, *divortium ex bona gratia* (Constantine 331 A. D.), *divortium cum damno* (Justinian 542 A.D.). Marriage and divorce were for the parties, whom failing the temporal power. In so far as a "church" or religious organization was concerned it was free to establish rules applicable to and binding on a member to the extent of his conscience and membership but no more.

The Roman Catholic Church did not, at least by the end of the first millennium of the Christian era, accept this philosophy and based its contrary view on Matthew (5:31-32, 19:8-9), Mark (10:11), Luke (16:18) and Corinthians (I. 7:10). That martial Christian and founder of the canon law, Gratian by his *Decretum* (1140) declared the indissolubility of marriage, but the definitive step was taken by the Council of Trent (1545-63) which anathematized those who denied that marriage was one of the evangelical sacraments and who argued that the Church erred in maintaining the indissolubility of marriage as a sacrament. Some forty years before Luther, (*circa* 1520) rejected the sacramental nature of marriage and its indissolubility. Calvin conceded divorce for adultery and desertion. On the whole, the Reformers were, in theory at least, prepared to recognize civil divorce but conventional morality or the Roman Catholic Church were the stronger. With the exception of Holland, the Scandinavian countries and Scotland, broadly speaking, Western Europe, whether catholic or protestant, and protestant England knew no "civil divorce" other than that which the Church, the Head of State or Parliament granted.

In that Europe the first relatively modern attempt to assert the primacy of the concept of marriage as a civil contract subject to the jurisdiction of the courts was made by the catholic Joseph II of Austria by his ordinance of 1783, but the momentous break with the ecclesiastical laws of what Bryce described as "the dark and middle ages" came with the French Revolution. In 1792 the French legislature introduced divorce by mutual consent and for adultery or incompatibility of temperament. The Code Napoleon (arts. 229-33) did not repudiate these grounds but limited their application and added cruelty. This freedom was shortlived. In 1816 the Bourbons abolished divorce and the remedy was not restored until the Loi Naquet was passed in 1884, this time without the ground of mutual consent. In 1941 the Pétain regime, which abolished "Liberty, Equality, Fraternity" in favour of "Work, Family, Homeland", restricted the availability of the remedy notwithstanding the marriage of the Maréchal to a divorcée. This restriction was annulled by de Gaulle's ordonnance of 1945. For the rest of Europe the turning point was partly the revolution of 1848, partly the advent of codification. Whatever the reason, divorce in country after country, whether protestant or catholic, became a secular remedy. In England the Matrimonial Causes Act, 1857 established a jurisdiction in the civil courts to grant divorce on the ground of adultery. This Act, as amended by the Parliament of Canada, is the basis of divorce jurisdiction in Ontario and the Western Provinces. Nova Scotia has had a Divorce Act since 1758, New Brunswick since 1787, and Prince Edward Island since 1835. Newfoundland, like Quebec, has no comparable legislation.

On the face of things, therefore it looks as if the influences which had affected Europe, England, and the rest of Canada had simply passed by Quebec, leaving, *faute de mieux* the Roman Catholic Church securely in control of the social institutions of the province. This may have been so, but perhaps the explanation is not quite so simple.

Loranger, in the second volume of his fascinating "*Commentaire sur le Code Civil du Bas-Canada*" (Commentary on the Civil Code of Lower Canada) published in 1879, suggests a more complex pattern of events. In his Avant-Propos he poses the question—

"What authority has precedence in this field? The ecclesiastic authority? The Civil authority? Or do these two authorities share the jurisdiction between themselves...?"—and describes how France disliked the decrees of the Council of Trent and that out of the decrees of the Parliament of Paris "decrees encouraged and advocated by the Gallic jurists, there arose a new form of jurisprudence, affirming the State's competence as regards the impediments to marriage, and, in this regard proclaiming the superiority of the civil authority over the spiritual authority. From this jurisprudence was born civil marriage, the child of the Revolution, the godless marriage of the *Code Napoléon*!" Two pages later he points out that in New France "under French rule, the dominant principle in the field of marriage, as in all other fields of shared authority, was the sovereignty of the civil authority over the ecclesiastic authority. The fact is beyond dispute. It was the civil and canon jurisprudence of France which influenced the Colony, where, as in the mother country, Gallic liberties prevailed. These liberties, as we pointed out in volume one of this work, "are totally inapplicable in Canada, since they owe their existence in France solely to the relationship between Church and State; since these relationships, which existed under the old regime in the Colony, were severed by the change of sovereignty, and since the century long independence of the Church in Canada has destroyed every last trace of them." Then he goes on to suggest that in the absence of a Quebec jurisprudence, a Quebec jurisconsult, unlike his French counterpart, is unable in this matter "to lean towards

the civil authority". His real, as distinct from his forensic, reasons for this conclusion emerge in his criticism of Pothier's opinion that "Marriage, being a contract, concerns like all other contracts, the political order, and is therefore subject, like all other contracts, to the legislation of the secular authority which God has established to regulate all that which concerns the government and good order of civil society." After excusing Pothier's fall from grace, he says—

"There is no doubt but that the dominant ideas of the mother country in the field of civil and religious liberty, i.e. the Gallic principles, were generally prevalent in civil and canon jurisdiction during the entire period of French rule. The Gallic principle in this field is the predominance of the civil authority over the religious authority. . .

"Through the change of Sovereignty, the Church in Canada was freed of its dependence on the State, and the doctrine of the competence of the civil authority as regards marriage disappeared along with several other tenets. Had this doctrine survived under the new regime, it would have meant that legislation concerning Catholic marriage in Lower Canada would have passed to the Protestant government of England. It is not hard to imagine the damaging effects on our religious liberty which the exercise of this power would have had. Those who value the conservation of this liberty no less than political liberty and who consider them both as the foundation of our national autonomy will be immediately aware of these effects.

"Fortunately, the contrary principle prevailed. . . Catholic marriage with its own individual characteristics was legally recognized in Lower Canada."

Fortified by this jurisprudential separation of Church from State, Loranger has no difficulty in concluding that an Act of the Parliament of Canada cannot dissolve a marriage contracted in Lower Canada. Whether the parties be catholic or protestant, to both alike articles 118 and 185 of the Civil Code apply and to the former there is the added reason of religious faith.

Sixteen years later, Mignault, in discussing art. 185, says, "I must admit that, as a Catholic, I consider marriage validly contracted to be indissoluble while both parties live. This is the doctrine of canon law and a Catholic cannot, in conscience, claim otherwise. . . in this province, and as regards divorced Catholics who wish to remarry, the principle set forth by canon law and taught by the Catholic Church remains unchanged, unassailable and indisputable." Some forty-seven years later still, Trudel, in 1942, commenting on art. 185, is no less emphatic, "Besides this very clear theory in our civil legislation, Canadian jurists must take into account federal legislation on divorce. Before doing so, the author, as a Catholic, must make this reservation, that he accepts these laws neither in principle nor in practice".

These are the ostensible answers as given by three reputable Québécois jurisconsults. Do they in 1966 justify in Quebec the prohibition of art. 185?

There seems little doubt that so far as "national autonomy" of those who in Quebec speak French as their mother tongue there is no need to rely upon the Roman Catholic Church. They control the legislature, the public services, their education, lower and higher, in fact the means of intellectual communication from press to television. They cannot reasonably fear inimical legislation by another sovereign power, protestant or otherwise. If a threat to their "national autonomy" does exist it can only be from the fact that from the Rio Grande to the North Pole, with the exception of Quebec, the French-Canadian writ does not run. Whatever the nature of that threat it is doubtful whether the Roman Catholic Church can be as in the past it appears to have been, a bulwark against what the Greeks would have called the barbarians.

Assuming little substance in the argument based on l'autonomie nationale, is art. 185 justified on the ground so succinctly expressed by Mignault that "the principle set forth by canon law and taught by the Catholic Church remains unchanged, unassailable and indisputable?" Even if it be true that the vast majority of those who live in Quebec are among the most faithful of their church, does it follow that the law of that church must be the law of the land, if so, why?

Clearly, any attempt to provide an answer to this question must canvass issues of such complexity that consideration of them would necessitate a journey far beyond the confines of this brief paper. Some of them merit brief reference. For example given that a stable family life is a desired end of our society, a Christian church which *ex hypothesi* is concerned with the internal regeneration of a human soul is necessarily concerned with the rules of law relating to marriage and its dissolution. Even if within a given community there is a Christian majority of one denomination has it the power in 1966 to impose on all within the territorial boundaries a matrimonial law based on its own ethic? Even if it has the power should such a majority use it? What is the rationale of art. 185? Is it that Jesus when he said, "What therefore God has joined together let not man put asunder", he was legislating for all mankind so that a Christian is under a duty not only to oppose a law providing for divorce and permitting remarriage but to seek its repeal, or was he merely asserting that for the Christian marriage is a personal *vinculum matrimonii*, a precept of lifelong fidelity which a Christian ought to obey or strive to obey? Even if Jesus did so legislate, is the prohibition of art. 185 reasonable and just in modern society? Is it in accord with the nature of men and women? How many Québécois seek papal annulment? How many obtain divorce by Act of Parliament? How many husbands leave their wives and conversely? How many fatherless families are there? How much concubinage is there? How many illegitimate children? If there can be separation *a mensa et thoro*, why cannot there be divorce *a vinculo*—is the distinction real or fanciful? In short, what, if any, are the social consequences of art. 185? In human terms does it cause less or more harm to husband, wife, and children than a law allowing divorce?

Whatever the answers to these several questions the uncontradictable fact seems to be that all significant European countries north of the Mediterranean, with the exception of Italy and Spain, have secular divorce laws, including even Portugal which, until recently at all events, restricted the remedy to non-catholic marriages.

SECULAR PHILOSOPHIES OF DIVORCE

Hitherto it would appear that the assumption upon which this paper proceeds is that marriage and divorce is a matter of exclusive provincial jurisdiction. No such assumption or any relevant concession is made by the writer, but the word "jurisdiction" justifies a glance at the Canadian scene and the debate now going on in ultra-Laurentian Canada and beyond upon the nature of the remedy of divorce.

In March of this year there was constituted a Special Joint Committee of the Senate and House of Commons to inquire into and report upon divorce in Canada and the social and legal problems relating thereto. On October 18, 1966, Mr. E. A. Driedger, Deputy Minister and Deputy Attorney General, appeared before this Committee and summarized in general terms the nature and scope of matrimonial relief across the country. This summary, so far as relevant, was substantially as follows—

A. *Divorce a vinculo matrimonii*

(i) To either party in all provinces except Quebec and Newfoundland on the ground of the adultery of the other;

(ii) In Nova Scotia also for cruelty, impotence and consanguinity within prohibited degrees;

(iii) In New Brunswick also for frigidity or impotence and marriage within the prohibited degrees;

(iv) In jurisdictions where the Imperial Matrimonial Causes Act of 1857 applies (British Columbia, Alberta, Saskatchewan, Manitoba, Yukon, Northwest Territories and Ontario) rape, sodomy and bestiality where the wife is the petitioner.

B. *Separation a mensa et thoro*

The Deputy Minister described this relief as "in effect a divorce but without the right to remarry" and stated that in all provinces except Quebec the grounds are adultery, cruelty and desertion for more than two years and, in Alberta and Saskatchewan, desertion where there is failure to comply with a judgment for restitution of conjugal rights, sodomy, bestiality or attempt to commit sodomy or bestiality.

C. *Legislative Jurisdiction*

The British North America Act assigns to the Parliament of Canada exclusive jurisdiction over "Marriage and Divorce", "Divorce" including a divorce *a vinculo matrimonii* and separation *a mensa et thoro*. The Deputy Minister expressed the opinion that the Parliament of Canada has exclusive jurisdiction to confer divorce jurisdiction on provincial courts, stated that the courts for the administration of divorce laws are at present the provincial courts established under head 14 of s. 92 of the B.N.A. Act, but that Parliament could establish a Canadian divorce court under s. 101 of the B.N.A. Act.

In subsequent hearings some of the matters discussed by the Committee have been the desirability of a Canadian domicile and a Canadian divorce court. The latter proposition was forcefully put by Mr. Justice A. A. M. Walsh, Senate Commissioner, who argued strongly for divorce cases being referred to the Exchequer Court and said *inter alia*, "The people in Quebec who object to the present system would still object to the new one, but those who do not object to the present system would have no reason to object to the cases being heard by the Exchequer Court sitting in Ottawa"; in other words, residents of Quebec who disagree with the philosophy and ethic of art. 185 would be entitled to the same relief as are or will or may be the non-Quebec residents in Canada. Perhaps the most important aspect of Mr. Walsh's proposal is that a federal divorce court would enable the development of an uniform Canadian divorce jurisprudence. On the other hand, Dr. P. M. Ollivier, Law Clerk and Parliamentary Counsel, House of Commons, expressed the opinion that the time had not yet arrived for establishing a divorce court in Quebec on the ground that in respect of the proportion of the population that is Catholic divorce is against their religion.

Putting aside, for the moment, the peculiarities of Quebec, perhaps the most interesting and fundamental question now being debated in and before the Committee is that of the rationale of divorce.

When the Morton Commission in the United Kingdom on Marriage and Divorce, which sat from 1951 to 1955, came to write its report it stated that the existing divorce law was founded on the "doctrine of the matrimonial offence", that is, (with the exception of insanity, to which special considerations apply) the petitioner seeking relief must establish that the respondent has been "guilty"

of one of the morally reprehensible grounds, for example, adultery, in respect of which divorce is granted. The two principal objections to this doctrine are—

(i) That the offences (of which alone the courts can take cognizance) are not as a rule the basic cause of the failure of the marriage, but rather symptoms of a deeper and more fundamental malaise.

(ii) The accusatorial procedure which it involves is so remote from the realities of life that many divorce proceedings are in fact elaborately concealed "divorces by consent".

The Morton Commission with one dissentient, Lord Walker (a judge of the Scottish Court of Session), agreed that the law of the matrimonial offence be retained, but differed seriously on the question whether there should be an additional ground based on the principle that there be dissolution of a marriage which has irretrievably broken down. Nine members of the Commission opposed the introduction of the doctrine of "breakdown", nine considered that the time had come for its introduction to a limited extent. Lord Walker alone recommended that the doctrine of the "matrimonial offence" be abandoned and replaced by a doctrine of "breakdown". His description of "breakdown" was—

"A broken marriage may ... be defined as one where the facts and circumstances affecting the lives of the parties adversely to one another are such as to make it improbable that an ordinary husband and wife would ever resume cohabitation."

He was against the co-existence of the doctrines.

At the time when the Morton Committee made its report (20th December, 1955) "breakdown" does not appear to have been as such a ground in any of the countries there described as of the Commonwealth (App. III Table 1), or in the U.S.A. (App. III, Table 3), but such ground, either alone or with other grounds, was then available in Bulgaria, Czechoslovakia, Greece, Hungary, Poland, Russia, Switzerland, Yugoslavia (App. III Table 2). On the other hand, New Zealand recognised "Separation by agreement" and Belgium and Portugal "mutual consent". Since 1955, both New Zealand and Australia have enacted provisions empowering the Court to grant a decree where the parties have lived apart for not less than seven years (New Zealand) or five years (Australia) and there is no reasonable likelihood of cohabitation being resumed. The respective enactments of Belgium, New Zealand and Australia are discussed in the Report by a Group, appointed by the Archbishop of Canterbury in January 1964, to review the law of England concerning divorce. This Report, published in 1966 by the S.P.C.K. under the title "Putting Asunder" recommends that the doctrine of the "matrimonial offence" be abandoned and that of "breakdown" substituted. It rejects not only the "matrimonial offence" but also the doctrine of "mutual consent".

As a cursory reading of the newspapers will tell the wind of "breakdown" is wafting gently across the Canadian landscape. Time and again it has been recommended as worthy of consideration by persons or groups appearing before or making submissions to the Joint Committee sitting in Ottawa, usually together with urgent recommendations for the setting up of reconciliation procedures. The implications, legal and otherwise, of this doctrine as the sole ground can be inferred from the following statement from the Report to the Archbishop of Canterbury.

"If the principle of breakdown were adopted, all verbally formulated "grounds" of divorce would disappear. The acts and circumstances which are defined in the existing "grounds" would then fall to be considered, together with other relevant data presented by the history of a marriage, as evidence of breakdown. Being seen in the context of the matrimonial

relationship as a whole, they would lose the adventitious significance which at present derives from their isolation and verbal formulation and their true significance should then be more apparent. An act of adultery, for instance, would no longer have to be regarded as an independent and self-sufficient reason for dissolving a marriage: its import would be determined by the part it had actually played in the relationship between the husband and wife concerned."

III

SOME PROBLEMS OF THE BROKEN MARRIAGE

Whether the relief of divorce *a vinculo matrimonii* or even separation *a mensa et thoro* be given or not there are and always will be broken marriages. The tragedy of the broken marriage is also a tragedy of our society because it involves in varying degree the fragmentation of our primary social unit, the family. One of the misfortunes of our age is not so much that old loyalties are dying, old faiths disappearing, and many of our political and social institutions crumbling away, but the palpable risk that this one social structure, in which a man and woman and their children may, when all else seems to be in dissolution, still find shelter, is itself under severe stress and strain for reasons not attributable to divorce. It may be that the family unit as we have known it is neither essential nor desirable and no attempt should be made to preserve it. Assuring, however, that it is desirable if not wholly essential to the good life and that legal rules are or ought to be a means promoting that life, what problems does the contingency or fact of the broken marriage create?—The following summary may cover most of the ground and sufficiently indicate to what extent the law must play a part in seeking or making solutions.

A. Prevention

(i) Before Marriage

Is pre-marital counselling desirable? Does it or can it help prevent breakdown? Should it be compulsory for all intending marriage? If so, how and when should it be enforced?

(ii) During Marriage and before Relief is granted

Whether the *rationale* of the relief is "offence" or "breakdown", is a reconciliation procedure desirable? Is it or can it be made effective? Should it be compulsory for those seeking relief? If so, in what manner?

B. The Broken Marriage

The pros and cons of the several "ideologies" involved have been referred to. Assuming some relief, if only *a mensa et thoro*, are the "offence" and "break-down" theories mutually exclusive or can both co-exist? Assuming the desirability of specific grounds with or without a "breakdown" ground, how long should the list be? Should the concept of "guilt" be abandoned? Should the accusatorial process be abandoned? Must there always be, if only in the public interest, a contradictor? Should insanity be a ground of relief whatever the theory? Should the relief granting tribunal be entitled to refuse relief on the ground that to do so would be against the public interest or, where means are available, just provision of maintenance has not been made?

C. The Consequences of the Broken Marriage

Here the range of problems is immense and only some can be mentioned.

If there is a matrimonial home which of the spouses should be given it?

If there is no matrimonial home should one be supplied and by whom or what agency?

What are the particular problems (and corresponding solutions, if any,) of the motherless family?

The fatherless family?

The parentless family?

Should the maintenance of one spouse be ordered of the other?

If so, upon what grounds, how should it be enforced, how should it be collected and what are its fiscal implications?

Should one spouse be entitled to damages against the other or a third party?

D. *Re-Marriage*

Assuming relief *a vinculo matrimonii* what restrictions, if any, should be placed on liberty to re-marry?

E. *The Tribunal and its Jurisdiction*

Is the traditional court of law, for example, the Superior Court of Quebec, a suitable tribunal for adjudicating upon matters of matrimonial relief or is a "Family Court", such as that described and advocated by Professor Beaudoin more apt for this kind of "litigation"? What should be the ground or grounds of jurisdiction? Should a "Canadian" domicile be established or the domiciliary concept abandoned?

J. J. Gow

Faculty of Law

McGill University

December 10th, 1966

APPENDIX "31"

Submission
to the

**SPECIAL JOINT COMMITTEE OF THE SENATE AND
HOUSE OF COMMONS ON DIVORCE**

by the

National Farmers Union

February, 1967

Submission

to the

SPECIAL JOINT COMMITTEE OF THE SENATE AND
HOUSE OF COMMONS

on Divorce

by the

National Farmers Union

February, 1967

The National Farmers Union is composed of the provincial farmers' unions of British Columbia, Alberta, Saskatchewan, Manitoba and Ontario. These farmers' unions, based on family memberships are concerned with the economic and the social welfare of farm people. The women within the farmers' unions have studied more specifically education, health and the social welfare not only of farm people but of society as a whole. We have long recognized the need for reform of the Canadian laws with regard to divorce.

The Farm Women's Union of Alberta has since 1946 requested that Canadian Divorce Laws be reformed to conform basically with the British Divorce Laws of 1937. At one time the FWUA policy on divorce law reform was reworded slightly to conform to the request of the Canadian Bar Association. In 1963 a committee of the provincial FWUA Board made a study of divorce laws in various countries and the FWUA policy was restated to include another clause.

The women of the Manitoba Farmers' Union have also been making similar studies. They requested similar reforms with the addition of a request that one Canadian domicile, as it relates to the application for divorce, be established.

The reforms requested in this submission were accepted by the National Farmers Union and a Study Committee on Divorce was appointed. This committee, composed of the four women's presidents of Alberta, Saskatchewan, Manitoba and Ontario, was not successful in its attempt to meet with the Minister of Justice when in Ottawa in 1965.

The National Farmers Union recognize that the family is the basis of Canadian society. We are greatly concerned that in most of Canada, when a marriage is beyond all hope of reconciliation, the only grounds for divorce is that of adultery. We are concerned that in 1961, twelve thousand deserted wives were receiving public maintenance in Canada. We are concerned that there are many common-law unions because desertion is not grounds for divorce and also concerned because of the limited grounds for divorce and the high cost of divorce. The state, to a limited extent, recognizes the fact of common-law unions by granting family allowances to the children. Also, children are registered in the name of their actual father. The fact remains that society discriminates against these families. Divorce and remarriage provides a better family basis in society.

We believe that the reform of the Canadian divorce procedure and the grounds for divorce are long past due. Our present court procedure gives attention to proof of guilt and defense of innocence rather than to therapy for the welfare of the individuals and the families concerned. The possibility of saving the marriage should receive first consideration.

The Australian Matrimonial Act of 1959 states that, "It is the duty of every court which has before it a matrimonial cause to consider the possibility

of the reconciliation of the parties." It promises financial assistance to Marriage Guidance Organizations in the belief that marriage counselling can and does prevent divorce. The Act also provides that no divorce shall be absolute until the court is satisfied that the welfare of the children has been properly arranged. No divorce proceeding can be initiated until three years of marriage have elapsed except by special permission of the court.

In some parts of the United States, it is compulsory that every divorce case be investigated by the Family Court or a Court of Conciliation. In Los Angeles Court of Conciliation, marriage counsellors have reconciled 43 per cent of the cases before them.

DIVORCE LAW REFORMS

The National Farmers Union submits the following for the consideration of your committee:

That divorce laws be revised so that divorces may be granted for the following reasons:

- (a) Habitual drunkenness or habitual intoxication by reason of taking or using to excess narcotics or stimulating drugs or preparations for a period of not less than two years or has been an habitual drunkard or habitually been so intoxicated for a part or parts of such period;
- (b) Adultery;
- (c) Desertion without cause for a period of three years immediately preceding the petition;
- (d) If since the celebration of marriage one spouse has treated the other party with cruelty;
- (e) If one party is incurably of unsound mind and has been under treatment for five years immediately preceding the petition;
- (f) The wife may petition on ground that the husband has been guilty of rape, sodomy or bestiality;
- (g) Legal presumption of death of the other spouse.

We further recommend that:

- (a) For the purpose of petitioning for divorce, one Canadian domicile rather than a provincial domicile be established;
- (b) Foreign marriage certificates be accepted at face value.

The study committee was concerned that at times the amount of alimony awarded was unrealistic. They did not arrive at a solution but request that this question be carefully studied by your committee.

Respectfully submitted by:

Mrs. Louise Johnston, President,
Farm Women's Union of Alberta.

Mrs. Margaret Nadjelski, Women's Pres.,
Saskatchewan Farmers Union.

Mrs. Margaret Oliver, Women's Pres.,
Manitoba Farmers' Union.

Mrs. Veronica Opsitnik, Women's Pres.,
Ontario Farmers' Union.

APPENDIX "32"

FEDERATED WOMEN'S INSTITUTES OF CANADA

Recommendations for presentation
to the

SPECIAL JOINT COMMITTEE

of the

SENATE AND HOUSE OF COMMONS ON DIVORCE

PREAMBLE

There appears to be a great surge on the part of men and women, moving toward demands for change in what is deemed an antiquated law for those desiring to be divorced from husband or wife in Canada. There needs to be a widening of the causes upon which a petition for divorce may be presented, and that this is becoming more urgent in a society which considers itself erudite and civilized is increasingly evident.

It appears to the Federated Women's Institutes of Canada that when a marriage has come to the place where two people agree that a grave mistake has been made and their position is intolerable, there should be no need to be reduced to connive at a reason which is repugnant to both of them, because the law says this is the only reason upon which they can go into the court. It might be added that even criminals making a mistake, after serving whatever sentence is required of them, are allowed to begin a new life.

There should be no reason why those who, for various reasons are opposed to a change in the present law, should become anxious over the matter. There are many other laws which "allow" but are there for those who wish to make use of them—they do not require that all persons "must do". Laws governing divorce would be in the same category.

Further to the present "cause" for petition; we believe that more often than not this develops because a marriage has already disintegrated and we contend that the type of mental anguish which ensues through a break-down, which finds two persons living a quite unnatural life, is a matter for your consideration. Having come to this state, what can possibly be gained by forcing a man and woman to continue this way of life, or having one or the other simply walk out one day, not to return, leaving two people with no clear way in which to move.

Recently, reports were available in which it was stated that many men and women live together in polite society unmarried, because they are part of this group which found no sensible way out of their dilemma. The fact is not known to their friends but despite the fact that they could for themselves make a place in the community it has a very insecure foundation. The woman has almost no status in law, nor do the children, if there are any. Adoption of children does make a secure place but these two people would look ridiculous trying to go through this sort of procedure, and we doubt that present social officers would permit two persons, living together out of wedlock, to go through the motions of adoption, and so, the lay through its blindness pushes persons who have need for a normal home life into this undesirable situation.

The present laws re desertion are also most unsatisfactory. As presently constituted a woman may, after a stipulated time and after having made a conscientious effort to locate her husband, go into the court and have him

declared "dead", but if he returns and she has remarried, she is in grave difficulty. Women too, are often deserters and men, in an effort to create a home life for a family of children, are driven to actions outside the law, or, children become wards of an agency.

The severing of a marriage based on one person's mental incapacity, we realize, may present difficulties. We presume, that with no other avenue open there could, conceivably, be those who would take advantage of this stipulation. However, it would appear that with one party having been committed to an institution for a long period of treatment (five years is suggested), and those in authority giving a proper statement that the person is incurably insane, this should be sufficient reason for the second party to go into the court with a request for severance of the marriage.

A resolution passed at the 1964 National Convention of the Federated Women's Institutes of Canada, and re-affirmed at the Annual Board Meeting, April 1966, was forwarded to the Special Joint Committee of the Senate and House of Commons on Divorce (Copy appended). We would now respectfully submit the following recommendations as changes to the present law:

RECOMMENDATIONS

1. That cruelty should include mental as well as physical but should be carefully defined.
2. That incurable insanity, as so attested by qualified authorities, and after treatment for a period of five years, should be accepted as a just cause for granting divorce.
3. That desertion when proven after a specific period, remains in effect in spite of the fact that the "deserter" may return.
4. That having proven to the courts that a marriage has disintegrated should be sufficient grounds for granting of a divorce, without resorting to the ground of adultery. It is difficult to differentiate between the seriousness of living in a constant state of upheaval, one hating the other, and some other sin one person might commit.
5. That the law must clear the way so that there may be a decent method of divorce rather than naming guilty parties. This would eliminate the situation when one party, in spitefulness, denies a divorce proceeding, despite full knowledge of the "sinning" party's behaviour.
6. Finally, today divorce is almost always available only to those who can pay the high cost involved in the present methods. While we do not think this is something to be had cheaply, on the other hand, simpler methods and reasons would obviate most of the cost as is not the case presently. Since divorce is a civil process it should be available to those where need is established and not denied to anyone, particularly for monetary reasons.

CONCLUSION

The Special Joint Committee of the Senate and House of Commons on Divorce, appointed for the hearing of representations, pro and con, has the responsibility of facing the fact that the present divorce laws, with the exception of those in the Province of Nova Scotia, are antiquated; that they do not meet the needs of present day society; that they work grave hardships on many law-abiding persons who would make a much better contribution to society if they could find a way (honestly) out of their dilemma. We would find, in the end, fewer children who become a problem to society and the community. Living, as they often do, in an atmosphere of tension, unkindness and insecurity, does nothing to help them develop into stable young men and women.

It is the sincere wish of the Federated Women's Institutes of Canada that the foregoing recommendations may have the serious consideration of the Special Joint Committee on Divorce.

Respectfully submitted,

(Mrs. J. Philip Matheson) President
Federated Women's Institutes of Canada

(Mrs. L. G. Lymburner) Chairman
FWIC Resolution Committee

Committee Members:

Mrs. R. C. Palmer

Mrs. Jos. Bielish

DIVORCE LAWS

Resolution as approved by delegates of the Federated Women's Institutes of Canada, National Convention, June 22-25, 1964.

WHEREAS—the present divorce laws cause unnecessary suffering to too many innocent people;

THEREFORE BE IT RESOLVED—that the grounds for which divorce can be granted in Canada be extended to include, cruelty, incurable insanity (5 years) and desertion.

(Mrs. J. Philip Matheson)
National President.

Resolution re-affirmed at Annual Board

Meeting, Federated Women's Institutes
of Canada, April 19-21, 1966.



First Session—Twenty-seventh Parliament

1966-67

PROCEEDINGS OF
THE SPECIAL JOINT COMMITTEE OF THE SENATE
AND HOUSE OF COMMONS ON
DIVORCE

No. 14

THURSDAY, FEBRUARY 9, 1967

Joint Chairmen

The Honourable A. W. Roebuck, Q.C.

and

A. J. P. Cameron, Q.C., M.P.

WITNESSES:

The Presbyterian Church in Canada: Reverend Wayne A. Smith, B.A.,
B.D.; Reverend A. J. Gowland, M.A.; Reverend W. L. Young, B.A.;
Reverend Fred H. Cromey, B.A.
The Canadian Psychiatric Association: J. B. Boulanger, M.D., Director;
F. C. R. Chalke, M.D., Director.

APPENDICES:

- 33.—Brief by Marcel Naud, Montreal.
- 34.—Canadian Jewish Congress.
- 35.—The Family Bureau of Greater Winnipeg.
- 36.—The County of York Law Association.

ROGER DUHAMEL, F.R.S.C.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1967

MEMBERS OF THE
SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS
ON DIVORCE
FOR THE SENATE

Hon. A. W. Roebuck, Q.C., Joint Chairman

The Honourable Senators

Aseltine	Connolly (<i>Halifax North</i>)	Flynn
Baird	Croll	Gershaw
Belisle	Denis	Haig
Burchill	Fergusson	Roebuck—(12).

FOR THE HOUSE OF COMMONS

A. J. P. Cameron, Q.C., (*High Park*), Joint Chairman

Members of the House of Commons

Aiken	Forest	McQuaid
Baldwin	Goyer	Otto
Brewin	Honey	Peters
Cameron (<i>High Park</i>)	Laflamme	Ryan
Cantin	Langlois (<i>Mégantic</i>)	Stanbury
Choquette	MacEwan	Trudeau
Chrétien	Mandziuk	Wahn
Fairweather	McCleave	Woolliams—(24).

(Quorum 7)

ORDERS OF REFERENCE

Extracts from the *Votes and Proceedings* of the House of Commons:
March 15, 1966:

“On motion of Mr. McIlraith, seconded by Mr. Hellyer, it was resolved—that a Special Joint Committee of the Senate and the House of Commons be appointed to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as many be referred to it by either House;

That 24 Members of the House of Commons, to be designated by the House at a later date, be members of the Special Joint Committee, and that Standing Order 67(1) of the House of Commons be suspended in relation thereto;

That the Committee have power to engage the services of such technical, clerical and other personnel as may be necessary for the purpose of the inquiry;

That the Committee have the power to send for persons, papers and records, to examine witnesses, to report from time to time, and to print such papers and evidence from day to day as may be ordered by the Committee, and that Standing Order 66 be suspended in relation thereto; and

That a Message be sent to the Senate requesting Their Honours to unite with this House for the above purpose, and to select, if the Senate deems it so advisable, some of its Members to act on the proposed Special Joint Committee.”

“By unanimous consent, on motion of Mr. McIlraith, seconded by Mr. Hellyer, it was ordered—That the order of the House of Monday, February 21, 1966 referring the subject-matter of the following bills to the Standing Committee on Justice and Legal Affairs, namely:—

Bill C-16, An Act to provide in Canada for the Dissolution of Marriage (Additional Grounds for Divorce).

Bill C-19, An Act to provide in Canada for the Dissolution and the Annulment of Marriage.

Bill C-41, An Act to amend the British North America Acts 1867 to 1965, (Provincial Marriage and Divorce Laws).

Bill C-44, An Act to provide in Canada for the Dissolution of Marriage.

Bill C-55, An Act to provide in Canada for the Dissolution of Marriage.

Bill C-58, An Act respecting Marriage and Divorce.

Bill C-79, An Act to amend the Dissolution and Annulment of Marriages Act (Additional Grounds for Divorce).

be discharged, and that the subject-matter of the same bills be referred to the Joint Committee of the Senate and the House of Commons on Divorce”.

March 16, 1966:

“By unanimous consent, on motion of Mr. Stewart, seconded by Mr. Byrne, it was ordered—That the subject-matter of Bill C-133, An Act to extend the grounds upon which courts now have jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief, be referred to the Special Joint Committee on Divorce”.

"By unanimous consent, on motion of Mr. Stewart, seconded by Mr. Byrne, it was ordered—That the subject-matter of Notice of Motion No. 11 be referred to the Special Joint Committee on Divorce."

March 22, 1966:

"On motion of Mr. Pilon, seconded by Mr. McNulty, it was ordered—That a Message be sent to the Senate to acquaint Their Honours that this House will unite with them in the formation of a Joint Committee of both Houses to inquire into and report upon divorce in Canada, and that the Members to serve on the said Committee, on the part of this House, will be as follows: Messrs. Aiken, Baldwin, Brewin, Cameron (*High Park*), Cantin, Choquette, Chrétien, Fairweather, Forest, Goyer, Honey, Laflamme, Langlois (*Mégantic*), MacEwan, Mandziuk, McCleave, McQuaid, Otto, Peters, Ryan, Stanbury, Trudeau, Wahn, and Woolliams."

LÉON-J. RAYMOND,
Clerk of the House of Commons.

Extracts from the Minutes of the Proceedings of the Senate:

March 23, 1966:

"Pursuant to the Order of the Day, the Senate proceeded to the consideration of the Message from the House of Commons requesting the appointment of a Special Joint Committee of the Senate and House of Commons on Divorce.

The Honourable Senator Connolly, P.C., moved, seconded by the Honourable Senator Roebuck:

That the Senate do unite with the House of Commons in the appointment of a Special Joint Committee of both Houses of Parliament to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either House;

That twelve Members of the Senate, to be designated at a later date, act on behalf of the Senate as members of the said Special Joint Committee;

That the Committee have power to engage the services of such technical, clerical and other personnel as may be necessary for the purpose of the inquiry;

That the Committee have the power to send for persons, papers and records, to examine witnesses, to report from time to time, and to print such papers and evidence from day to day as may be ordered by the Committee, and to sit during sittings and adjournments of the Senate; and

That a Message be sent to the House of Commons to inform that House accordingly.

After debate, and—

The question being put on the motion, it was—
Resolved in the affirmative."

March 29, 1966:

"With leave of the Senate,

The Honourable Senator Beaubien (*Provencher*) moved, seconded by the Honourable Senator Inman:

That the following Senators be appointed to act on behalf of the Senate on the Special Joint Committee of the Senate and House of Commons to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, namely, the Honourable Senators Aseltine, Baird, Belisle, Bourget, Burchill, Connolly (*Halifax North*), Croll, Fergusson, Flynn, Gershaw, Haig, and Roebuck; and

That a Message be sent to the House of Commons to inform that House accordingly.

The question being put on the motion, it was—

Resolved in the affirmative.”

May 10, 1966:

“Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Roebuck, seconded by the Honourable Senator Croll, for the second reading of the Bill S-19, intituled; “An Act to extend the grounds upon which courts now having jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief”.

The question being put on the motion—

In amendment, the Honourable Senator Connolly, P.C., moved, seconded by the Honourable Senator Hugessen, that the Bill be not now read the second time, but that the subject-matter be referred to the Special Joint Committee on Divorce.

After debate, and—

The question being put on the motion, it was—

Resolved in the affirmative.”

J. F. MacNEILL,
Clerk of the Senate.

MINUTES OF PROCEEDINGS

THURSDAY, February 9, 1967.

Pursuant to adjournment and notice, the Special Joint Committee of the Senate and House of Commons on Divorce met this day at 3:30 p.m.

Present: For the Senate: The Honourable Senators Roebuck (*Joint Chairman*), Aseltine, Baird, Belisle, Burchill, Fergusson, Gershaw and Haig—8.

For the House of Commons: Messrs: Cameron (*High Park*) (*Joint Chairman*), Aiken, Honey, McCleave, Stanbury and Wahn—6.

In attendance: Peter J. King, Ph. D., Special Assistant.

The following witnesses were heard:

The Presbyterian Church in Canada:

Reverend Wayne A. Smith, B.A., B.D.

Reverend A. J. Gowland, M.A.

Reverend W. L. Young, B.A.

Reverend Fred H. Cromey, B.A.

The Canadian Psychiatric Association:

J. B. Boulanger, M.D., Director.

F. C. R. Chalke, M.D., Director.

Briefs submitted by the following are printed as Appendices:

33.—Marcel Naud, Montreal.

34.—Canadian Jewish Congress.

35.—The Family Bureau of Greater Winnipeg.

36.—The County of York Law Association.

At 5.45 p.m. the Committee adjourned until Tuesday next, February 14, 1967 at 3:30 p.m.

Attest.

Patrick J. Savoie,
Clerk of the Committee.

THE SENATE
SPECIAL JOINT COMMITTEE OF THE SENATE AND
HOUSE OF COMMONS ON DIVORCE

EVIDENCE

OTTAWA, Thursday, February 9, 1967.

The Special Joint Committee of the Senate and House of Commons on Divorce met this day at 3.30 p.m.

Senator Arthur A. Roebuck and Mr. A. J. P. Cameron (*High Park*), Co-Chairmen.

The Co-CHAIRMAN (*Senator Roebuck*): Honourable senators, members of the House of Commons: We have a quorum and I think we should get down to the business of the day without any delay.

I must explain that our program has been changed since we were last together. I told you that Mr. James P. Trotter, Q.C., was to appear before us today on behalf on the Liberal Caucus of the Legislature of the Province of Ontario, but just a few days ago there appeared in the Speech from the Throne in the Legislature some reference to the subject of divorce and I understand that the provincial Government, or perhaps the Legislature itself, has appointed a committee for the purpose of studying the subject. Therefore, Mr. Trotter felt that until this committee reported it would be a little out of place for him to come down here and assume some authority for the caucus. I thoroughly appreciated his reason, and so he will not be here. On the other hand, we have a delegation from the Presbyterian Church in Canada and we have also got a delegation from the Canadian Psychiatric Association, about whom I shall have more to say later on.

Our first witnesses are men of great experience in the matter we are discussing, since they represent one of the great churches of Canada. We are very fortunate indeed in having them with us. There are four witnesses. The first one I propose to introduce is the Rev. Wayne A. Smith, chairman of the delegation.

Mr. Smith obtained his B.D. degree in 1954. He has had congregations at Port Carling, Torrance, Hamilton and Paris, Ontario. Beginning March 1, 1967, he will be the Assistant Secretary of the Board of Evangelism and Social Action of the Presbyterian Church in Canada. In his role as pastor he has engaged in pastoral and marital counselling which has enabled him to see the need for the widening of the grounds for divorce. He has also been a member, and for the past two years the chairman, of our Committee on Family Life. This is the committee of the Presbyterian Church in Canada that makes a study of questions pertaining to marriage, divorce, remarriage, etc., and recommends policy in these areas to the General Assembly, the highest court of the Presbyterian Church in Canada.

Mr. Smith shared in the writing of a commentary entitled, *Marriage, Divorce and Remarriage*. We have all had copies of that, and I assure you I read it through carefully.

Mr. Smith, the audience is yours.

The Rev. Wayne A. Smith, B.A., B.D., (Chairman of the Delegation representing the Presbyterian Church in Canada): Mr. Chairman, honourable senators, and members of the House of Commons, we wish to extend our sincere thanks for this invitation to appear before you this afternoon.

In the month of November you had read into the record a resolution passed by the General Assembly of the Presbyterian Church in Canada reflecting the attitude of our denomination to the grounds for divorce in Canada. At that time you seemed to think that perhaps the Presbyterian Church would make no further submissions. On our part, we felt we should explain our position a little more in terms of the document you have before you containing supportive reasons why we thought the ground should be broadened to some extent, and since your committee has graciously invited us to speak to you this afternoon we are prepared to do so.

We did not prepare a lengthy brief because we knew that other denominations had made representations to you. The United Church of Canada had submitted to you a document of considerable length, and having seen press reports of it, which we read in detail, we felt, as the first press reports came through, that we were in agreement with that document and so we did not think it worth while to repeat.

We did deem it necessary, however, to give supportive reasons for the position which we have taken and which appears in the brief that is in your hands.

Ours basically is a theological paper. It does not go into the legal aspects of the subject, or make specific recommendations; it simply points out the theological principles involved, as we in our communion understand them.

It is noteworthy that the Presbyterian Church has had as its doctrine for three hundred years that the grounds of divorce are adultery plus wilful desertion of such a kind as cannot be remedied by the Church or the Civil Magistrate; and our Church has now recognized that the grounds of divorce dictated by our doctrine are broader than the grounds now appearing in the Statutes of the Dominion of Canada.

We have been able to secure acceptance in our Church of the position we have tried to state in this brief. We think this is notable because our Church has been regarded traditionally as conservative on theological and moral issues; but there does seem to be a real temper in our Church which corresponds to a great extent to this submission and, I am sure, many others of the submissions your committee has received over the past few months.

What we desire to do is to make two points: first of all that there are other things besides adultery that kill marriage; there is wilful desertion, according to our doctrine. Our doctrine is based primarily on the Scriptures, and supportively on the Westminster Confession of Faith; and it is the Westminster Confession of Faith that gives the two grounds of adultery and wilful desertion.

The second of the two points I have mentioned is that our Church is not in favour of easy divorce. We believe that society as a whole and the Christian Church in particular have a responsibility to safeguard the institution of marriage, and as well the souls of the people who are involved in the breakdown of marriage, and those of their children.

We feel that the Church as a whole and society as a whole ought to be doing all it can to preserve the institution of marriage, and all the benefits that flow from it, and those are the two points which we desire to make. Would it be your wish that I should now read the brief, Mr. Chairman?

The Co-CHAIRMAN (Senator Roebuck): Yes, Mr. Smith, if you please.

Mr. SMITH: This is the brief as we have prepared it:

A BRIEF CONCERNING CANADIAN LEGISLATION ON DIVORCE

To the Joint Committee of the Senate and House of Commons on Divorce.

The Board of Evangelism and Social Action of the Presbyterian Church in Canada has already informed the joint committee of the position taken by the General Assembly of the Presbyterian Church in Canada with respect to the grounds for divorce. This position was taken in June 1963 when the General Assembly adopted the following recommendation from its Board of Evangelism and Social Action: "Whereas the teaching of the Westminster Confession of Faith re Marriage and Divorce (chapter 24, section 6) is that 'although the corruption of man be such as is to study arguments, unduly to put asunder those whom God hath joined together in marriage; yet nothing but adultery, or such wilful desertion as can no way be remedied by the Church or the Civil Magistrate, is cause sufficient of dissolving the bond of marriage: wherein a public and orderly course of proceeding is to be observed, and the persons concerned in it not left to their own wills and discretion in their own case'; we, therefore, recommend that the General Assembly urge the federal Government to appoint a Royal Commission on Divorce to consider such grounds for divorce in addition to adultery as 'Wilful desertion as can no way be remedied by the Church or Civil Magistrate'."

It is therefore the stated position of the Presbyterian Church in Canada that other grounds for divorce exist alongside the grounds of adultery. These additional grounds are called "Wilful Desertion" in the Westminster Confession of Faith. This document forms the subordinate standard of our Church's doctrine, in that we find it agreeable to the Word of God.

It is the purpose of this brief to present supportive reasons why present law on divorce ought to be amended so as to include such additional grounds as are here called "*Wilful Desertion*".

Supportive Reasons

I. The Break-down of Marriage.

The bible understands marriage as an indissoluble union between a consenting man and woman, for their mutual help, the raising up of legitimate issue and for the good ordering of family life and society. The bible thinks of marriage as a wedding of the soul and body of a man and woman of such a profound kind that "they become one flesh".

Thus the Christian Church has always believed that God's Will is that marriage be permanent.

But the bible and Christian tradition are completely realistic in acknowledging the capacity of man, in his sin and weakness, to frustrate the purpose of God. Sin or weakness (or both) is apt to destroy relationships between God and man, between man and his neighbour, between a man and his wife. It is thus possible for a marriage to die, and death may result from other causes besides adultery.

II. The Nature of Wilful Desertion.

It is necessary to ascertain, if we can, what the authors of the Westminster Confession of Faith meant by the expression "Wilful Desertion". The Rev. Dr. L. H. Fowler who has studied this matter is of the opinion that wilful desertion meant the rejection of the one flesh relationship. He says: "Desertion is not a matter of geography, but one of not continuing to consummate the marriage. A wilful geographic separation is desertion, but there can be the same desertion

while the parties occupy the same house and the same room. In other words, the Westminster Confession of Faith teaches that desertion is adultery in reverse. The Confession of Faith indicates that transgression against the bond (adultery) or denying the bond (desertion) breaks the bond itself."

Thus the expression "Wilful Desertion" may have several meanings today. In the first place it may mean non-support in an economic sense. It may also mean the refusal of one or both partners to continue in the one flesh relationship, that is to say, refusal of physical intercourse. Wilful desertion may also be interpreted in the sense of emotional non-support. Thus, mental cruelty might come under the category of wilful desertion.

III. Where There is No Remedy.

The Westminster Confession of Faith would warn us, however, that divorce must be regarded as a last resort. We are discouraged from favouring any measure which would make divorce quick and easy, and are to favour only those measures which will help families in real distress.

The foregoing quotation from the Westminster Confession of Faith would only admit as grounds for divorce "Such wilful desertion as can no way be remedied by the Church or Civil Magistrate". And when divorce proceedings are undertaken we are urged to see that "A public and orderly course of proceeding is to be observed, and the persons concerned in it not left to their own wills and discretion in their own case".

The Church and the Civil Magistrate are both urged to remedy sick marriages and to refrain from allowing couples to exercise their own wills and discretion.

Thus, our Church does not hold that divorce is the natural consequence even of proved adultery or wilful desertion. There is an obligation placed upon Church and Society to explore every means of reconciling the partners in a sick marriage to the end that their marriage may be rehabilitated and preserved. Where there is the slightest spark of mutual love and concern, there is hope. Divorce belongs only where a marriage has died.

Respectfully submitted,

The Executive of

The Board of Evangelism and Social Action,

The Presbyterian Church in Canada.

Mr. Chairman, from a procedural point of view I would ask whether your committee would be interested to hear further about certain studies that the Family Life Committee of our Church has undertaken with regard to the whole matter of grounds for divorce, and also about remarriage.

We have mentioned that we had prepared this commentary on *Marriage, Divorce and Remarriage*, which I believe your committee now has on hand. The Rev. Arthur Gowland would be pleased to speak to this. It has not the same standing as the resolution on page 1, but it has received general approval throughout the Church.

The CO-CHAIRMAN (*Senator Roebuck*): We are in your hands rather than you in ours. Shall we ask you some questions now, or shall we hear the other members of your delegation and then have a question period?

Mr. SMITH: If the committee so wishes, questions can be asked about the brief I have just read and we could deal with the subject generally afterwards.

The CO-CHAIRMAN (*Senator Roebuck*): I think that would be a good course to follow.

Senator HAIG: Referring to the words "yet nothing but adultery, or such wilful desertion as can no way be remedied": in what way can the Church or the civil authorities remedy such a breakdown of marriage?

Mr. SMITH: It is possible for the Church to undertake certain counselling procedures; and our committee has also discussed the role the courts could play in the matter of conciliation or reconciliation to rectify sick marriages before the breakdown actually takes place. We realize there is a very real limit placed on society at this point having regard to the functions of social workers, family courts, and so on; but we would hope the day might come when it would be possible for society to say to a couple: Your marriage is sick, you need a waiting period, you need time for counselling with other persons; and we should make provision to deal with these varied problems before divorce proceedings are entered into on a large scale.

The Co-CHAIRMAN (*Senator Roebuck*): Would you give the court authority to say: Come back in six months and we will talk to you again.

Mr. SMITH: There are other members of our committee who have been discussing this aspect recently.

Senator HAIG: The brief also says: "...wherein a public and orderly course of proceeding is to be observed, and the persons concerned in it are not left to their own wills and discretion in their own case". What do you mean by "a public and orderly course of proceeding is to be observed"?

Mr. SMITH: The language of this document which is quoted is of seventeenth century vintage when the powers of the Church and the Civil Magistrate were otherwise than they are today. I would understand by these words, as applied to a temporary situation, that couples should not be left to their own decision to say: We desire a divorce, and we consent to a divorce.

The Co-CHAIRMAN (*Senator Roebuck*): You are not in favour of divorce by consent?

Mr. SMITH: That is right.

Senator BELISLE: Towards the end of the first paragraph the brief says: "we, therefore, recommend that the General Assembly urge the federal Government to appoint a Royal Commission on Divorce." Are we to understand that you would rather have a royal commission than this committee?

Mr. SMITH: This resolution was placed before our General Assembly in 1963 before your committee was set up. I am sure the Church in Canada is indeed delighted with the manner in which this Parliamentary Committee has proceeded in this matter.

Senator BELISLE: That is a very diplomatic answer.

Mr. SMITH: We are used to that in the Presbyterian Church.

Mr. McCLEAVE: And we are used to giving such answers here.

Mr. SMITH: The resolution holds official status in our Church at the present time. No similar statements have been authorized by the General Assembly since 1963.

Mr. GOWLAND: Our Church has been concerned about this for a good many years.

Senator BELISLE: Last Tuesday we heard an eminent jurist from Nova Scotia who told us his thinking was, not for the committee to recommend a widening of the grounds for divorce but to consider the advisability of having a family court which would be less expensive to the parties seeking divorce, with authority to deal with such cases without going through the superior courts. It was suggested that this would facilitate proceedings.

Mr. SMITH: The point being made is that we should proceed by way of family courts rather than as at the present time, with an extension of the legal grounds for divorce.

Senator BELISLE: He was speaking of local family courts.

Mr. SMITH: I am sure our Church would take very much the same view. What we are concerned with is marriage breakdown. This is an expression which I know has been used before your committee by other denominations and other groups. Our Church arrived at pretty much the same point of view, that there is a distinction between marital offence and marriage breakdown; and, by far, a better understanding of what happens is "marriage breakdown."

Senator BELISLE: Desertion, in your brief, would indicate marriage breakdown?

Mr. SMITH: Yes. It is a symptom of the disease, and so is adultery.

The Co-CHAIRMAN (*Mr. Cameron*): Does your thinking indicate that the Presbyterian Church would favour the theory of compulsory or enforced desertion as, for example, where a person is serving a long prison term, or becomes insane with no reasonable expectation of regaining sanity? Would your Church regard that as falling within the ambit of "wilful desertion"?

Mr. SMITH: Our view of legal desertion is stated in the terms I have already outlined. We have made explicit the possibility of wilful desertion including non-support emotionally, physically and financially. Once again, the document from which we have drawn our doctrine is now three hundred years old, so that the distinction which we are accustomed to making today between things which are wilful and things which are compulsory was not so finely drawn then. I presume the climate in our Church would be such as to conduce to a more compassionate point of view, such as our sister denominations evidently have, so as to permit of the inclusion of mental illness and some forms of imprisonment as coming within the so-called grounds.

The Co-CHAIRMAN (*Senator Roebuck*): I believe you have a question you wish to ask, Mr. Stanbury?

Mr. STANBURY: May I say to the Rev. Mr. Smith that for a body which is traditionally conservative the Presbyterian Church in Canada seems to be very liberal in the position it is taking on this subject, and I am glad to see it, as a member of the Church. I am interested to know whether any of you gentlemen have knowledge of the redrafting or updating of the Westminster Confession of Faith that has taken place in the United States, and whether or not any of these issues have been clarified in that updating process.

Mr. GOWLAND: This statement of Faith that Mr. Stanbury is talking about does not deal with this question of marriage and divorce. It may be dealt with in some other place but not in the particular statement that Mr. Stanbury refers to.

Mr. SMITH: The two major Presbyterian denominations in the United States did revise the Westminster Confession of Faith rather radically fifteen years ago, and I believe our committee has seen the chapter on marriage and divorce, but I am afraid I cannot remember the details of the report.

Mr. STANBURY: May I ask one other question. Have you envisaged any requirement in the law whereby some sort of counselling procedure, with a view to reconciliation, should be complied with before dissolution of marriage takes place.

Mr. SMITH: I would suggest that either Mr. Young or Mr. Cromey reply.

The Co-CHAIRMAN (*Mr. Cameron*): May I ask Mr. Stanbury to be good enough to allow his question to remain unanswered for a moment or two so that I may ask this question. On page 2 I see mental cruelty mentioned as within the definition of wilful desertion: that is to say, if a marriage has broken down by reason of mental cruelty it is really the same thing as desertion. Would you also include physical cruelty?

Mr. SMITH: I would say so, sir, inasmuch as what underlies our philosophy here is desertion of responsibility, desertion of what the bible calls the one-flesh relationship, and the point we are making is that these are manifestations. We recognize these.

The CO-CHAIRMAN (*Senator Roebuck*): My Co-Chairman has asked you whether you would include involuntary separations such, for instance, as prolonged illness which makes impossible the continuation of the real marriage estate; a long sentence in one of the penitentiaries, illness such as we run into a number of times, of a mental character; or perhaps just involuntary separation where the husband disappears without any fault on any person's part and the marriage is gone. Would you recognize that as desertion? Mr. Gowland, would you take in my question at the same time? I would like to have the answer on the record so that those who read it will be influenced by the person who is speaking.

May I say for the record that the Rev. A. J. Gowland has his B.A. and M.A. from the University of Toronto and graduated from Knox College in 1937; he also took post-graduate studies in New College, Edinburgh. Before his appointment as Secretary of the Board of Evangelism and Social Action of the Presbyterian Church in Canada he was a minister in congregations in Oakville, St. Mary's and Toronto, Ontario, and Calgary, Alberta. As in the case of Mr. Smith, he had the opportunity as a pastor to counsel people in all aspects of family life. He has been Secretary of the Committee on Family Life from its beginning and shared in the writing of the commentary entitled *Marriage, Divorce and Remarriage*.

The Rev. A. J. Gowland: Mr. Chairman, with reference to your question whether the conditions you have indicated could be included in our understanding of the term "wilful desertion," I believe they could, for the reason that the Westminster Confession of Faith indicates that the primary purpose of marriage is the mutual help of husband and wife. If we believe that this is the primary purpose of marriage, then, if a man, by reason of imprisonment is separated from his partner for a period of 15 to 20 years, such separation has really destroyed the primary purpose of the marriage, and so I believe this could be included.

CO-CHAIRMAN (*Senator Roebuck*): With no prospect of change.

Mr. GOWLAND: With no prospect of change.

CO-CHAIRMAN (*Senator Roebuck*): Thank you for that answer, Mr. Gowland.

Mr. HONEY: We have had some evidence and submissions before us dealing with the matter of separation as a ground for dissolving marriage, and some of the people who have appeared have indicated that separation by mutual consent, even if for two or three years, should be a ground of divorce. In other words, if the parties are not able to live together in harmony, that might be considered a proper ground. Would it be your view that this would not be acceptable as a ground for divorce if the separation were by mutual consent?

Mr. SMITH: I return to our view that persons should not be left to their own discretion and desire in this matter. We believe that what is at stake is not only the pleasure of the couple but the whole fabric of marriage, and I would doubt that our Church as a whole would look favourably on this as an additional ground for divorce.

Mr. McCLEAVE: Just as a follow-up question, there might be a refusal of either or of both parties, and if there is only a one-flesh relationship that refusal to have physical intercourse would be broad enough to cover voluntary separation in the sense that if it were mutual both would have refused to live in the one-flesh relationship.

CO-CHAIRMAN (*Senator Roebuck*): What about the case where only one refuses?

Mr. McCLEAVE: I am following up the idea of voluntary separation and I thought my question was proper. I hate to sound as if I were cross-examining, or as if I were niggling, but one sentence refutes what the witness said in answer to Mr. Honey's question.

Mr. SMITH: I do not believe we would be able to carry our Church along with an interpretation that would simply leave matters to a decision to be taken by a couple that they now wish to live separately and that after a certain lapse of time they could have their divorce recognized.

CO-CHAIRMAN (*Senator Roebuck*): Mr. McCleave himself at a previous hearing where this same subject was discussed put this problem to a witness. He said: Here is a man who marries a woman. They have some children and he deserts her, does not support her, and at the end of three years he comes back and against her will asks for a divorce. Would you give it to him?

Mr. SMITH: What was the former witness' reply to that question?

CO-CHAIRMAN (*Senator Roebuck*): He said yes. He was supporting a theory. What would you say, Mr. Smith?

Mr. SMITH: One of the beauties of the Presbyterian system, Mr. Chairman, is that we can refer things back to Church courts where they may be talked about at some length, and I probably would refer this question back to the Church court.

Senator HAIG: Another diplomatic answer.

Mr. McCLEAVE: You disagree with divorce by consent, I take it. One of the Christian virtues is forgiveness. Now suppose one of the parties found the other had been guilty of adultery and, despite the offence, said: I will forgive you and perhaps the marriage can be resumed. That is one way in which the matter could be settled. But suppose that person were to say: I believe you are guilty of adultery and I am going to take action against you in court, and for the purpose I will use the very skimpy motel or hotel evidence which, where there is no defence, generally enables a divorce to be granted. There you have another way of settling the matter. Obviously divorce by consent can be looked at in two different ways. In one case the offending party and the innocent party have in effect agreed that because of the sin of the one the marriage shall be dissolved; and in the other case they in effect agree that the marriage be resumed. I suggest that you might wish to qualify your answer on divorce by consent, bearing that in mind.

Mr. SMITH: At the bottom of page 2 of our brief we make somewhat the same approach. We say: "Thus, our Church does not hold that divorce is the natural consequence even of proved adultery or wilful desertion." That is to say, we certainly regard it as being more in accordance with the essence and true meaning of marriage to approach marital problems from the point of view of confession and forgiveness than to put the main emphasis on legal requirement and to say that once this is violated the marriage is at an end.

Mr. McCLEAVE: May I ask one final question? One of the great difficulties is in the field of reconciliation. It is the conviction of many of us that once these matters find their way into legal offices the lawyers cannot get the parties to go back. I am sure any barrister worth his salt would try to keep a marriage together; but once writs or petitions are issued reconciliation at that stage is impossible. Can you suggest any solution to this difficulty that faces us in trying to bring about reconciliation? To be specific, perhaps we could start at some level before the matter gets to the legal office.

Mr. SMITH: I suggest that Mr. Young could deal with that.

The Co-CHAIRMAN (*Senator Roebuck*): I suggest that at this stage we should hear the other members of the delegation and then resume the question period if we have time. Mr. Gowland, have you anything further to say to us?

Mr. GOWLAND: I will not take too much time, but Mr. Smith suggested that I might indicate some of the features of the commentary on *Marriage, Divorce and Remarriage*.

In this document you have in your hands we have discussed the question of adultery as a ground for divorce and emphasized the fact that even if adultery is committed by one of the parties to the marriage it should be looked upon as permissive and not normative: it does not necessarily lead to divorce and there should be an element of reconciliation.

On the whole question of divorce, we underline the fact that divorce is something required of necessity, which was not in the original purpose of God, and we have discussed this question of what we mean by wilful desertion. But we did discuss also, in the commentary, the status of the innocent party in a divorce action, and it was the consensus of our committee that it is a very difficult thing to determine who is the guilty party. There may be more fault on one side than on the other, but in many instances there is some fault on both sides. It is therefore not practical to designate one party as the innocent party, for both share in responsibility.

The Co-CHAIRMAN (*Senator Roebuck*): You would not say that is always so? There is in English law a principle that a person is presumed innocent until at least something is shown of guilt.

Mr. GOWLAND: We recognize that this could be; but our view is that it is a very difficult thing for anyone outside to know who the innocent party is or who the guilty party is.

We were looking at this question from the point of view of the minister who is called upon to officiate at a remarriage of persons who had been respectively divorced. How is the minister to know who the innocent party is? And this is a problem that confronts every minister of the Gospel.

The Co-CHAIRMAN (*Senator Roebuck*): But that is aside from the question before us. We are thinking of the court: what answer shall the court give when one person asks for a divorce?

Mr. SMITH: At the present time our delegation sees a difficulty with this distinction between innocent party and guilty party; because, in the counselling that takes place very often where the marriage is breaking or has broken, we discover that the man has been driven to drink or adultery—or the woman, on the other hand—and this creates a difficulty. The distinction that the law makes between innocence and guilt may be necessary in the present procedures, but it is not necessarily something we can look at uncritically and take for granted in a situation of remarriage.

When, however, it comes to dealing with the psychological and emotional impact that is made on an individual, whether that person is regarded as innocent or guilty in a degree, I am sure we would favour the kind of submissions your committee has been receiving, in the hope that the problems of divorce would be considered from the point of view of marriage breakdown rather than in terms of marital offence.

Mr. HONEY: I would like to say this. It seems to me, with respect, that you are taking a paradoxical position here. I agree with the theory that we should not try to assess the guilt of either party, we should endeavour to avoid that if possible; but though apparently you would not like to accept divorce by mutual consent you do assert the doctrine of wilful desertion, in which case your

position is that in such a situation there must be, before an action can be instituted, a guilty party. There must be someone who has deserted someone else; because I take it from what you have said that in the case of wilful desertion, the husband deserting the wife, let us say, she would be entitled to sue for divorce, but only as the innocent party: if she were a guilty party she could not sue. In other words, the determination of innocence would have to be made under your theory of wilful desertion.

Mr. SMITH: I would regard both adultery and desertion as symptoms of a relationship that has been broken; and it is in this sense that I say it is not helpful to say that one party is innocent and the other guilty. We know that some things happen to disrupt the relationship, and often it takes two to bring that about.

Mr. HONEY: In the case of the husband, there might sometimes be good reasons for his deserting, but unless you explored the reasons you could not permit him to institute action for divorce under the thesis you have put forward.

Mr. SMITH: The answer to that is that before divorce proceedings were begun there should be investigation with a view to rehabilitating the marriage to find out what the reason was for the breakdown.

In regard to everything we have to say in this brief it must be taken for granted that there has been this prior investigation looking to the rehabilitation of the marriage.

Mr. STANBURY: A short while ago I asked whether these gentlemen felt that the law should prescribe some procedure that would have to be gone through before dissolution, or perhaps before the commencement of proceedings for dissolution, there being provision for a certain waiting period to give the parties a proper opportunity to decide.

Mr. SMITH: The consensus of our commentary and brief would add up to this: that State and Church should take some action and not leave it to the individuals themselves.

Mr. McCLEAVE: I suggest, Mr. Chairman, that the next member of the delegation be introduced. He could answer my question about reconciliation.

The CO-CHAIRMAN (*Senator Roebuck*): May I introduce Mr. Young. He was born in Port Elgin, Ontario, and received his B.A. degree from the University of Toronto, and is a graduate of Knox Theological College, Toronto, Ontario. He has been a minister of Presbyterian congregations in Pictou, N.S., Collingwood, Ontario, and is at present the minister at St. Andrew's Presbyterian Church, Hamilton, Ontario. As a pastor in the aforementioned congregations he has had wide experience in pastoral and marriage counselling. He is also the Chairman of the Board of Evangelism and Social Action of the Presbyterian Church in Canada. Mr. Young.

The Rev. YOUNG: I would like to preface the answer I will attempt to make to the question raised by Mr. Stanbury, Mr. McCleave and an honourable senator whose name I missed. In the matter of counselling, either voluntarily or as a requirement of law, I would offer this comment from the standpoint of a minister in a pastoral situation confronted by couples wishing to be married, where one at least has had a previous divorce.

In some ways the present law on divorce makes divorce too easy. This may sound rather strange in that we are trying to widen the grounds of divorce; but divorce is too easy in this sense. If adultery is proven, whether it be adultery *de facto* or adultery that is trumped up, the time involved is really not very long, so that it is possible for a person to be asking to be remarried within, say, 18 months of the time when the previous marriage ceased, or the parties ceased to

live together, and application was made for divorce. As soon as they have the final decree they can obtain a licence and present themselves to a minister.

The minister, from his point of view, seriously questions whether this person is ready for remarriage. There should be a longer waiting period before they can get a licence and be remarried. This is all related to the question that has been asked, and in answering the question I would like to restate it: whether the court should require counselling, and how it should be undertaken.

When a couple decide that the only answer to their impasse is a divorce, if they were to make application to the court, the court might say to them: All right, but you must wait a reasonable length of time, during which period you will be obliged to undergo some competent counselling, to the end that your marriage may be saved. And the report of the counselling proceedings will then be brought before this court if and when, after a reasonable period of time, you wish to continue the proceedings.

When I say "reasonable length of time" I suggest eighteen months after the application has been filed: provided it can be shown that for at least eighteen months previous to the filing of the application the marriage was in a very serious state—in fact, a state of incompatibility.

This makes a total of three years, but not three years after the application; there could be a retroactive element. In this way, I believe, we would serve the parties to the marriage, the community as a whole, the Church and its ministers, in requiring counselling.

Co-Chairman Senator ROEBUCK: Would you give that authority to the minister?

Mr. YOUNG: Do you mean the clergy?

Co-Chairman Senator ROEBUCK: Yes.

Mr. YOUNG: Well, the clergyman, of course, has this opportunity now if they come to him voluntarily. Do I take it your question is: Would the court refer the parties to the minister?

Co-Chairman Senator ROEBUCK: You are talking about remarriage and the question is whether you would give that authority to the minister to say "I will marry you in six months' time, or a year and six months".

Mr. YOUNG: My concern is that the divorce itself be delayed.

Co-Chairman Senator ROEBUCK: Would you give that discretion to the judge to say: We will adjourn this case for six months or a year and a half in order that you people may counsel with some competent person.

Mr. YOUNG: Yes; and perhaps the judge would direct them to some social or counselling agency, maybe a minister if they have a church relationship, and require that the report of these counselling sessions be transmitted to him.

Senator HAIG: Isn't that similar to what Judge O Hearn said the other day? The Family Court would have facilities and counselling—provision would be made for counselling and reconciliation if possible. But what happens if the two parties do not agree to counselling and are determined to get the divorce. Then either they get the divorce or they enter into a common-law relationship. What happens? How can you prevent the provincial government granting a licence to two parties who are of the right age and are perfectly able to get married?

Mr. SMITH: You can lead a horse to water, of course. And yet, I would imagine, there would be many couples involved in a very serious marital problem, whose scope is limited to discuss things between themselves. They get to the point where they can no longer sanely and wisely discuss these matters, and either from lack of contact or through embarrassment they do not seek anyone to counsel with.

Senator HAIG: Of course, as regards counsel service before divorce, there should be an adjournment for six months; but after divorce is granted I do not see how you can get two individuals or four individuals to agree to counsel service for another six months. I agree with counselling before application. The application might be delayed six months.

Mr. YOUNG: I was misunderstood in my remarks because the waiting period I was advocating was before the granting of divorce, not after.

Senator HAIG: Thank you.

Co-Chairman Senator ROEBUCK: I think perhaps it was my error in the way I framed my question. The witness has made that clear from the very first that he was talking about the time prior to the divorce and not afterwards.

Mr. WAHN: Let us assume a situation where one spouse has been guilty of adultery, and this investigation which has been referred to is made and the conclusion reached that despite the adultery the marriage is not irretrievably lost, and that if the divorce is refused there is the chance that the marriage can be rehabilitated. Would you permit divorce in such circumstances where adultery is proved? What is the view of your Church on that—that the divorce be permitted? Adultery is proved, but on investigation it is believed that the marriage can nevertheless be saved. What is the result?

Mr. GOWLAND: This is the point I made as a result of a study by the Committee on Family Life: that even if adultery has been proved it does not necessarily lead to divorce. It is permissive, not normative.

Mr. WAHN: Would you refuse the divorce if a study indicated that the marriage could be saved even though adultery had been proved?

Mr. GOWLAND: Yes; and that is in harmony with the doctrine of the Church.

Mr. WAHN: If you look at the Westminster Confession you will observe it indicates that adultery is the basis for divorce, "or such wilful desertion as can no way be remedied by the Church or the Civil Magistrate". Those words are made applicable not to adultery but to the other cause. I gather, however, supposing adultery is proved, that if as a result of investigation it is determined that the marriage can be saved you would be in favour of refusing the divorce on the ground of adultery?

Mr. GOWLAND: That was the consensus of our committee. We felt that this was the teaching of our Church on this subject.

Co-Chairman Senator ROEBUCK: We have not heard from Mr. Cromey and so I will introduce him to the members of the committee and to the record. Mr. Cromey was born in the North of Ireland. He received his B.A. degree from Queen's University and is a graduate of the Assemblies Theological College in Belfast, Ireland. After graduation from the Assemblies College, Mr. Cromey spent seven years as a missionary in India. On his return from India he was minister in the Presbyterian Church in Northern Ireland for three years. He came to Canada ten years ago and has been a minister of Presbyterian Churches in Galt and Kincardine and is at present the minister of St. Andrew's Church, Markham, Ontario, and St. James Church, Stouffville, Ontario. Like the other members of the delegation, he has had wide experience in pastoral and marriage counselling and for the past three years has been a member of the Committee on Family Life of the Presbyterian Church in Canada. Mr. Cromey, may we hear from you.

The Rev. Fred H. Cromey: I appreciate the privilege that has been accorded us of presenting this cause to your committee who are considering the problems of marriage and divorce. The subject is dear to our heart as a Church be-

cause—and I believe I speak not only for myself but for the Church—we put great emphasis on the love of God towards men, and the understanding of God, and we strive to work the problem out in delicate situations resulting from strained family relationships.

I can say that in my own experience I have found that time has healed many wounds and brought the members of a family together, not only parents but children. Wounds have been healed and time has been of the essence in many of the problems that we have encountered, and our experience has been that many marriages have been saved by making time an almost compulsory element.

Mention has been made of a period of a year and a half or two years. In the car coming up to Ottawa we recalled an instance where a man did leave his family and after three years discovered what a fool he had been and was reunited with his wife and children, and they lived happily ever after, as the story goes.

This phase of our work is woven into the brief in the third section, where we say: "Our Church does not hold that divorce is the natural consequence even of proved adultery or wilful desertion. There is an obligation placed upon church and society to explore every means of reconciling the partners in a sick marriage to the end that their marriage may be rehabilitated and preserved." That has been brought out, and I repeat it by way of emphasis.

Co-Chairman Senator ROEBUCK: Have you considered the matter from the standpoint of the children? From the standpoint of partners and public we have heard evidence. But what about the children? We have been told there are 50,000 common-law marriages in Canada and there are barbarous laws with regard to illegitimacy. It means therefore that a very large number of children come into the world as bastards. I am not inventing the word, but it is a nasty word, and many children start life with two strikes against them as a result of it.

Have you studied the question of compulsory delays, having regard to the right of children to be born within the married state of their parents rather than from this common-law union, so called, about which there is nothing common and nothing of law. The children have rights, have they not?

Mr. CROMEY: Unquestionably.

The Co-CHAIRMAN (*Senator Roebuck*): My question is: Have you considered the possibility of there being still more illicit relationships and more illegitimate children as a result of any compulsory delays, certainly after the divorce has been granted if not during the time in which it is being considered?

Mr. CROMEY: This is certainly a very grave problem, but I feel that during this period of consultation there is every reason to hope that the mere fact that the case is being considered would serve as a deterrent to an illicit relationship with somebody else. So long as interested persons are discussing the matter, so long as hope is held out of reconciliation, we have reason to believe that the parties will be thinking back to the former state instead of thinking of seeking the gratification of their present desires. That is one factor to which I would call attention.

The Co-CHAIRMAN (*Senator Roebuck*): You think it would be a factor in some cases?

Mr. CROMEY: Yes.

The Co-CHAIRMAN (*Senator Roebuck*): But not in all cases?

Mr. CROMEY: No.

The Co-CHAIRMAN (*Senator Roebuck*): So that specific compulsory delays are to be considered in the light of their danger to the children of illicit marriages?

Mr. CROMEY: Yes.

The Co-CHAIRMAN (*Senator Roebuck*): We have reached about the limit of our time and I would like to hear from my Co-Chairman Mr. Cameron. Have you something to say, Mr. Cameron?

The Co-CHAIRMAN (*Mr. Cameron*): Senator Roebuck and members of the committee, it is a great pleasure for me, as a member of the Presbyterian Church and an Elder of that Church, and having been brought up in the Westminster Confession of Faith, to listen to this presentation today. I believe I understand pretty thoroughly the rationale of Presbyterian thinking, and what has been outlined here, in my opinion, covers the ground in a very wide way. It is a matter of common sense. The last speaker realizes that in dealing with divorce you are dealing with all types of persons, and what may be applicable to one may not be applicable to another. However, I do not wish to discuss my Presbyterian background. I simply wish to assure the gentlemen of the delegation that, having heard their presentation, we are much impressed with the manner in which they have conveyed their point of view and the point of view of the Presbyterian Church. We wish to thank you, gentlemen, very sincerely for your appearance here today.

Mr. SMITH: On behalf of the delegation I thank you and the members of the committee for your cordial hearing and the privilege of appearing before you to present the view of our Church on the subject.

The Co-CHAIRMAN (*Senator Roebuck*): Gentlemen, we have a second distinguished delegation before us, namely The Canadian Psychiatric Association, which is the national medical association for physicians who specialize in psychiatry. The association was incorporated under Part II of the Companies Act. Letters Patent were issued by the Secretary of State for Canada on June 1, 1951. The membership is approximately 1,300 in January 1967. The Canadian Psychiatric Association has been affiliated with The Canadian Medical Association since 1954. Nine provincial psychiatric associations are affiliated with the national body.

We have before us two prominent members of that association, the first of whom to address you will be Dr. Jean Baptiste Boulanger, born August 24, 1922. His degrees are: B.A., M.A., L.Ps., D.I.P. (Paris) M.D., F.R.C.F. Dr. Boulanger is Associate Professor of Psychiatry, Faculty of Medicine, University of Montreal. Consultant in Psychiatry, Institut Albert Prevost, the General Hospital of Verdun, Lakeshore General Hospital. Consultant in Child Psychiatry and Director of Group Psychotherapy, Hospital Ste. Justine. Chairman of the Committee on Psychiatry and the Law, Canadian Psychiatric Association. Director, Canadian Psychiatric Association; Director, Quebec Psychiatric Association; Past President, Canadian Psychoanalytic Society; Past Director and Member of the Training Committee, Canadian Institute of Psychoanalysis. Dr. Boulanger is Associate Editor of the Canadian Psychiatric Association Journal. We shall be glad to hear from our witness.

Dr. Jean Baptiste Boulanger (*The Canadian Psychiatric Association*): Mr. Chairman, I wish to thank the committee for its invitation, even though we were a bit late in applying for it. This is not to be taken as evidence of a lack of interest on our part, for we were quite aware of the fact that the general situation which gave rise to the creation of this committee was under discussion in Parliament.

I would like to make it clear that we endorse the brief that has been submitted by the Canadian Mental Health Association. In fact, we sent a telegram endorsing it. But this is an independent recommendation of the Canadian

Psychiatric Association, which is the national association of physicians specializing in psychiatry and having affiliated provincial organizations of psychiatrists across Canada.

A Committee on Psychiatry and the Law was established at the 1966 Annual General Meeting of the Canadian Psychiatric Association held in Edmonton, Alberta, with the following terms of reference as defined by the Board of Directors: "To recommend policy to the Board of Directors regarding existing legislation of concern to psychiatry and proposed amendments thereto."

According to the usual procedure in our Association, a chairman for this committee was appointed and he in turn selected members in his own geographical area to serve on the committee. The members of the nucleus group were: Dr. J. B. Boulanger, chairman, and Drs. Bruno Cormier, Alan Mann and Lucien Panaccio. Corresponding members from all across Canada were invited to join our committee, and we have in all 10 representatives of the 10 provinces plus the four members of the nucleus committee.

This committee met twice, on July 20 and July 22, and a draft was circulated to all corresponding members, and after the receipt of their answers, a final draft was drawn on December 19 and presented as a report to a meeting of the Board of Directors held in Toronto on the 26th January of this year.

I emphasize the fact that the section concerning mental illness as a ground for divorce was circulated on July 29, 1966, independently and was unanimously accepted by all corresponding members and also unanimously endorsed as a recommendation by the Board of Directors of our Association. It represents, therefore, the official position of the Canadian Psychiatric Association. It was also the expression of opinion of the Association at large, that the present divorce procedure in the Canadian Parliament needs considerable improvement. There are quite a few Roman Catholic members in the committee and in the Association and there was no dissident opinion about the need for a revision of the divorce law.

The committee and the Association feel that grounds for divorce obtainable through private bill, should not differ, essentially, from the grounds accepted for legal separation.

The Association is opposed to the extension of grounds for divorce to illness in general, and the Canadian Medical Association will be asked to support this stand. If, however, Parliament decided otherwise, the committee and the Association would disapprove of the discrimination against mental illness. We have reviewed the legislation in the United States permitting divorce for chronic mental illness. Three conditions are variously applied: (a) The concept of incurable insanity. (b) Length of commitment, which may vary from 18 months to five years. (c) Expert opinion, which may be that of an executive officer, or the consensus of five qualified psychiatrists. None of the statutes examined was found satisfactory and psychiatrically defensible.

In trying to be fair to both parties, the mentally ill and the mentally sound, of the marriage, the committee also rejects the provisions of the French "Code civil" on divorce. In France, any court litigation is prohibited while the respondent is committed, and mental illness is considered as an "excuse absolutoire": the jurisprudence including insanity, neurasthenia, nervous disorders, idiocy and epilepsy under "démence".

We have tried to be fair to both parties, the mentally sound and the mentally ill.

CO-CHAIRMAN (*Senator Roebuck*): You do not hold with the French "Code civil"?

Dr. BOULANGER: No. In conclusion, this is what we recommend. It is the resolution which has been adopted officially by the Association as received from the committee:

Resolution
Passed by The Canadian Psychiatric
Association
Board of Directors
January 26, 1967

The Canadian Psychiatric Association is of the opinion that mental illness should not be legally introduced as ground for divorce or as a defence in a divorce case. The court would be asked to appreciate the behavior of the respondent without reference to its etiology and could grant a divorce on the grounds that the respondent's behavior is incompatible with the fulfilment of marital duties and parental responsibilities. The Association therefore opposes Bills C-133, C-79, C-58, C-55, C-44, C-19, C-16 and S-19, which provide for divorce on the basis of mental illness and are presently tabled in Parliament.

In a word, in our opinion mental illness should not be mentioned at all. What should be tried by the court, what should be left to the court, in our view, is whether the behavior of one or other of the parties is compatible with married life and the education of the children.

It is our opinion that a man or a woman can make life impossible in the home, whether that person is hallucinating or drunk, or whether he is just a nasty individual.

Another important aspect we would stress concerns the legal concept of guilt which has been very often mentioned. It is our opinion that married life is a shared responsibility; and when one knows, as a psychiatrist knows, what goes on, there is no such thing as lily-white innocence or unmitigated guilt.

If the concept of mental illness is to be introduced, we would have to obtain a unanimous criterion on the etiology and the diagnosis of such disease; and, as some of you know from court experience, it is difficult to find two psychiatrists who would agree on criteria.

We do not believe there is such a thing as incurable mental disease. We do not believe that diagnosis in itself entails any precise prognosis: in other words, the condition in a severe psychotic diagnosis may be cured in a few days whereas the condition with a rather benign diagnosis may entail for years, because in some patients there are great personal difficulties.

One last thing I would bring out is the question of a "privilege", which as you know is not protected in cases of divorce. We feel that it is extremely difficult for a patient to confide in a psychiatrist and really trust the psychiatrist if he or she is exposed to betrayal by the psychiatrist in a court action concerning his or her family life.

Co-CHAIRMAN (*Senator Roebuck*): Such betrayal has never taken place in any Parliamentary divorce. No psychiatrist ever appeared before a committee of Parliament who was required to answer any question that would necessitate a betrayal of confidence. I do not know what the ordinary courts do. Have you had any experience with courts that permitted a psychiatrist to be driven into divulging what he felt to be a confidence?

Senator HAIG: Do I understand you would not allow a court to grant a decree declaring a person mentally incompetent?

Dr. BOULANGER: The law does have some provisions about being mentally incompetent.

Senator HAIG: You have to get an order of the court, supported by affidavits of psychiatrists, and the court declares the person mentally incompetent.

Dr. BOULANGER: Yes; that would be incapacity. I agree that a person can be declared incompetent and committed for mental illness; but what we are dis-

cussing here is whether evidence should be brought, implying mental illness as grounds for divorce.

Mr. AIKEN: You would however permit a "mental condition," or a "condition of mind" properly defined, to be used as a ground of divorce.

Dr. BOULANGER: No. I would ask Dr. Chalke to answer that.

The Co-CHAIRMAN (*Senator Roebuck*): Shall we introduce Dr. Chalke?

Mr. AIKEN: The answer I get, then, is that under no circumstances would mental illness or a mental condition or any condition of mind be considered a ground for divorce?

Dr. BOULANGER: No. On the other hand, the behavior of the person could be examined by the court and the court would decide whether or not that behavior was compatible with the fulfilment of marital duties and family responsibilities.

Mr. AIKEN: This would open up a tremendous ground beyond a mental condition.

Dr. BOULANGER: If a man beats his wife every day, he may be doing it because he is hallucinating a voice, or because he is drunk, or because he is a nasty person or a psychopath or anything; but what is to be considered is the fact that it is impossible for his wife and children to live with him.

Mr. AIKEN: In the example you have cited it would be cruelty and not a question of mental disability; and you take the view that any other condition that might bring about grounds for divorce should be direct grounds and not the indirect grounds of mental illness?

Dr. BOULANGER: Yes.

Senator HAIG: Suppose a man or his wife is committed under a court order as mentally incompetent: are you suggesting to us that these two people could never get a divorce? We have a court order declaring a woman mentally incompetent, and after five years she is still in an institution; and you suggest that the husband cannot get a divorce?

Dr. BOULANGER: Dr. Chalke will answer that question.

The Co-CHAIRMAN (*Senator Roebuck*): I had better introduce Dr. Chalke: He is F. C. R. Chalke, M.D., University of Manitoba, 1943; M.Sc., Queen's University, 1948; F.A.P.A., 1959. Certified in Psychiatry, Royal College of Physicians & Surgeons (Can. 1950). Presently: Professor and Head, Department of Psychiatry, University of Ottawa, 1959. Associate Dean, Faculty of Medicine, University of Ottawa, 1966. Chairman, Medical Advisory Board, Ontario Mental Health Foundation, 1962. Editor-in-Chief and Founder, Canadian Psychiatric Association Journal, 1955. Director, Canadian Psychiatric Association, 1966. Chairman, Committee on Law and Mental Disorder of the National Scientific Planning Council, Canadian Mental Health Association. Consultant in Psychiatry-Surgeon General, Canadian Forces Medical Service. Consultant in Psychiatry, Canadian Pensions Commission. Chairman, Panel on Psychiatric Research, Defence Research Board. Formerly: Medical Officer, Canadian Army, 1943-46. Senior Psychiatrist, Canadian Army, 1947-53. Private Practice of Psychiatry 1953-58. President, Ontario Psychiatric Association 1966-67. President, Canadian Association of Professors of Psychiatry 1965-66.

Our witness has had a most remarkable experience in psychiatry and medicine, and I have great pleasure in introducing Dr. Chalke.

Dr. F. C. R. Chalke, Professor and Head, Department of Psychiatry, University of Ottawa: Would you like me to reply director, Mr. Chairman?

Co-Chairman Senator ROEBUCK: Yes.

Dr. CHALKE: I think the problem that has been raised is one that should have received an answer thirty or forty years ago, at the time when moral judgments were all either black or white. This or that person was declared mentally ill by court order, and that even in the case of non-criminal offences, and the philosophy that prevails is one that dates back to the last century: that once you were mentally ill you were irremediably ill.

This philosophy has been completely abandoned by the medical profession. In the first place, the whole movement is to reduce the number of people admitted by court order, and this has been successfully done in some provinces of Canada and in Great Britain so that less than from 8 to 5 per cent need commitment; and we are pushing very hard to get people to stay voluntarily in hospital, though they can leave whenever they like. This is being done more and more, and there are fewer and fewer legal commitments. This reduces the number of people who are held against their will.

There is also a separation now of mental incompetency in relation to the management of business estates from unwilling hospital committal. There are people who are not mentally competent who are not in hospital—people who are mentally incompetent in regard to their property—but they are not incarcerated by any court order. To be declared incompetent does not really mean you cannot manage your marital situation.

If a person is committed against his will, this of course creates a problem of being incarcerated the same as being in a penitentiary, and if it goes on and that person cannot get out, the impediment to marriage is the fact that he is, wilfully or unwillingly, separated. This is the impediment, not mental illness *per se*.

Senator HAIG: You are speaking now of certain degrees of incompetence.

Dr. CHALKE: Yes; and this brings us back to some statements that appear in some of the bills that have come before the House of Commons and the Senate. The terms "of unsound mind" and "mentally ill" are meaningless to anyone who is professionally expert in this field. Mental illness is not simply one particular illness any more than the term "physically sick" denotes one particular physical disorder. It ranges from a mental sprained ankle, as it were, to mental cancer, so that if you put an expert on the stand and asked him: "Is this person mentally ill—yes or no?" you are putting to him a question that opens up to him a very wide range to choose from.

I suggest therefore that the question is meaningless. And the same is true of "unsound mind". With all due respect to you, honourable senators and members of the House of Commons, I say that none of us is physically sound and none of us is mentally sound. I, for one, am not physically sound because I have to adjust my vision; and none of us is one hundred percent mentally sound. So, if the question is asked—Is this person of sound mind?—no one can answer, no matter how hard he tries.

This is the basic reason for our problem about incarceration. The practice is dying out, and unwilling incarceration will disappear from the scene except for people who are held during Her Majesty's pleasure under warrant because of certain acts.

To the question whether someone is of sound or unsound mind we cannot give an answer. We would go along with the Canadian Mental Health Association, that Dr. Boulanger has spoken about, whose view is that what makes a marriage work, or hinders its working, is behavior, which takes any one of three or four forms, such as for example pathological jealousy, where one of the parties harbours the belief, without any reasonable ground for it, that the other is unfaithful. This creates a situation which makes marriage intolerable.

Mr. AIKEN: Where would you put that in as a ground for divorce? This is a question that bothers me with the conditions that you have mentioned. We have

never had the proposal that a person's behaviour be a ground for divorce, except for cruelty.

Dr. BOULANGER: But after all, adultery, which is one of the main grounds for divorce, is a matter of behaviour, is it not? Is not one of the parties saying, by his—or her—behaviour that the marriage does not exist either in his mind or in his heart? So that anything that severely breaks the marriage is behaviour of one kind or another.

Mr. AIKEN: Our witnesses are solving their problem but not doing anything to solve ours. If you do not include any condition of mental illness as a ground for divorce, I would like to follow the matter up by asking: Where would you put these cases where a person, through lack of comprehension, will never recover his ability to lead a normal life? Where do you put that, under the head "Desertion"? Or would you put it under "cruelty"? I do not think either would be a voluntary act. I do not see where all these cases, which the members of this committee are concerned about, are to be put. I do not know where you will put them.

Co-Chairman Senator ROEBUCK: May I say something? I think we are worried about distinctions that do not exist. There is a principle of British law that a man's thinking cannot be probed. We have granted in Parliamentary divorce a good many nullities and I have in mind one case where a chap married a girl; they went through the ceremony; then outside the church he kissed her good-bye and took the next boat to England. We gave her the divorce on the ground that he was crazy, not because we had examined his head but simply by his actions. A man's thoughts are read by his actions, so that what the witness is telling us is nothing new in either practice or theory. Call it mental illness if you like, or very extraordinary and objectionable conduct, you arrive at the same place.

Mr. MCCLEAVE: The plight we are in puts me in mind of the two psychiatrists. One said to the other: You are fine. How am I? The other answered: I think so.

Co-Chairman Senator ROEBUCK: You heard about the fellow who said to his wife: All the world's queer but thee and me, and thee is a bit queer.

Mr. MCCLEAVE: They would not like to see incorporated in the law anything that would make expert testimony completely unworkable in many cases; but we can solve the dilemma with the theory that divorce would be granted on the basis of illness that would make the marriage completely broken down, whether you define the illness as mental or physical. Isn't that what the Canadian Medical Association recommended, and what you yourselves recommend?

Dr. CHALKE: If it is the will of the Canadian people, that illness that makes the continuance of a marriage impossible, constitutes an impediment, that amounts to a ground for divorce.—We can be of help to you if that is the line of argument, as long as it is not solely mental. If somebody has a stroke and is confined to bed and can only mumble, and if that is a ground for divorce, we can do the same with mental illness. There are neurological diseases in which people may have a cardiac arrest, leading to a condition from which they do not recover in time, so that they become vegetables: they cannot recognize anyone and do not know the nature of contracts they had assumed years before. Because of the marriage contract binding the parties "in sickness and in health," ill health has never been a ground, so you will find yourself in the dilemma of the "quantity" of ill health that makes living together impossible.

Diabetics sometimes become impotent. Will this be a ground for divorce?

Mr. MCCLEAVE: Mere physical incapacity is a ground for annulment.

Dr. BOULANGER: In that case, would you enact in the law that a person could be divorced, because he was a diabetic, or because he was impotent? There is a distinction between saying that because of mental illness a person should be divorced, and saying, whatever the illness may be: "Because this person cannot fulfil the conditions that constitute married life, the marriage has broken down." But that does not say that you are going to specify either diabetes or impotence in the law.

Mr. McCLEAVE: The witness has posed a very interesting question. One may be able to carry on a part of the functions of married life, such as bringing up children, even though one is a diabetic and becomes impotent. The approach we have taken is that the illness be of such a nature that the marriage is gone for all practical purposes, as for example where a person is in an institution and is incapable of playing the part of a helpmate in bringing up the children or anything of that sort.

Dr. CHALKE: If you like you can go back to the days when a person was either sane or insane. But there are different degrees of competence in the management of one's business, carrying on one's profession, and so on, and we run into all sorts of problems. There are various mental requirements in law, for being married, for being a Member of Parliament, for being a doctor. There is a difference between the skill required for driving a motor vehicle, and the knowledge for making a will.

There are many forms of "mental illness" or mental disorders that do not render a person ill in a medical sense, and this is really the problem. Suppose I am put on the witness stand and am told: The petitioner maintains that she should be divorced because her husband is mentally ill. Is he or is he not mentally ill? He might have some illness but this would not be an impediment to marriage, not necessarily; and that is what we are afraid of in the use of blanket terms.

Dr. BOULANGER: Often the diagnosis does not give the degree of compatibility or incompatibility. One could make a rather grave diagnosis and yet the patient might be a good husband or wife and parent; on the other hand you might have a patient with a minor psychiatric diagnosis, who could not be committed for that disorder, and yet his or her behaviour might be such as to make life impossible for the family.

I would say this. If a person has been in a mental institution for, let us say, ten years and shows no improvement, this in my opinion could be similar to the kind of impediment that keeps the couple apart where one is in prison and is therefore unable to fulfil the obligations of a spouse. That is why we oppose the French attitude, which does not permit of divorce as long as a person is committed.

The whole essence of the marriage lies in the relationship between the parties. Some husbands will accept a disabled partner and care for her; others will not. The party who wants a divorce will create the cause, even fictitious adultery, to get it; and there are those who have many grounds for divorce, yet will not ask for it because they do not want it, and you cannot force it upon them.

Mr. McCLEAVE: What in your opinion would be an acceptable descriptive term in legislation—illness or disability or what?

The Co-CHAIRMAN (*Senator Roebuck*): Marriage breakdown, incompatibility of the partners, inability of one or other to maintain the marriage?

Mr. McCLEAVE: Suppose one is disabled mentally or physically: would you use the word illness in the legislation as the cause leading to the breakdown of the marriage? What word would you use?

Dr. CHALKE: It would have to be illness leading to behaviour, rather than wilful or malicious. It would be something arising out of illness, but it would be the same kind of behaviour that would make the marriage incompatible if it were from sin or wilfulness. I submit this definition—and it was written, may I say, by a lawyer who was intimately involved in writing mental health legislation in this country. He was a member of the CMHA Committee on Legislation and Mental Disorder, to which I referred in my introduction. He was taking exception as a lawyer to the Canadian Bar Association's statement, which you may have had before you. He would recommend, from the doctor's point of view, some such wording as this: Disorder or illness to an extent that renders the afflicted spouse incapable of appreciating the marriage contract, and where the spouse has been in an institution as an invalid—and this means in any hospital, presumably including any mental hospital—for a period of at least five years preceding the commencement of proceedings, and there is no likelihood of a resumption of cohabitation and the issue of a decree will not prove unduly harsh or oppressive to the dependant spouse.

Mr. McCLEAVE: Thank you.

Mr. STANBURY: I think Dr. Chalke has answered part of my question by reading the last paragraph drafted by a lawyer working with the Canadian Mental Health Association. At the same time, Dr. Chalke's use of the word "behaviour" is at once too wide and too narrow. It is too wide because it does not impose any quantitative limitation on the kind of behaviour contemplated: Behaviour over what period of time? Behaviour how long ago? You do not deal, Dr. Chalke, with any criterion in the definition you suggested at first in what seemed to me to be a complete solution. Really, you fairly well answered my question except that I would be interested to know whether you would enlarge on the reference to behaviour by indicating the quantity of the behaviour or the time element which would be regarded as affording an adequate ground for divorce.

Dr. BOULANGER: That is something that is always more or less a matter for the Court to decide.

Mr. STANBURY: If it is your intention to give the court complete discretion I understand what you are proposing. But that would be quite revolutionary.

Dr. BOULANGER: It is like mental cruelty. Would you say there was mental cruelty if the husband used filthy words?

Mr. STANBURY: The courts define cruelty but not behaviour.

Dr. BOULANGER: But cruelty is behaviour.

Mr. STANBURY: Yes: so is adultery behaviour. But if you are going to use the word behaviour in a loose way you will present quite a problem to the courts. Other terms have been defined over the years.

Dr. BOULANGER: It is a matter of incompatibility.

Mr. STANBURY: Is it for a year or three years or what?

Dr. BOULANGER: It is for the court to decide whether the manifestations of the disorder are such that the afflicted person is incapable of fulfilling his or her obligations.

Mr. STANBURY: You would leave that to the court?

Dr. BOULANGER: Yes.

Dr. CHALKE: We are not suggesting that the word "behaviour" should be introduced into legislation; rather, we are concerned with different modes of behaviour—desertion, cruelty and so on—which would make the marriage

incompatible. We are not proposing the abstract term "behaviour," but it should be in behavioral terms—cruelty, sodomy, and so on.

Mr. STANBURY: I am sympathetic there; but in using the word behaviour you left out a large area which you then only partly filled in with your definition, because sometimes, one might say, there is almost a lack of behaviour.

Dr. BOULANGER: The manifestations, the actions, are not necessarily linked with a specific etiology or illness, and that is why we are not in favour of the idea of introducing illness as such. It is the manifestations that cause disruption and not the illness itself.

Co-CHAIRMAN (*Senator Roebuck*): We have pretty well plumbed the principles involved and it is time to call it a day. I would like to hear from my Co-Chairman.

Co-CHAIRMAN Mr. CAMERON: We have been privileged in having two very distinguished psychiatrists give testimony before the committee today, in the person of Dr. Boulanger and Dr. Chalke, and on your behalf I wish to thank the witnesses for having opened many avenues of thought for us. At times it seemed to be a little over my depth, but I believe I have now a fair appreciation of the approach of these two gentlemen to the problem. What they have told us will be very useful when we come to draft our ideas of the law relating to the severance of the marriage tie, so far as Canada is concerned. I thank both distinguished gentlemen for their evidence.

The committee adjourned.

APPENDICE "33"

Brief to the Special Joint Committee of the Senate and House of Commons on
Divorce by

Marcel Naud, 11925, rue Valmont, Montreal, P.Q.

Montreal, November 8, 1966

Gentlemen of the Committee,

After reading and examining the two reports from your Committee, I wish to inform you of the following observations so that henceforth all citizens affected by the subject may enjoy, as any free person does, the greatest and most inviolable of *existential* possessions: JUSTICE and LIBERTY founded on TRUTH.

Before any divorce is granted there must be PROOF OF A PERMANENT RUPTURE IN THE MATRIMONIAL BOND and hence THE PROOF OF THE INEXISTENCE OF THE MATRIMONIAL BOND BETWEEN TWO PERSONS BELIEVED TO BE UNITED BY SUCH A BOND. If this principle is established as the basis for divorce, some general indications may be given for the enlightenment of the legislator which are characteristic of the inexistence of matrimonial bonds, but which could not be considered exhaustive because reality and existence make such an inventory impossible.

In fact, if the marriage no longer exists in SPIRIT, why should we strive so hard to preserve it, as we do at the present time, if it has no REAL MEANING?

Why punish one or two people because a union which they believed possible has become impossible for them?

Why punish one or two people throughout their lives because they are incapable of living together or of tolerating each other? It is all the more unjust because no positive science can assist people who decide to get married.

When two people who once formed a couple refuse to prolong their life together, why does the State not ratify their desire, without condemning both of them or one of them to the benefit of the other by compelling him to support the other?

When does a divorce exist? Whenever a married couple are spiritually separated and in profound disagreement. That is real divorce: spiritual divorce. When can the State ratify such a spiritual divorce and consent to the annulment of all bonds and all responsibilities of one partner towards the other? When there is a definite proof that a husband and wife find it impossible to go on living together. It is simple but it is *true*.

The granting of divorce by the State should henceforth be based on the principle set forth above.

The trained professionals we already possess: *psychiatrists; psychologists and socialists* should, as soon as possible, be *Commissioned by the State* to carry out these investigations for the purpose of enlightening those who will later be responsible for legislating on someone's DIVORCE.

The practice of wrecking the lives of thousands and thousands of citizens because divorce is impossible for them should cease.

The practice of consenting to separation of bed and board based on the over-simplified criterion of incompatibility of character, condemning the person who works to pay separate maintenance should cease. That is a degree of servitude which is unacceptable nowadays.

May it please the members of the committee on divorce to decide in favour of the principle stated above so that all citizens may enjoy the PEACE and FREEDOM to which they are entitled in life.

Yours truly,

Marcel Naud,
11925, rue Valmont,
Montréal, P.Q.

APPENDIX "34"

BRIEF

PRESENTED TO

SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS

ON DIVORCE

by

CANADIAN JEWISH CONGRESS

Submitted by:

Rabbi S. M. Zambrowsky, Chairman, National Religious Affairs
Committee

Rabbi H. J. Stern, Vice-Chairman, National Religious Affairs Committee

Louis Herman, Q.C., Chairman, National Joint Community Relations
Committee

Saul Hayes, Q.C., Executive Vice-President

Samuel Lewin, Secretary, Religious Affairs Committee

January 26th, 1967.

BRIEF
SUBMITTED BY
CANADIAN JEWISH CONGRESS
TO
SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF
COMMONS ON DIVORCE

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

- (a) Laws governing the divorce procedures which recognize adultery as the sole ground of divorce are completely inadequate. In many cases there is outright promotion of immorality by the assertion of it as the sine qua non of divorce proceedings.
- (b) The proceedings, as presently constituted, too often, breed disrespect for the law and lead to a situation where subterfuge, collusion and perjury have to replace honest efforts to abide by the law.
- (c) A marriage should be dissolved by law only after it is clearly demonstrated that it has no hopes for viability.
- (d) Provisions of granting divorce by resolution of the Senate be abolished and jurisdiction of divorce procedures be vested with competent courts.
- (e) Only the judgment of the constituted courts should authorize a dissolution of marriage.
- (f) Divorce proceedings ought to include conciliation procedures, without which divorce courts will not be empowered to dissolve a marriage.
- (g) A divorce ought to be obtainable wherever a marriage has been irretrievably broken and domestic harmony manifestly ruptured in the judgment of the court.
- (h) Conciliation procedures, which will form an integral part of divorce proceedings, ought to take cognizance of the need for a religious Bill of Divorce in case one or both parties recognize the need for such a religious act.
- (i) No divorce be granted unless and until provisions were made for the welfare of minor children.
- (j) The costs of obtaining a divorce ruling be either completely eliminated or substantially reduced.

1. Interest in Proceedings

The Canadian Jewish Congress welcomes the opportunity of presenting to the Special Joint Committee of the Senate and of the House of Commons on Divorce the views of the Jewish community on divorce procedures presently obtaining and to advance recommendations for changes in these procedures.

The Canadian Jewish Congress is an organization fully representative of the Jewish community through the election of its delegates from organizations and the public at large by democratic processes. Founded in 1919 and reorganized in 1934, it has been the acknowledged spokesman of the Jewish community on public issues and in this capacity, has been recognized by municipal, provincial, federal and international authorities as the authoritative body of the Jewish community.

2. *Jewish Community of Canada*

While the Jewish community is not monolithic, it is perfectly unanimous in its firm belief in the necessity of the preservation of its identity as a group for its very survival.

In the Canadian census, the Jews are identified by religion and by ethnic origin and its predominant characteristic is its religious affiliation. In 1961, the number of those who were recorded as Jews by religious affiliation, exceeded substantially the number of those identified by ethnic origin and the respective figures were as follows: Jews by religion—254,368; Jews by ethnic origin—173,344.

The Jewish population is in the unique position that questions with regard to religion and with regard to ethnic origin may be answered in the same way by simply saying that the person is Jewish. With regard to any other group of the population the answers must be different. This may perhaps account partially for the large disparity between the two figures.

3. *Religious Structure of Jewish Community*

The Jewish religion does not have an established hierarchy but the inner community discipline in Canada is such that in matters of religious import there is virtually an unanimous acceptance of the National Religious Affairs Committee of the Canadian Jewish Congress as being truly representative of all segments within the Jewish Community.

The views expressed in this brief have been approved unanimously by the Religious Affairs Committee of the Canadian Jewish Congress and thus reflect the concerted opinions of all groups within the Jewish community, orthodox, conservative and reform. It is authorized to convey this submission on behalf of the Canadian Jewish Congress.

4. *General Principles*

We respectfully submit that insofar as the Jewish community is concerned, there is no conflict between the religious and secular views on divorce.

The Jewish concept of marriage has always been that while the marriage bond is expected to be inviolable, it is not indissoluble. Rabbinic writ also makes it abundantly clear that divorce can only be a last resort for the relief of the parties when marriage has been irretrievably broken down in line with the Talmudic maxim that "the very altar weeps for one who divorces the wife of his youth".

The sanctity of the home and the family, as a source of strength and the transmitter of the Jewish heritage, permeates the teachings of Judaism. Ours is a family-oriented religion, where the stability and strength of the family unit was and is intimately tied up with our faith and our history.

Yet, while every effort is made to encourage and assure a sound family life, Judaism recognizes that occasions do arise when two persons are unable to live together as husband and wife. To demand that they do so, in spite of their antagonisms to each other, often leads to subterfuge, conflict, hostility, hatred, extra-marital associations, and ultimately the destruction of the very foundation of family stability.

While it is true that the Talmud and other Biblical commentaries offer moral and religious reasons against the indiscreet practice of divorce, no Biblical or Talmudic law ever went so far as to advocate total prohibition against divorce. The rabbis of old pointed out that when the relationship between husband and wife has deteriorated to an empty, meaningless arrangement, the marriage is no longer moral or holy. The epitome of the Judaic concept is found in the authoritative rabbinic interpretations of Biblical references which call for a Bill of Divorce in all cases where domestic harmony is manifestly ruptured.

5. *Inadequacy of Present Law*

Although the interest of the Canadian Jewish Congress in this subject stems from our religious tradition and concern, it is by no means intended to indicate that the Canadian Jewish Congress supports revision of the divorce laws in order to make the laws conform to Jewish tenets or, for that matter, to any religious tenets. We consider revision of these laws as necessary social legislation, and we support it because of our commitment to the preservation of democratic values which include (a) respect for the law, (b) belief that laws must not discriminate against those who are financially unable to obtain redress, and (c) belief that the laws must be instruments of social justice.

It is in this context that we view the laws governing the divorce procedures in most of the Canadian provinces, which recognize adultery as the sole ground of divorce, as being in conflict with each of these values, completely inadequate and, in a sense, promoting immorality by making immorality itself or the assertion of it through trumped up evidence as necessary in divorce proceedings.

The general picture is only slightly changed by recognition of cruelty as an additional ground of divorce in Nova Scotia and certain forms of perversion as grounds in some of the provinces.

We submit that the procedures, as presently constituted, breed disrespect for the law and have led to a situation where subterfuge, collusion and perjury have replaced honest efforts to abide by the law. Any law, which has resulted in inducing the interested parties to stage cases of adultery in order to obtain the divorce, has no place on the books of a nation that prides itself of its commitment to justice and fair play.

It is, moreover, socially unrealistic to make adultery the only grounds for divorce. In a majority of cases adultery is not the cause for which divorce is sought. In fact, surveys indicate that it rates less than one-tenth among the five leading causes for divorce, including cruelty, desertion, drunkenness, neglect, and others.

6. *Conciliation Procedures*

Society which views marriage as a life-long union has certainly a vital stake in the stability of marriage. We do not subscribe to the concept of divorce by consent, which would imply that marriage is a private contractual arrangement. A marriage should be dissolved by law and only after it is clearly demonstrated that it has no hopes for viability. Thus, dissolution of marriage ought to require an exercise of judgment by a court which would be properly delegated and which would have a final decision whether or not a marriage ought to be dissolved.

7. *Jewish Religious Requirements*

In Jewish law, a divorce is a religious act involving compliance with a number of requirements and has to be executed by a competent ecclesiastical tribunal of three rabbis.

We do not suggest that a religious requirement ought to be enforced by law. We would, however, recommend that conciliation procedures, by a properly designated court, the *conditio sine qua non* of a divorce, should take this requirement into consideration and on failure to reconcile the parties and where they or one of them observe these religious requirements, the settlement arrangements also recognize the need for such a religious divorce.

8. *Divorce Courts*

We oppose the present provisions of granting divorce by resolution of the Senate. One cannot expect a legislative body to exercise the necessary judicial functions required in divorce action and we therefore recommend that these provisions be changed and that jurisdiction of divorce procedures be in the hands of competent courts.

We also recommend that the high cost involved in obtaining a divorce ruling be either completely eliminated or substantially reduced.

9. *Welfare of Children*

It is obvious that, in the course of the conciliation procedures which would have to precede the granting of a divorce, full consideration be given to the needs and welfare of the children involved and that it be mandatory for a divorce ruling to adequately protect the welfare of the children.

10. *Conclusion*

We respectfully submit that our goal ought to be the creation of a sound and sensible divorce law designed for the prime purpose of saving a marriage, where there is hope that it can be saved or otherwise dissolving it with the least possible turmoil, with the fewest obstacles and with the least expense. Such laws, must, moreover be designed in a fashion as to provide the maximum protection of minor children.

APPENDIX "35"

BRIEF SUBMITTED TO SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS ON DIVORCE

by
THE FAMILY BUREAU OF GREATER WINNIPEG
264 EDMONTON STREET
WINNIPEG 1, MANITOBA

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

From 30 years of experience as a family service agency, in direct work with troubled families, the Family Bureau of Greater Winnipeg submits that:

1. The basis of Canada's existing divorce legislation is unsound. The legislation views divorce as relief given to an innocent party because of an offence committed by a guilty one. It is submitted that:

- (a) If marriages are to be dissolved because of the commission of a "matrimonial offence", our experience indicates that adultery, in most provinces the sole offence so recognized, is only one of a number of kinds of behavior which may undermine a marriage, and is no more central to the destruction of marriage than are many other forms of behavior.
- (b) Responsibility for the failure of a marriage is usually shared by both partners. Recognition of this fact is common among the partners themselves, yet existing law seems to require them to present to the courts a distorted selection of the relevant facts.
- (c) Many situations commonly recognized as creating serious hardship and often leading to the establishment of common-law unions do not involve any 'offence'—eg long term mental illness of a marriage partner.
- (d) There are wide variations in seriousness within any particular category of 'offence'. The agency knows of marriages which have successfully survived each type of 'offence' in the sense of a triable issue, in fact ended without any 'offence' in the sense of a triable issue, having been committed.
- (e) The adversary procedure which is associated with the present law tends to increase bitterness and antagonism, having harmful effects both on the parties themselves and on children involved.

2. The Family Bureau of Greater Winnipeg supports, as a valid alternative for a divorce law, the concept that divorce should be the legal recognition of a marriage breakdown which has already occurred.

3. The agency recognizes that a law and procedure based on the marriage breakdown concept requires the development of valid tests of marriage breakdown. For the immediate future we believe that such tests will need to involve a substantial period of separation to establish the permanency of the breakdown. Such period could be reduced in some instances by other supporting evidence. We believe that in time the necessary expertise can be developed to reduce the length of period of separation necessary for valid testing.

4. The agency submits that when a family is broken by divorce, children of the family are parties directly and vitally affected by the action, and their interests should be represented and considered. The agency recommends that no decree of divorce shall be granted where children are involved until the court has received and assessed an independent report concerning plans for care, custody and maintenance of the children.

5. The agency is aware in many instances of serious inequities and obstacles to the granting of divorce, which have no relation to the validity of the grounds on which the divorce may be sought. It believes that these inequities should be removed:

- (a) It recommends that Canada should be considered as one domiciliary unit for purposes of divorce.
- (b) It recommends that efforts be made to remove economic obstacles to the granting of divorces for which there are valid grounds.

6. The Family Bureau of Greater Winnipeg respects and shares the concern for the stability of marriage which has led many to oppose change in the divorce law. It considers, however, that opposing urgently necessary reform of a law which bears little relation to social realities is a misguided expression of a concern which is in itself valid. It urges that such concern should instead find positive expression through development on a wide scale throughout Canada of pre-marriage and marriage guidance and counselling services, education for family living, and other social provisions to strengthen families.

BACKGROUND OF THE BRIEF; PURPOSE, FUNCTION, AND EXPERIENCE OF THE FAMILY BUREAU OF GREATER WINNIPEG

The Family Bureau of Greater Winnipeg is a private family service agency which was established in 1936, its first stated objective being "to foster the development of wholesome family life in this community."¹ This objective is forwarded chiefly through service to individual families who are under stress from a variety of social and personal problems, but it is also part of the planned activity of the agency "to take a part in the program of the community for social betterment, seeking in counsel with other organizations or individuals, to lessen such abuses in society as may be factors in undermining the well-being of individuals and families."²

The agency is non-sectarian. Among the Board of Directors, staff and clientele is represented a variety of faiths and personal philosophies. As individuals, some members of Board and staff hold marriage to be indissoluble except by death. However, while holding this belief as binding upon themselves, they do not believe that in a multi-religious, multi-cultural society, the law should attempt to impose on all members of society a standard of conduct which is binding on the conscience of some, unless such standard is demonstrably required for the 'peace, order and good government' of the total community.

The agency is united in recognizing the value of marriage and of the family as a means of providing continuity and stability in relationships, as sources of happiness, emotional support and well being to the marriage partners, and as providing for close, continuous and stable relationships for the rearing of children. Over the thirty years it has been in existence, the agency has acquired a wealth of experience concerning families and family living. We work with

¹ Excerpt from bylaws of Family Bureau of Greater Winnipeg.

² Ibid.

married couples concerning problems in their own relationship, problems of other relationships within the family group and problems which confront the family group as a whole. We also work with many separated, divorced or widowed parents, to help them support the values of family living even though their families are incomplete. We work also with many couples and families living together in common law unions. Many of these unions are stable and offer to their members the essential supports of family living. Often however, the parents of these unions and sometimes the children, are guilty and troubled because the union does not have a recognized and respected status in the community.

The majority of married couples who come to us concerning problems in their relationship do so because they desire to improve this relationship and maintain the existence of the family, and we offer help towards this end. In some instances however, the antagonisms and strains within the family are so serious and the unhappiness engendered so acute that it is recognized as best for all concerned if a separation or a divorce takes place. The agency is well aware from these experiences of the difficulties and strains of marriage breakup and of the subsequent difficulties of incomplete families. Thus it does not take an easy or superficial view of marriage breakup. Its experience, however, supports the fact that some families have found greater peace and happiness through dissolution of a marriage than had previously been attainable to them. In a number of instances, new unions have been formed successfully; while it is true, as frequently alleged, that some individuals repeat their mistakes through a series of marriages or common-law unions, it is also true that other individuals learn from their mistakes, and are able to achieve a stable and satisfying relationship with a different partner.

The Family Bureau of Greater Winnipeg welcomes the establishment by the Parliament of Canada of the Special Joint Committee on Divorce. It commends the attention now being given to the problems presented by our existing divorce law, and to the difficult task of formulating recommendations for divorce legislation which will better promote the social good. The agency is following with interest the considerations of the Committee through its published proceedings; we are aware that the Committee has before it a great deal of information and has available to it a variety of informed legal and social opinion. The agency will therefore confine its comments to those matters relating most closely to its own experience in work with troubled families.

CRITICISM OF BASIS OF EXISTING DIVORCE LAW

Our first major comment concerns the inadequacy of the basis of the present law. The present law treats divorce as a benefit conferred upon an injured party, who is himself innocent, because of a specific "offence" committed by a guilty one. With minor exceptions in some provinces, the sole "offence" which is recognized in Canada as grounds for dissolution of marriage through divorce is that of adultery. If the concept of dissolution because of "matrimonial offence" is maintained, our experience suggests that there are many other "matrimonial offences" which contribute at least as seriously and frequently to the destruction of marriage as does adultery. Some of these are in the area of sexual relationship, for example, sadistic sexual behavior or continued refusal of marital intercourse. Other "offences" operate in different areas of marriage and family relationships, such as physical cruelty to spouse or children, continuous hostility and undermining of the partner or other family members, or withdrawal from the marriage relationship, sometimes culminating in physical desertion.

However, while recognizing that "matrimonial offences", of various types do occur, we find great difficulty in accepting the existence of these, established

through the adversary system, as constituting valid grounds for dissolution of marriage. We shall outline our major reasons for this.

First, each of the major "offence" categories which may be considered contains a wide variety of types of situations. We submit that there is a substantive difference between an isolated, impulsive act or brief episode of adultery, and a continuing series of "affairs" or an established extra-marital liaison which is used to taunt and depreciate the spouse. Similarly, the difference is great between blows struck in anger and under provocation, and the presence of a continuing attitude of hostility and anger, which may express itself in recurrent physical abuse, or in continuous undermining and depreciating of the spouse and/or children, and in verbal attacks which are essentially as cruel as physical attacks.

Desertion also, as we have implied, can be a matter of degree, as certainly the affection and emotional support, even significant communication, which we would consider to be of the essence of the marriage relationship, can be withdrawn although partners continue under the same roof. Further, examination of circumstances existing prior to an actual desertion has indicated to us in many instances that the party finally leaving the other is not necessarily the more "guilty" party, or the one more responsible for the breakdown of the marriage. This is also true, we submit, in relation to other matrimonial offences.

Our very use of the term "more responsible for the breakdown of the marriage" indicates a concept of shared responsibility which is foreign to the present law, although in our opinion it is much more typical and representative of the facts of marriage breakdown than is the assumption of the present law. The concept of a "guilty" and an "innocent" party in marriage breakdown has drama, but rarely accuracy.

It is our experience that when marriage partners themselves discuss the causes of marital difficulty or breakdown, they may frequently make angry accusations against one another, but they nevertheless almost invariably show some recognition of a shared responsibility for the difficulty or breakdown. In discussing divorce they show considerable discomfort at the law's requirements, which seem to lead them to a distorted representation of the facts. An extreme instance of this is the type of situation in which a marriage has been broken by separation or desertion and both parties have thereafter formed stable common-law unions. Yet a divorce which would make possible the legalizing of these unions and legitimation of children born to them, has been attainable only if the court was kept uninformed of one half of the true facts. We recognize that there are other situations in both the civil and criminal law requiring difficult and discriminating judgments in the assessment of responsibility, but we suggest that none present such difficulties as the complex personal interaction, much of it private and properly unavailable to the courts, which is represented in a marriage relationship.

A further serious area of difficulty in considering divorce on the basis of matrimonial offence is the considerable number of marriages which are broken in fact though not in law, by occurrences which cannot properly be considered as offences. The most striking example of this is presented by severe long-term mental illness of one of the partners. The Canadian Mental Health Association in its brief to this Joint Committee has, we believe, ably presented the relevant factors here. In particular, we believe the Association established clearly that mental illness is in fact illness, comparable to physical illness, which may also be long-term, and vitally affect the marriage relationship. We believe that it is revolting to both sense and conscience that illness should be considered an "offence", or that it should, in itself be grounds for divorce. The existence of spouse and children, and the relationships with them, may be factors contributing significantly to the improvement or recovery of the patient. On the other hand, the existence of an unhappy marriage relationship may have been a factor

in the development of the illness, and the stresses of family relationships may operate against recovery. From the viewpoint of the other spouse, however, there is little doubt that a situation of serious hardship may be created by the illness. On grounds of compassion and the relief of social hardship, certain situations among this group should, we suggest, have priority in considerations of reform of the divorce law; yet this could hardly be done on grounds of the illness alone, and in view of recent changes in medical practice, "permanent" institutionalization does not offer the clear grounds it once appeared to do.

We should also like to point out the close parallel which exists between the marriage situation involving long-term mental illness and institutionalization and that of the marriage situation where one partner is involved in criminal activities and has been imprisoned for long periods, perhaps for life. While there may be a difference in that "offence" of some nature is involved here, it is not necessarily or typically a matrimonial offence. Here again, the existence of family ties in many instances is a factor influencing towards rehabilitation; in other instances family difficulties may have been a factor contributing to the criminal activity. Again, there are cases where the spouse has a strong claim on the compassion of the community for legal release from a marriage which has in fact ended. Yet as with the group of similar cases involving a severely deteriorated mentally ill spouse, if divorce is to be granted, it must be on grounds other than those of a matrimonial offence.

Another factor which contributes to our difficulty in accepting the matrimonial offence concept as a valid base for divorce law is the fact that our agency knows of marriages which have survived successfully each type of specific "matrimonial offence" outlined. On the other hand we know of other marriages which have clearly ended in fact without any specific offence, certainly in the sense of a triable issue, having been committed.

There is one further serious criticism of the "offence" approach and the adversary system accompanying it, which our agency wishes to make, namely its tendency to increase bitterness and antagonism between the parties. This we see as harmful to the parties themselves, hindering their ability to make a mature and fair assessment of their experience in a way which will enable them to avoid making similar mistakes in future. Such bitterness and antagonism also impose heavy strains on any children who are involved, who in the majority of instances are already torn by conflicting loyalties.

RECOMMENDATIONS CONCERNING ALTERNATE BASIS FOR DIVORCE LAW

For the above reasons, the Family Bureau of Greater Winnipeg supports an alternative approach to divorce, which suggests that it be considered as essentially the legal recognition of a marriage breakdown which has already occurred. This point of view has already been presented before before the Joint Committee by several different groups, and considerable argument and information has been given which we do not intend to repeat. We would like to comment however, that we see this approach as differing from the concept of simple "divorce by consent" primarily by maintaining the role of the state as an active and vitally concerned party.

As previously indicated, the Family Bureau of Greater Winnipeg is strongly committed to belief in the importance of marriage and family living to the well being of society, and therefore believes that laws should be planned towards creating conditions under which the family may best perform its essential function. The agency recognizes for instance, that the ease with which marriages may be dissolved can be presumed to exert significant effect on the attitudes and expectations of persons entering marriage. Our experience strongly supports the

belief that marriage should be undertaken seriously, after consideration, and with the intention of establishing a stable and permanent union.

Unfortunately, valid concerns for the stability of marriage have too often been advanced as reasons for refusing to examine the serious faults in our existing law and practice concerning divorce, so that social reality has come so far out of line with legal structure as to seriously undermine the law and the respect in which it is held. Our agency believes that there are other ways in which concern for the stability of marriage may find valid expression, and will have suggestions to make concerning these later. Here, we merely wish to underline our belief that the social importance of marriage requires that the state should, through its legislative and judicial functions, exert significant control.

IMPLICATIONS OF CHANGE IN BASIS OF DIVORCE LAW

In supporting the marriage breakdown concept of divorce, we recognize that it represents a marked break with legal tradition. While it maintains the judicial function of weighing evidence and making judgment, the evidence and the judgment will be of differing nature from those required in the past. This in turn implies changes in court procedure, and in the development of expertise, either within or available to the court.

The crux of the problem presented by a transfer from law and procedure based on the matrimonial offence concept to law and procedure based on the marriage breakdown concept is, we believe, the question of developing adequate tests of marriage breakdown. The accuracy of such tests is clearly central to the effectiveness of the law in practice. In addition, since the ill effects of existence in the "no man's land" between the married and the unmarried state form some of the most cogent reasons for reform of our present law and procedure, it is clearly desirable also that such tests involve no unnecessary delay.

As an agency with a considerable body of knowledge and experience in marriage counselling, we are convinced that it is entirely feasible for society to develop the necessary expertise on which such judgments may be based. We are also keenly aware, however, of the still-developing stage of knowledge in this as in other areas of human behavior and relationships, and of the present serious shortage of adequately trained and experienced personnel. We know that the development of needed personnel and the refining of skills and judgment will under the best of circumstances require time, and we are emphatically of the opinion that urgent reforms should not wait upon the development of these. Typically, change in procedures, and necessary personnel to implement them, follow changes in the law.

It is our opinion, therefore, that for the immediate future such tests of breakdown must involve a time factor—a waiting period by which the finality of the breakdown may in large part be measured. It is possible that in certain necessary situations the waiting period may be shortened by evidence establishing the existence of a matrimonial offence of serious proportion which would support the probability of permanent breakdown having occurred.

For purposes of illustration, we quote a proposed draft section of divorce legislation prepared by Mr. Douglas F. Fitch of Calgary, who participated in earlier presentations to the Joint Committee in which it is suggested that:

"Permanent breakdown of the marriage shall be proven by evidence that either:

- (a) the petitioner and defendant have separated and thereafter have lived separately and apart for a continuous period (except for a period of cohabitation of not more than two months that has reconciliation as a prime purpose) of not less than three years immediately

preceding the date of the granting of the decree, and there are no reasonable grounds for believing that there will be a reconciliation, or

- (b) (i) the petitioner and the defendant have separated and thereafter have lived separately and apart for a continuous period of not less than one year immediately preceding the date of the granting of the decree, and there are no reasonable grounds for believing that there will be a reconciliation, and
- (ii) the defendant has committed adultery or has, during a period of not less than one year, habitually been guilty of extreme cruelty.”*

We submit that there are a number of possible ways in which the existing divorce law may be reformed to provide relief for some of the situations of extreme hardship now existing, while still falling short of what we, and other proponents of the “marriage breakdown” concept, consider desirable. The laws of many countries, for example, New Zealand, Australia, France and England, are presently based partly on the ‘offence’ concept and partly on the ‘breakdown’ concept. We express the hope, however, that Canada may now take advantage of experience gained elsewhere during the long period in which there has been no Canadian divorce law reform, to frame a law which will give leadership in the direction towards which others are moving.

NEED FOR RECOGNITION AND PROTECTION OF THE INTERESTS OF CHILDREN WHEN DIVORCE IS GRANTED

The next major point which the agency desires to draw to the attention of the Committee is the failure of our present divorce laws to recognize adequately the position of children as interested parties in a divorce action. We respectfully suggest that the law should take cognizance of the fact that where there are children of a marriage, such children become parties directly affected by the continuance or dissolution of the marriage. Our observations lead us to believe that the bitterness, anger and hurt which so frequently accompany marriage breakdown make it difficult and often impossible for the parents to represent adequately and objectively the interests of their children.

As previously indicated, we understand that the law in relation to marriage does not consider it a simple contract between two people which can be dissolved by their own consent; the state becomes a party to the contract. We submit that one of the major arguments for the state being a party to the contract relates to the interests and welfare of children. We respectfully suggest that the state should, therefore, ensure that the interests of children are safeguarded, whether these are children of the marriage itself or other children in the family. We are concerned that in practice this situation does not prevail. Most divorce actions in Canada are undefended actions in which only one party is represented. Although the fact of whether or not there is issue of the marriage is a matter before the Court in a divorce action, the Court rarely inquires into the circumstances surrounding the welfare and interests of the children, and in most cases an order of custody is made without even cursory investigation, or no decision whatever is made concerning custody or support arrangements.

This agency, therefore, recommends that the custody of the children in a family be dealt with in every divorce action to an extent required to safeguard and protect their interests. The agency recommends that no decree of divorce should be granted unless the court has received a report upon an investigation of the plans of the parties to the divorce respecting the custody of the children of the marriage and the interest and welfare of the children. Such a report would not, of course, bind the court, but merely provide the court with professional and

* “Let’s Abolish Matrimonial Offences”, by Douglas F. Fitch, *The Canadian Bar Journal*, April 1966.

objective information upon which the court's decision could be made. Directors of Welfare of the various provinces, for example, could be responsible for the making of such a report, as is current practice in adoption legislation in most provinces, or a special court official could be charged with responsibility for obtaining these reports, as is presently done for divorce hearings in the province of Ontario.

This agency has been called upon for help in many family situations following a divorce or separation in which no consideration had been given to adequate planning for the children, and it considers this matter to be of urgent priority.

INEQUITIES AND PROCEDURAL DIFFICULTIES; RECOMMENDATIONS CONCERNING DOMICILE AND LEGAL AID

The final major area in which this agency believes there is urgent need for reform is the existence of inequities and procedural difficulties in obtaining divorce—factors which are unrelated to the basis on which the divorce is sought. First among these are the difficulties created by the requirements of domicile.

In Canada, each province is a separate domiciliary unit and for a provincial court to assume jurisdiction to hear and grant a divorce, it must be proved to the court that the parties to the marriage were at the time the divorce action was instituted domiciled in that province. Domicile is a legal term and means more than mere residence. It means residence along with the intention of remaining, and in some situations a person may be domiciled in one province, but resident in another. A married woman has no independent domicile; while married, her domicile is that of her husband.

The necessity of proving provincial domicile often leads to hardship and unreasonable expense to those seeking divorce and in some situations, may even make a divorce impossible. The Divorce Jurisdiction Act of 1930 partly alleviates the difficulty created by domicile by permitting a wife who has been deserted by her husband for at least two years to bring divorce proceedings in the jurisdiction in which the husband was domiciled at the time of the desertion. That Act, however does not assist a wife where the parties have separated by mutual consent, and if the husband in such case has lived in several provinces since separation, the wife may be prevented from proceeding with a divorce action because she cannot prove her husband's domicile in any particular province.

This agency, therefore, recommends that Canada should be considered as one domiciliary unit for purposes of divorce jurisdiction. The agency recommends that a provincial court be given jurisdiction in a divorce action where one of the parties resides in that province and it is proved that the husband is domiciled anywhere in Canada.

The second major inequity which is unrelated to the actual grounds on which the divorce itself is sought, is the inequity faced by people in our society who are unable to afford the costs of divorce action. While we recognize that this raises matters which are clearly in areas of provincial jurisdiction, we nevertheless consider it a problem so serious and widespread that it needs to be drawn to the attention of the Joint Committee, in the hope that the Committee may in turn find means of encouraging action in provincial jurisdiction towards growth in provision of legal aid. Here, we quote one of our family counselling staff speaking of families she has known over a number of years of experience with

the agency: "In the main, those who have had opportunity to divorce have been able to re-establish themselves relatively successfully, whereas those left in the no-man's land of separation status have a poorer image of themselves, more often pick up with undesirable partners and more often exist for years on welfare payments, with little hope or planning for the future."*

RECOMMENDATIONS CONCERNING POSITIVE PROGRAMS TO STABILIZE AND IMPROVE MARRIAGE AND FAMILY LIFE IN CANADA

In concluding this presentation, the agency wishes again to stress that, as indicated by its name and charter, The Family Bureau of Greater Winnipeg is committed to the aim of strengthening the values of family living. Its substantial concrete experience in this endeavor leads it to the conclusion that these values are not being served by the existing Canadian divorce law.

The agency recognizes and respects the convictions concerning the permanency of marriage and the fears of social and emotional consequences of "easy divorce" which have lead many to oppose any change in the present law. It believes that many people in our society will, as in other areas of social behavior, continue to hold in their individual consciences a standard more exacting than that required by law. It is aware also, however, that many people in our society do not, in belief or practice, hold marriage to be indissoluble under all circumstances, or under the sole circumstances recognized by the present law. It has reason to believe that the values and standards of these people are being undermined by present law and practice. Its direct observations are that social reality has deviated so far from the law in divorce matters as to bring the law itself into disrepute. Since Canadian society in 1967 is so profoundly different from English society in 1857, while the divorce law has remained essentially unchanged from the English law of that time, it is, we suggest, not surprising that such a situation should exist.

The agency submits that there are many possible channels through which the valid concerns of Canadian citizens who have formerly opposed change in the divorce law may find positive expression. If, as a society, we have serious concern and desire to strengthen the values of marriage and family living, there is much for us to do. Pre-marriage education and counselling, marriage and family counselling services and family life education, exist only in scattered and embryonic form throughout our country. What services do exist are confined almost entirely to the major cities, and can serve only a small proportion of their population. Initiative has been taken by private organizations such as our own, and churches have in a number of instances, increasingly of late, given leadership in this field. A concerted effort to develop a broad social program should, we submit, involve financial support for expansion of existing programs, the development of new programs, and specific attention to the education of consellers and educators.

Further, there are various forms of social legislation which can provide broad programs of services which will strengthen and supplement the efforts of families to perform their vital functions under social conditions which create severe strains—strains differing in nature from those existing in earlier societies.

* Miss Lynn Thomas, family counsellor.

Whether or not these matters form part of the frame of reference of the Joint Committee on Divorce is of course a matter for the Committee itself to decide. We respectfully submit that they are relevant, and express the hope that this Committee will take them under consideration in its deliberations.

Respectfully submitted
on behalf of
The Family Bureau of Greater Winnipeg
Alan R. Philp, President
BOARD OF DIRECTORS
Anthony Quaglia, Vice-President
BOARD OF DIRECTORS
(Mrs. S.) Dorothy McArton
EXECUTIVE DIRECTOR
(Miss) Miriam Schachter
FAMILY COUNSELLOR

264 Edmonton Street
Winnipeg 1, Manitoba
January 26th, 1967

THE FAMILY BUREAU OF GREATER WINNIPEG

264 Edmonton Street
Winnipeg 1, Manitoba

January 27, 1967.

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Mrs. B. Stuart Parker	380 Elm Street, Winnipeg
Dr. Frank Pearson	Norlyn Medical Bldg., 309 Hargrave St., Winnipeg
Mrs. R. J. Stanners	140 Dumoulin Street, St. Boniface
Mr. Frank Syms	Red River Cooperative Limited, Winnipeg
Rev. Dr. Gordon L. Toombs	Young United Church, Winnipeg

Executive Director

(Mrs. S.) Dorothy McArton, BA., Dip. SW

*Counselling Staff**Full-time*

Miss Jacqueline Briscoe, BA, MSW
Miss Marilyn Corda, BScHEc
Mrs. Jean Demianyk, BSc, MSW
Mrs. Dorothy Forbes
Miss Marjorie Fulton, BA, MSW
Miss Cae Gillon, BScHEc, MSW
Mr. Glenn Hodges, BA, MSW
Mr. T. J. Hunter, BA, MSW
Mrs. Linda Ladyman, BA, BSW
Miss Miriam Schachter, BA, BSW
Mrs. Beth Simkin, MA, BSW
Mr. Don Sirois, BA
Miss Marilyn Thomas, BA, MSW
Miss Frederica Van de Werve, HEc
Mrs. Shirley Weatherhead, BA, BSW

Part-time

Mrs. Miriam Hutton, BHSc, MSW
Mrs. Gail Isaak, BA, BSW
Mrs. Polly Kay, BA, MSW
Miss Jean Matheson, BScHEc, BSW
Mrs. Claire Macdonald, BA, Dip. SW
Prof. Baird Poskanzer, BA, MS
Mrs. Ruth Rachlis, BA

Psychiatric Consultant—Dr. Philip Katz, MD; Supervisors of Student Units, (Univ. of Manitoba, School of Social Work); Full time: Mr. Clayton Wother-spoon, BA, MSW; Mrs. Zelda Feldbrill, BA, MSW, part time.

APPENDIX "36"

SUBMISSION TO SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS ON DIVORCE BY THE COUNTY OF YORK LAW ASSOCIATION

1. The County of York Law Association is composed of lawyers practising in the County of York. There are about 2,285 members of the Association of about 3,200 lawyers in the County of York. Our membership represents about one-third of all the lawyers in Ontario. The address of the Association is the New Court House, 361 University Avenue, Toronto 1, Ontario.

2. It is the recommendation of this Association that the grounds for dissolution for marriage in Canada be as follows:—

(1) Adultery, sodomy or bestiality, or conviction upon a charge of rape;

(2) Cruelty, as defined as follows:—Cruelty shall include any conduct that creates a danger to life, limb or health and any conduct that in the opinion of the Court is grossly insulting and intolerable, being of such a character that the person seeking the divorce cannot reasonably be expected to be willing to cohabit with the other spouse who has been guilty of such conduct;

(3) Desertion without just cause for a period of three years immediately preceding commencement of the proceedings;

(4) Voluntary separation of the husband and wife for a period of three years immediately preceding the commencement of proceedings provided that the Court shall be satisfied that:—

- (i) There is no reasonable likelihood of a resumption of cohabitation, and
- (ii) The issue of a decree will not prove unduly harsh or oppressive to the defendant spouse.

(5) Incurable unsoundness of mind where the afflicted spouse has been continuously under care and treatment for a period of five years immediately preceding the commencement of proceedings;

(6) Wilful refusal to consummate the marriage;

(7) Marriage breakdown if there is no reasonable likelihood that the spouses will live together again;

And it is further recommended that:—

- (i) That no decree of divorce shall issue unless and until the Court is satisfied as respects every child of the marriage and of the family who is under the age of sixteen years that: Arrangements for the care and upbringing of such child have been made and are satisfactory or are the best that can be devised in the circumstances.
- (ii) That the defences of condonation and collusion constitute discretionary and not absolute bars to matrimonial relief.

All of which is respectfully submitted by

THE COUNTY OF YORK
LAW ASSOCIATION

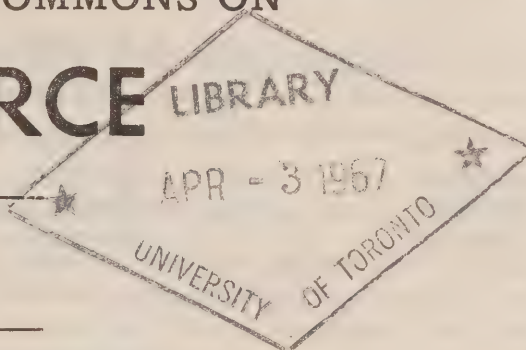


First Session—Twenty-seventh Parliament
1966-67

PROCEEDINGS OF
THE SPECIAL JOINT COMMITTEE OF THE SENATE
AND HOUSE OF COMMONS ON

DIVORCE

No. 15



TUESDAY, FEBRUARY 14, 1967

Joint Chairmen

The Honourable A. W. Roebuck, Q.C.

and

A. J. P. Cameron, Q.C., M.P.

WITNESSES:

His Excellency Sir Kenneth Bailey, C.B.E., Q.C., High Commissioner for Australia. *Barristers' Society of New Brunswick*: John P. Palmer, Q.C., Benjamin R. Guss, Q.C.

APPENDICES:

- 37.—The Commonwealth of Australia. Matrimonial Causes Act 1959 (*Selected Clauses*).
- 38.—The Commonwealth of Australia. Matrimonial Causes Act 1965 (*Selected Clauses*).
- 39.—The Commonwealth of Australia. Matrimonial Causes Act 1966 (*Selected Clauses*).
- 40.—Brief of the Barristers' Society of New Brunswick.

ROGER DUHAMEL, F.R.S.C.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1967

MEMBERS OF THE
SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS
ON DIVORCE

FOR THE SENATE

Hon. A. W. Roebuck, Q.C., Joint Chairman

The Honourable Senators

Aseltine	Connolly (<i>Halifax North</i>)	Flynn
Baird	Croll	Gershaw
Belisle	Denis	Haig
Burchill	Fergusson	Roebuck—(12).

FOR THE HOUSE OF COMMONS

A. J. P. Cameron, Q.C., (*High Park*), Joint Chairman

Members of the House of Commons

Aiken	Forest	McQuaid
Baldwin	Goyer	Otto
Brewin	Honey	Peters
Cameron (<i>High Park</i>)	Laflamme	Ryan
Cantin	Langlois (<i>Mégantic</i>)	Stanbury
Choquette	MacEwan	Trudeau
Chrétien	Mandziuk	Wahn
Fairweather	McCleave	Woolliams—(24).

(Quorum 7)

ORDERS OF REFERENCE

Extracts from the Votes and Proceedings of the House of Commons: March 15, 1966:

"On motion of Mr. McIlraith, seconded by Mr. Hellyer, it was resolved—that a Special Joint Committee of the Senate and the House of Commons be appointed to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either House;

That 24 Members of the House of Commons, to be designated by the House at a later date, be members of the Special Joint Committee, and that Standing Order 67(1) of the House of Commons be suspended in relation thereto;

That the Committee have power to engage the services of such technical, clerical and other personnel as may be necessary for the purpose of the inquiry;

That the Committee have the power to send for persons, papers and records, to examine witnesses, to report from time to time, and to print such papers and evidence from day to day as may be ordered by the Committee, and that Standing Order 66 be suspended in relation thereto; and

That a Message be sent to the Senate requesting Their Honours to unite with this House for the above purpose, and to select, if the Senate deems it so advisable, some of its Members to act on the proposed Special Joint Committee."

"By unanimous consent, on motion of Mr. McIlraith, seconded by Mr. Hellyer, it was ordered—That the order of the House of Monday, February 21, 1966 referring the subject-matter of the following bills to the Standing Committee on Justice and Legal Affairs, namely:—

Bill C-16 An Act to provide in Canada for the Dissolution of Marriage (Additional Grounds for Divorce).

Bill C-19 An Act to provide in Canada for the Dissolution and the Annulment of Marriage.

Bill C-41. An Act to amend the British North America Acts, 1867 to 1965, (Provincial Marriage and Divorce Laws).

Bill C-44, An Act to provide in Canada for the Dissolution of Marriage.

Bill C-55, An Act to provide in Canada for the Dissolution of Marriage.

Bill C-58, An Act respecting Marriage and Divorce.

Bill C-79, An Act to amend the Dissolution and Annulment of Marriages Act (Additional Grounds for Divorce).

be discharged, and that the subject-matter of the same bills be referred to the Joint Committee of the Senate and the House of Commons on Divorce".

March 16, 1966:

"By unanimous consent, on motion of Mr. Stewart, seconded by Mr. Byrne, it was ordered—That the subject-matter of Bill C-133, An Act to extend the grounds upon which courts now have jurisdiction to grant divorces a *vinculo matrimonii* may grant such relief, be referred to the Special Joint Committee on Divorce".

"By unanimous consent, on motion of Mr. Stewart, seconded by Mr. Byrne, it was ordered—That the subject-matter of Notice of Motion No. 11 be referred to the Special Joint Committee on Divorce."

March 22, 1966:

"On motion of Mr. Pilon, seconded by Mr. McNulty, it was ordered—That a Message be sent to the Senate to acquaint Their Honours that this House will unite with them in the formation of a Joint Committee of both Houses to inquire into and report upon divorce in Canada, and that the Members to serve on the said Committee, on the part of this House, will be as follows: Messrs. Aiken, Baldwin, Brewin, Cameron (*High Park*), Cantin, Choquette, Chrétien, Fairweather, Forest, Goyer, Honey, Laflamme, Langlois (*Mégantic*), MacEwan, Mandziuk, McCleave, McQuaid, Otto, Peters, Ryan, Stanbury, Trudeau, Wahn and Woolliams."

LÉON-J. RAYMOND,
Clerk of the House of Commons.

Extracts from the Minutes of the Proceedings of the Senate:

March 23, 1966:

"Pursuant to the Order of the Day, the Senate proceeded to the consideration of the Message from the House of Commons requesting the appointment of Special Joint Committee of the Senate and House of Commons on Divorce.

The Honourable Senator Connolly, P.C., moved, seconded by the Honourable Senator Roebuck:

That the Senate do unite with the House of Commons in the appointment of a Special Joint Committee of both Houses of Parliament to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either House;

That twelve Members of the Senate, to be designated at a later date, act on behalf of the Senate as members of the said Special Joint Committee;

That the Committee have power to engage the services of such technical, clerical and other personnel as may be necessary for the purpose of the inquiry;

That the Committee have the power to send for persons, papers and records, to examine witnesses, to report from time to time, and to print such papers and evidence from day to day as may be ordered by the Committee, and to sit during sittings and adjournments of the Senate; and

That a Message be sent to the House of Commons to inform that House accordingly.

After debate, and—

The question being put on the motion, it was—

Resolved in the affirmative."

March 29, 1966:

"With leave of the Senate,

The Honourable Senator Beaubien (*Provencher*) moved, seconded by the Honourable Senator Inman:

That the following Senators be appointed to act on behalf of the Senate on the Special Joint Committee of the Senate and House of Commons to inquire into and report upon divorce in Canada and the social and legal problems relating

thereto, namely, the Honourable Senators Aseltine, Baird, Belisle, Bourget, Burchill, Connolly (*Halifax North*), Croll, Fergusson, Flynn, Gershaw, Haig, and Roebuck; and

That a Message be sent to the House of Commons to inform that House accordingly.

The question being put on the motion, it was—
Resolved in the affirmative.”

May 10, 1966:

“Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Roebuck, seconded by the Honourable Senator Croll, for the second reading of the Bill S-19, intituled; “An Act to extend the grounds upon which courts now having jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief”.

The question being put on the motion—

In amendment, the Honourable Senator Connolly, P.C., moved, seconded by the Honourable Senator Hugessen, that the Bill be not now read the second time, but that the subject-matter be referred to the Special Joint Committee on Divorce.

After debate, and—

The question being put on the motion, it was—
Resolved in the affirmative.”

J. F. MACNEILL,
Clerk of the Senate.

MINUTES OF PROCEEDINGS

TUESDAY, February 14, 1967

Pursuant to adjournment and notice, the Special Joint Committee of the Senate and House of Commons on Divorce met this day at 3:30 p.m.

Present: For the Senate: The Honourable Senators Roebuck (*Joint Chairman*), Aseltine, Baird, Belisle and Fergusson—5.

For the House of Commons: Messrs. Cameron (*High Park*) (*Joint Chairman*) Fairweather, Honey, McCleave, McQuaid, Otto, Peters, Stanbury and Wahn—9.

In attendance: Peter J. King, Ph.D., Special Assistant.

The following witnesses were heard:

His Excellency Sir Kenneth Bailey, C.B.E., Q.C.,
High Commissioner for Australia.

Barristers' Society of New Brunswick:

John P. Palmer, Q.C.
Benjamin R. Guss, Q.C.

The following are printed as Appendices:

37. The Commonwealth of Australia. Matrimonial Causes Act 1959 (*Selected Clauses*)
38. The Commonwealth of Australia. Matrimonial Causes Act 1965 (*Selected Clauses*).
39. The Commonwealth of Australia. Matrimonial Causes Act 1966 (*Selected Clauses*).
40. Brief of the Barristers' Society of New Brunswick.

At 5.45 p.m. the Committee adjourned until Thursday next, February 16, 1967 at 3:30 p.m.

Attest.

Patrick J. Savoie,
Clerk of the Committee.

THE SENATE

SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS ON DIVORCE

EVIDENCE

OTTAWA, Tuesday, February 14, 1967.

The Special Joint Committee of the Senate and House of Commons on Divorce met this day at 3:30 p.m.

Senator Arthur A. Roebuck and Mr. A. J. P. Cameron (*High Park*) Co-Chairmen.

The CO-CHAIRMAN (*Mr. Cameron*): The committee will come to order; we have a quorum. Our first witness is Sir Kenneth Bailey, C.B.E., Q.C., High Commissioner for Australia. Sir Kenneth was born in Melbourne, Australia, on November 3, 1898. He served in the First Australian Imperial Force in France, 1918-1919. He was educated at the universities of Melbourne and Oxford, Corpus Christi College; he was Rhodes Scholar for Victoria in 1918; he was called to the bar at Gray's Inn, London, in 1924, and was admitted as a barrister and solicitor in Victoria, Australia, in 1928.

Sir Kenneth Bailey's first appointment was as Vice-Master of Queen's College in the University of Melbourne, 1924 to 1927. From 1928 till 1930 he was Professor of Jurisprudence, and from 1931 till 1946 Professor of Public Law, in the University of Melbourne, and was Dean of the Faculty of Law from 1928 until he was seconded to the Australian Government as a wartime constitutional consultant in 1943. He was Chairman of the Professorial Board from 1938 till 1940. He was a member of the governing body of the University of Melbourne from 1929 till 1942, and of the Australian National University from 1948 till 1960.

From 1946 till 1964 Sir Kenneth Bailey held the offices of Solicitor-General and Secretary of the Attorney-General's Department, the latter office corresponding to the Canadian office of Deputy Minister of Justice. As Solicitor-General he appeared for the Commonwealth of Australia in a number of constitutional cases in the High Court of Australia and in the Privy Council in London. In 1962 he was counsel for Australia in the International Court of Justice in the proceedings leading to the court's advisory opinion on the expenses of the United Nations in the peace-keeping operations in the Gaza Strip and in the Congo.

In 1945 Sir Kenneth Bailey was a member of the Australian delegation at the international conference in San Francisco at which the Charter of the United Nations was adopted. Since then he has represented Australia at a number of the sessions of the General Assembly. In 1956 he was Rapporteur of the Legal Committee. He has led Australian delegations at the two Geneva conferences on the Law of the Sea, in 1958 and 1960, and in the Sub-Committee on the Peaceful Uses of Outer Space, 1962 to 1966.

Sir Kenneth Bailey is an honorary fellow of Corpus Christi College, Oxford, a bencher of Gray's Inn, and Queen's Counsel in Australia. He was awarded the decoration of C.B.E. in 1953, and was knighted in 1958. He took up duty as High Commissioner for Australia in Canada in July, 1964.

In 1925 Sir Kenneth married Yseult Donnison of Blewbury, Berkshire, the sister of a Corpus contemporary. They have three sons, each at present living in a different country. Lady Bailey was awarded the decoration of O.B.E. in 1961, in particular for her work as President of the Australian Pre-School Association.

Members of the committee, I have much pleasure in introducing to you Sir Kenneth Bailey, High Commissioner for Australia. I believe that he will give us a background history of the divorce law in Australia.

His Excellency Sir Kenneth Bailey C.B.E., Q.C., High Commissioner for Australia: Mr. Chairman and members of the Committee, the committee does me honour in giving me the opportunity to give a brief explanation of the divorce law of Australia as it is and was.

I think probably most members of the committee know that the current divorce law in Australia is wholly federal in character, under the Matrimonial Causes Act, 1959, which came into operation on February 1, 1961, which has since been amended by two acts, of 1965 and 1966, and which has been supplemented by a number of matrimonial causes Rules regulating the practice in the divorce jurisdictions.

There were two earlier federal acts, 1945 and 1955, about which I shall not make a statement to the committee, other than to say they were directed solely towards relaxing the common-law rule that only the courts of the Australian State in which a petitioner was domiciled could exercise jurisdiction over a petition for divorce. I shall deal later with the question of domicile as it stands under the 1959 act, and the 1959 act repeals both those earlier measures, so I think the committee need not be concerned with them.

Before 1961, with the sole jurisdictional exceptions that I have mentioned, there had been no substantive federal divorce law in Australia except in the two mainland federal Territories, the Australian Capital Territory in which Canberra is situated and the Northern Territory, to the north of the State of South Australia. In these Territories, the law is wholly federal; otherwise, till 1961, the substantive law had been exclusively that of the six component states of the Australian Federation.

Details of the former state laws as such are perhaps not required for the purposes of the committee, but the committee will correct me if that assumption is wrong. The state statutes had existed for different periods up to about 100 years, when they were superseded by the federal act of 1959. They were based largely on the British act of 1857, and provided for the hearing of petitions for divorce, nullity or judicial separation by the superior courts, and also for decrees of dissolution or nullity on specified grounds, added to or modified from time to time.

There was a good deal of diversity from one state to another in the selection of grounds of divorce, and a synoptic table of state statutes would present a most complex picture. However, many of the differences in the law from one state to another in Australia concerned solely questions of detail, or even questions of drafting, rather than questions of substance. I think it a fair generalization to say that, except perhaps in the State of Queensland, which in divorce had been conservative, divorce was available to Australians, in whatever state they lived, on a wider range of grounds than it was, or is, available to their counterparts in Canada. In particular, divorce by judicial decree has been at all material times available in each and every one of the states and territories in Australia. That is to say, there is no Australian analogue to the grant of divorce by *ad hoc* legislative procedure as in Canada, from Quebec and Newfoundland.

Among the few significant differences between the states in the grounds of divorce were, first, that Victoria, one of the two most populous states, preserved

in respect of the ground of adultery the double standard which came from the British Act of 1857. A single act of adultery was sufficient, in a husband's petition, to found a decree of divorce, but in the case of a wife suing for divorce from her husband aggravated adultery, in one or other of various forms, was required. New South Wales, the most populous of the Australian states, did not at any time recognize insanity as a ground of divorce, though all the other states had done so for up to sixty years. On the other hand, New South Wales did establish as a ground divorce disobedience to a decree for the restitution of conjugal rights, and that was thought of in other states as providing a quicker and simpler means of divorce than they were prepared to adopt for themselves. Finally, Western Australia permitted divorce on the ground of five years' separation. So did South Australia, but only in the case of separation under judicial order. In Western Australia it did not matter how the separation came into existence.

Turning now to the 1959 Act of the federal Parliament, that act was passed in the exercise of an express constitutional power in Section 51, paragraph (xxii) of the Australian Constitution, which, as perhaps all members of the committee know, was an Act of Parliament of the Parliament of Westminster, enacted in 1900 on the basis of a draft prepared and settled in Australia.

The CO-CHAIRMAN (*Senator Roebuck*): With the consent of the provinces?

Sir Kenneth BAILEY: Yes, by referendum; indeed by Act of Parliament and by referendum. The terms of paragraph (xxii) of Section 51, reading the covering words as well, are: "The Parliament"—that is the federal Parliament—"shall...have power to make laws for the peace, order and good government of the Commonwealth"—that is to say, the whole of federated Australia; I try to avoid the Australian technical use of the word "Commonwealth" because it is so ambiguous a term, referring also as it does nowadays to the Commonwealth of Nations.

The CO-CHAIRMAN (*Senator Roebuck*): And the British Commonwealth.

Sir Kenneth BAILEY: Yes. With us in Australia, the term "Commonwealth" fulfils the same legal and political and practical office as a means of description as the word "Dominion" has done in Canada. "The Parliament shall...have power to make laws for the peace, order, and good government of the Commonwealth with respect to," and then there follows a list of subjects, which includes "(xxii) Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants". The preceding paragraph, paragraph (xxi), gives a like power with respect to the simple term "Marriage".

In the drafting stages in Australia, the draftsmen began with the phrase "marriage and divorce". This phrase, of course, came from the British North America Act, which was part of the material that was under very close study in Australia in those years. But our draftsmen had some doubts whether "divorce" was quite a wide enough term, and added both the term "matrimonial causes" and the elaborate qualification about "parental rights, and the custody and guardianship of infants" in relation to divorce and matrimonial causes. If some feel that "matrimonial causes" is a rather stiff phrase and that another term than "matrimonial causes" might be a better one, Australians would have to plead that that was the subject of this constitutional power, and they had better use the constitutional term because, if they used some other word, either it might be less, in which case it would not use the constitutional power to the full, or it might be more, in which case the law might in part be invalid.

Perhaps I should, in Canada, add by way of supplement that the federal power given in Australia by paragraph (xxii) of our Section 51 is not an exclusive federal power. It is a concurrent power and, subject only to the paramountcy of any federal law, the state laws which were already in existence

in 1900 when the constitution was enacted continued in operation, as amended from time to time, until they were superseded at the beginning of 1961.

"Matrimonial causes" were not defined in the Australian Constitution. It was thought at the time that the phrase would include judicial separation as well as dissolution of marriage; nullity; restitution of conjugal rights; jactitation of marriage; damages against an adulterer, and probably maintenance of wives and children and marriage settlements. In recent times some uncertainty has been felt in Australian governmental circles whether maintenance in its entirety is included in the federal constitutional power, for example in cases where no other matrimonial relief is sought, as where perhaps a marriage has ceased to exist and the question is one merely of varying, or seeking enforcement of, a subsisting judicial order for the maintenance of a former wife.

The 1959 act does define "matrimonial causes" very widely, in section 5, but still so as to leave to the states the subject of maintenance orders which are not incidental to a suit for dissolution or nullity of marriage. In effect, that leaves untouched the state law as it is administered in courts of summary jurisdiction, the ordinary magistrates' courts. All suits in matrimonial causes under the federal act, however, are instituted in superior courts, and it is only as incidental to those proceedings that the federal act deals with maintenance.

Since February, 1961, all state laws on the subject of divorce and matrimonial causes have ceased to have any operation. The federal Parliament of Australia cannot, of course, repeal a state law, but section 109 of the Constitution renders invalid any state law to the extent of any inconsistency with a federal law; and by section 8 of the act of 1959 the federal Parliament declared that in future no matrimonial cause should be instituted or continued otherwise than under and in accordance with the federal act. Fairly elaborate transitional provisions were, of course, required and were included, but the state laws have wholly ceased to operate.

The main changes made by the 1959 act can perhaps be stated under four headings. I think the Attorney-General of Australia, who administers this act, would wish me to emphasize that it was not as conceived, and is not as operated, merely a "divorce act", still less an "easy divorce" act. It was an attempt to grapple with the problem of the stability of marriage as an urgent social issue in all its aspects. On the one hand it tried by means, some of which were novel, to avert or prevent the breakdown of marriages and to promote the stability of marriages. On the other hand it provided for relief to parties to a marriage that had hopelessly disintegrated, not only by the traditional procedures of granting dissolution on the petition of a party wronged by a matrimonial offence regarded as being so grave as to destroy the foundations of a common life, but also by the adoption as in western Australia and New Zealand of new provisions permitting the court irrespective of any question of wrongdoing, to dissolve a marriage that had hopelessly broken down in fact, as evidenced by separation of long duration with no prospect of reconciliation.

In considering that aspect in 1959, the Attorney-General of the day, the present Chief Justice of Australia, Sir Garfield Barwick, was greatly pressed with the problem that I know has been so much present in the minds of members of this committee, namely that of the spouse long separated from the other spouse and anxious to start afresh and begin a legitimate family with another person. The new Australian separation provisions were thought of by Sir Garfield Barwick greatly from that angle—from the angle of promoting a new marriage as well as from the angle of the social disutility of preserving the mere husk, shell or bones of a marriage that has ceased to have vitality or meaning.

The first set of provisions, therefore, to which I should like to direct attention are those provisions directed towards promoting the stability of marriage. There were several. There was in the first place a provision, in completely new

Australian legislation, for federal financial aid to approved marriage guidance organizations. Perhaps I could read the few words in which the act made this provision:

The Attorney-General may, from time to time, out of moneys appropriated by the Parliament for the purposes of this Part, grant to an approved marriage guidance organization, upon such conditions as he thinks fit, such sums by way of financial assistance as he determines.

This was not an authority to establish a marriage guidance organization of the government's own. There were marriage guidance organizations in being, and the Attorney General was authorised to give them financial support, to the extent provided for by parliament, if he approved them. The amount provided in the current financial year for the support of marriage guidance organizations is a sum of approximately A\$183,000, or C\$220,000.

The Attorney-General has been at pains not to establish such a close and detailed official supervision of marriage guidance organizations as would destroy their independence. But as a condition of securing approval, and therefore financial support, he has insisted on getting reports of what they are doing, and he has encouraged them to co-ordinate their own activities with those of other organizations, and in particular to establish, in consultation with university faculties of social welfare and the like, suitable courses of training for marriage guidance counsellors. In the result, the work of the marriage guidance organizations has very substantially increased, and improved, since the enactment of the 1959 act.

The second provision for promoting the stability of marriage is one to be found in the Matrimonial Causes Rules. When a petition or other document instituting a matrimonial cause is brought to a solicitor's office, the document is not to be effective for the purpose of proceedings under the act unless the solicitor has, by written certificate under his own hand, certified first that he has brought to the attention of the party the provisions of the act relating to the reconciliation of parties to a marriage, and the approved marriage guidance organizations reasonably available to assist in effecting a reconciliation between the spouses; secondly, that he has discussed with the party the possibility of a reconciliation between that party and the other spouse, either with or without the assistance of such an organization (Rule 15).

My information is that practitioners are treating this obligation seriously. It would be pleasant to be able to report that in a high percentage of cases a reconciliation is effected. I cannot give figures of that kind. But I am assured by persons in a position to know the practice that, not only are the certificates regularly furnished—of course they have to be, because otherwise the petitions cannot proceed—but the obligation to bring the possibilities of reconciliation to the notice of parties is most carefully observed, more particularly, it is said, by the younger practitioners.

Next, the act itself requires a judge before whom a petition for the dissolution of a marriage comes to take into consideration the possibility of reconciliation between the parties even at that stage. Section 14 of the act says:

It is the duty of the court in which a matrimonial cause has been instituted to give consideration, from time to time, to the possibility of a reconciliation of the parties to the marriage. . . .and if at any time it appears to the Judge constituting the court, either from the nature of the case, the evidence in the proceedings or the attitude of those parties, or of either of them, or of counsel, that there is a reasonable possibility of such a reconciliation, the Judge may do all or any of the following:—

- (a) adjourn the proceedings to afford those parties an opportunity of becoming reconciled or to enable anything to be done in accordance with either of the next two succeeding paragraphs;
- (b) with the consent of those parties, interview them in chambers, with or without counsel, as the Judge thinks proper, with a view to effecting a reconciliation;
- (c) nominate—
 - (i) an approved marriage guidance organization or a person with experience or training in marriage conciliation; or
 - (ii) in special circumstances, some other suitable person to act as conciliator.

I may mention that the act makes specific provision for maintaining the secrecy of any statements made in the course of marriage guidance counselling or such conciliation procedures as are provided for in the act.

While I am on the act itself, I think I should also mention the addition in 1965 of provisions based on the British act of 1963, permitting the parties to a marriage, where there has been desertion, to try out the resumption of cohabitation, with or without sexual intercourse, for a period of not more than three months, with a view to effecting a reconciliation, and, if no reconciliation is in fact effected during that period, to resume their separate existence without interrupting the statutory period of desertion or of mere separation, as the case might be.

Our own 1965 provisions took note of some of the criticisms, both by judges and by academic writers, of the British statute of 1963 and are not in exactly the same form. We think they clarify some of the points in the British legislation to which criticism had been directed.

Co-CHAIRMAN (*Mr. Cameron*): Thank you, Sir Kenneth.

Sir Kenneth BAILEY: The provisions of the 1959 act with respect to the position of children may be looked at from more angles than one, but at this moment I want to add them to my list of provisions directed towards promoting the stability of marriages. That may seem an odd classification of the provisions, when I say that Section 71 of the act provides that, where there are children of a marriage, no decree nisi for divorce may become absolute until the court, by order, has declared:

- (a) that it is satisfied that proper arrangements in all the circumstances have been made for the welfare and, where appropriate, the advancement and education of those children; or
- (b) that there are such special circumstances that the decree nisi should become absolute notwithstanding that the court is not satisfied that such arrangements have been made.

The members of the committee may think that the stage when a decree nisi has been pronounced is a bit late to be thinking of preserving the stability of a marriage, and in a manner of speaking, of course, that is right. It must be only a rare case when the necessity for satisfying the court that proper provision has been made for the children before a decree becomes absolute will lead the parties to become reconciled again and discontinue their proceedings.

But that is not the whole story as we see it in Australia. It is rather that this provision is naturally before the minds of legal advisers, solicitors and counsel for both sides, and in particular before the mind of a petitioner. The rules indeed make provision for the holding of compulsory conferences between the parties, before a suit is set down for hearing, on such matters as the provision to be made for children; rules 165-168. The very existence of these statutory requirements may very well lead, and in some cases has led, to discussions about what is to be

done with the children which will set the dispute between the parents themselves in a quite different light, and have in fact, in a few cases, led to a decision to try again.

CO-CHAIRMAN (*Mr. Cameron*): Changed their minds.

Sir Kenneth BAILEY: Yes. At any rate, not to persist at that stage with the proceedings. I do advisedly, therefore, put that provision in the category of provisions directed towards promoting the stability of marriages, though its effect must be limited to a small number of cases.

The Attorney-General of Australia would certainly include in this set of provisions a reference to the rule in Section 43 of the Act, that no petition may be instituted during the first three years of a marriage, with certain exceptions, without the leave of the court. The thought underlying that provision in the act will be clear to all members of the committee. The feeling is that at that early stage processes of adjustment are still going on, and it is too early to say that a marriage has broken down, or that what one or other party has done makes it impossible ever to resume a common life. The leave of the court is always available in extreme cases.

In the second place, the 1959 act contains certain provisions directed towards establishing an Australian, as distinct from a state, domicile; and in the case of deserted women replacing domicile by residence as a criterion of jurisdiction. These provisions are based on the two earlier federal acts of 1945 and 1955. There are now three jurisdictional rules to be found in Sections 23 and 24 of the act. Firstly, proceedings for dissolution of a marriage can only be instituted by a person domiciled in Australia. It does not matter where in Australia he is domiciled; it may be in a state or in a federal territory, or it may be uncertain in what state or territory he is domiciled; as long as it is in Australia the condition of the act is fulfilled. Secondly, for the purposes of that rule a deserted wife is deemed to be domiciled in Australia if she was herself domiciled in Australia immediately before her marriage; if her husband was domiciled in Australia immediately before he deserted her; or if she has been resident in Australia for three years immediately before the petition was instituted. Therefore, the deserted wife never needs to rely on domicile if she has been resident in Australia for three years before she institutes her petition.

CO-CHAIRMAN (*Senator Roebuck*): Does she bring her action in the courts of the particular state in which she is resident?

Sir Kenneth BAILEY: Yes, sir, in the normal course. The act is very flexible in this regard, however, partly because there has been in Australia, particularly since the second world war, a great deal of movement from one state to another, and the supreme courts of the states have all jurisdiction to deal with suits for dissolution irrespective of any question of the residence of the petitioner or the respondent in their own state. In the normal course it would naturally be most convenient for a petitioner to bring the suit in the supreme court of the jurisdiction in which he or she is living. If for some reason or other a different supreme court is adopted, it is a matter for that court to decide whether it will in fact exercise jurisdiction or make an order transferring it to another. Though it is not laid down precisely anywhere, in the normal course a petition will be instituted in the superior courts of the state or territory in which a petitioner is living, but there is great flexibility. That, sir, was the third of the three jurisdictional rules that I wished to mention.

CO-CHAIRMAN (*Mr. Cameron*): It is solely a matter of convenience?

Sir Kenneth BAILEY: Yes, solely for convenience. That provision for transfer from one court to another on grounds of convenience is to be found in Section 26 of the act. Perhaps I should mention that, partly for constitutional and partly for practical reasons some residential qualifications are required for suits in the

federal territories. But this does not really alter the broad picture of jurisdiction as I have sketched it.

I have spoken for a very long time, and it is time I began to draw these remarks to a close; but I think perhaps the committee would wish me to say something briefly about the grounds for divorce under the act.

Co-CHAIRMAN (*Mr. Cameron*): We are certainly very interested in that.

Sir Kenneth BAILEY: They number fourteen in all, each one of them found in substance, though seldom in exactly the same words, in one or more of the states. Most of them had been found previously in most, if not all, of the states.

Perhaps I should just run down the list in section 28. It begins with what one might call the usual grounds: adultery, desertion—and in this case desertion without just cause or excuse for not less than two years. In the state laws previously the period was three years, but, in part because of the length of time that the preparation of petitions took, in part because of the length of time that often elapsed between the filing of a petition and its hearing, in part because of a general feeling in the community that three years was too long for a party to have to wait before instituting proceedings, the Law Council of Australia recommended that the period of desertion should be reduced to two years, and it was. After (a) adultery and (b) desertion there come: (c) wilful and persistent refusal to consummate the marriage; (d) habitual cruelty during a period of not less than one year; (e) rape, sodomy or bestiality committed since the marriage; (f) habitual drunkenness or intoxication by drugs since the marriage for a period of not less than two years; (g) since the marriage, suffering frequent convictions for crime and habitually leaving the petitioner without reasonable means of support, within a period of five years; (h) serving since the marriage a term of imprisonment for a period of not less than three years after conviction for an offence punishable by death or imprisonment for life, and being still in prison at the date of the petition; (i) since the marriage, conviction of attempting to murder or otherwise unlawfully kill the petitioner, or of committing offences involving the intentional infliction of grievous bodily harm on the petitioner; (j) failure habitually and wilfully throughout two years to pay maintenance for the petitioner under a court order, or under an agreement providing for separation; (k) failure to comply throughout a period of at least one year, with a decree of restitution of conjugal rights made under the act.

Then there is the ground of insanity, which perhaps I should read in full:

- (1) that the other party to the marriage—
 - (i) is, at the date of the petition, of unsound mind and unlikely to recover; and
 - (ii) since the marriage and within the period of six years immediately preceding the date of the petition, has been confined for a period of, or for periods aggregating, not less than five years in a institution where persons may be confined for unsoundness of mind in accordance with law, or in more than one such institution.

There is provision in that paragraph, as you will have noted, for the possibility that, though at the time when the petition is instituted the absent spouse must be found to be unlikely to recover, there may have been periods during the previous six years when possibilities of recovery had permitted his or her temporary release from the institution, following only by re-committal.

Finally, there is the ground of separation, which again I shall read in full:

- (m) that the parties to the marriage have separated and thereafter have lived separately and apart for a continuous period of not less than five years immediately preceding the date of the petition, and there is no reasonable likelihood of cohabitation being resumed.

The provisions of that paragraph, which is Section 28 (m) of the act, need to be supplemented by reference to two further provisions, which are to be found in Sections 36 and 37. Section 36 declares that the parties to a marriage may be taken to have separated, not only in accordance with a judicial decree or an express agreement, but if they separated in fact, notwithstanding that the cohabitation was brought to an end by the action or conduct of one only of the parties, whether it constituted desertion or not.

The second is so closely geared to the operation of section 28 (m) that I think I should read it almost in full. It is Section 37 (1):

Where, on the hearing of a petition for a decree of dissolution of marriage on the ground specified in paragraph (m) of section twenty-eight...the court is satisfied that, by reason of the conduct of the petitioner, whether before or after the separation commenced, or for any other reason, it would, in the particular circumstances of the case, be harsh and oppressive to the respondent, or contrary to the public interest, to grant a decree on that ground on the petition of the petitioner, the court shall refuse to make the decree sought.

There are two further subsections in that section which are also relevant to the court's discretion. First:

(3) The court may, in its discretion, refuse to make a decree of dissolution of marriage on the ground of separation if the petitioner has, whether before or after the separation commenced, committed adultery that has not been condoned by the respondent or, having been so condoned, has been revived.

An earlier subsection (2) says that the court shall not grant a decree unless it is satisfied that proper financial provision is made for the respondent—proper, that is, in all the circumstances of the case.

The safeguards, of course, are that, if it can be shown that the court is satisfied that to make the decree would be harsh or oppressive to the respondent, or against the public interest, the decree must not be issued. These are strong words, and they have been judicially noted as strong words. The courts have many times had to interpret these phrases and they have naturally given decisions which are intimately bound up with the totality of all the facts in the particular case. Therefore, there is not much which is serviceable by way of precedent. The courts have avoided trying to paraphrase the statutory words; they have rather attempted to apply these broad moral community judgments—"harsh", "oppressive", "contrary to the public interest"—to the totality of the circumstances in the particular case, and have made up their minds accordingly whether a decree should or should not be issued in those circumstances.

One thing does emerge very clearly from the few years during which this provision has been before the courts. The judges have given effect to what they understand to be the clear intention of parliament, that a petitioner is not to be denied a decree merely because it can be shown that he was at fault in bringing about the separation that has taken place. This is a provision by which parliament intended to make a dissolution of marriage available, irrespective of the question of fault, unless there was something which might very broadly be described as of an outrageous character that would make it harsh, oppressive or contrary to the public interest to give such a petitioner an opportunity of marrying again. It was a real attempt to make a breakdown provision, apart altogether from any question of matrimonial offense.

Now, sir, I think it is high time I desisted from haranguing the committee and allowed the members, who have given me so patient a hearing, to ask any questions.

Co-CHAIRMAN (*Mr. Cameron*): We are greatly indebted to you, Sir Kenneth, for your very learned, instructive and informative discussion on the law of our sister state of Australia.

Have any members of the committee any questions they wish to ask?

Mr. McCLEAVE: I have two or three very quick ones. Sir Kenneth, is the adultery set forth as a ground for divorce defined or limited in any way, or is it just set forth in the Australian act as adultery?

Sir Kenneth BAILEY: Adultery; not qualified.

Mr. McCLEAVE: Turning to the question of public acceptance of the new law in Australia, have there been any requests for wider grounds, or a change or modification of some of the grounds, or are the existing grounds generally accepted?

Sir Kenneth BAILEY: The record would suggest that the act has won very general acceptance. When in 1965 parliament introduced those special provisions about reconciliation that were based on the British act of 1963, it had been noticed that no organizations took the opportunity to raise the question of further or other grounds, or even the removal of grounds already there. The ground of separation had been particularly controversial at the time the 1959 act was enacted, but it was noted that in 1965 no attempt was made to effect further major changes.

Mr. McCLEAVE: My final question, sir, deals with reconciliation. I gather that there are three possible steps or levels. There is no compulsion at any one of these levels, is there?

Sir Kenneth BAILEY: No.

Mr. PETERS: Do you have a problem in Australia in relation to property rights when the disposition of property and jurisdiction of the children are involved in cases where state governments may exercise some control?

Sir Kenneth BAILEY: So far as I know, no difficulty has arisen so long as the federal provision operates as an incident in the handling of a matrimonial cause. That is, federal law by constitutional definition prevails over any inconsistent state law. So far as I am aware, no difficulty has arisen with state law in relation to matrimonial causes.

Mr. PETERS: In Australia has there been a history of provincial or state governments operating by enabling legislation in this field in relation to matrimonial disputes?

Sir Kenneth BAILEY: Yes. Only the states did it until 1959, because the divorce law of Australia was wholly state law until 1959. I think it to be true that the provisions for protecting the property interests of spouses and children are more extensive, more detailed, in the federal act than they were in any of the state acts that it superseded. In the federal act there is even a provision, which again I think had a British counterport, enabling a maintenance order to be enforced by the attachment of earnings, which was not operative under any of the state laws, so far as I know.

Mr. PETERS: In contested cases, is there machinery under the Australia act to allow for appeal, wherever that may exist, either as to the disposition of the property or the disposition of the children?

Sir Kenneth BAILEY: Yes; as to both matters. There are two possible appeals. In the first place, there is an appeal as of right, a full appeal on all matters, from the judge of the superior court of a state who hears the petition to either the full Supreme Court or the Court of Appeal of that state, according to

how the appellate work of the state is organized. Thereafter, by special leave of the federal supreme court, the High Court of Australia, there is an appeal to that court.

The act does not establish or use federal courts to exercise jurisdiction under the Matrimonial Causes Act; it uses the constitutional provision enabling the federal Parliament to invest state courts with federal jurisdiction. The only federal courts which exercise jurisdiction under this act are the supreme courts of the federal territories; otherwise it is the same judges in the same courts, though with a different source of authority and applying different rules, as formerly exercised divorce jurisdiction under state law. Because this is now federal jurisdiction, it is for the federal parliament to regulate the appellate jurisdictions available to it, and it has so regulated it by permitting unrestricted appeal to the full court or the appellate court of the state, and thereafter, by leave, to the High Court of Australia.

Mr. PETERS: With the exception of the territories, have any of the states not availed themselves of the enabling legislation to operate the necessary state court?

Sir Kenneth BAILEY: That question does not really arise, because this is federal law, it is the only law, and the courts are vested with jurisdiction by federal law. They are under a duty to exercise it.

Mr. PETERS: It is really not enabling legislation then, it is substantive legislation?

Sir Kenneth BAILEY: That is correct, it is substantive legislation.

Mr. PETERS: It applies to the state courts?

Sir Kenneth BAILEY: Yes, under a provision in the Constitution enabling the federation to invest the courts of a state with federal jurisdiction in any matter arising under a law made by the Parliament.

Mr. PETERS: Was there any objection on the part of any of the states to accepting this responsibility?

Sir Kenneth BAILEY: No, Mr. Peters, I think not, partly for the reason I have given, that the state supreme courts were already organized to exercise jurisdiction on divorce, and had in fact been exercising it for sixty to a hundred years. They had the courts, they had the organization, the registrars and the premises, and it is their regular constitutional duty to exercise federal jurisdiction as conferred by Parliament, and they have been doing so in many other matters ever since federation. There were, it is right to say, very full consultations at all levels between the federation and the states during the preparation of this measure; there were conferences of registrars in divorce, conferences of attorneys-general, conferences of judges, so it was very fully prepared.

Senator FERGUSON: Sir Kenneth, I was very interested in what you said about marriage counselling. Could you tell us how long they have been organized? When were the first ones organized? I do not mean the exact date, but is it ten years, fifteen years, five years?

Sir Kenneth BAILEY: I would hesitate to give a year, Senator Fergusson. I seem to remember them in being, one in particular, some thirty years ago. They have increased greatly in recent years, and are now, of course, large and substantial with federal assistance. As I remember, both the churches and welfare organizations had begun to establish marriage guidance organizations by the late thirties.

Senator FERGUSON: I gather from what you say that they probably got some government support quite early in their career?

Sir Kenneth BAILEY: No, I do not think so: certainly not from federal sources.

Senator FERGUSON: Apparently the government gives a large amount of support now. Are there any standards that they have to meet to get that support? Do they have to have a certain number of trained social workers doing the counselling, or is the money just given out without any standards to be met?

Sir Kenneth BAILEY: No, that is not so. It is, of course, a diplomatic and delicate operation for a government department to determine the conditions on which it will offer financial assistance to a voluntary organization, and it has been handled with a great deal of delicacy and many conferences. The department has a marriage guidance officer whose sole function is liaison with and organizing conferences of the marriage guidance organizations; these are held regularly. The organizations are invoking the assistance of university faculties of social welfare and social administration and are reporting regularly to the Attorney-General, both the course of training they are prepared to insist on and also the whole manner in which they expend their money. To use a perhaps harsh word, but not an oppressive one I hope, there is some government supervision in order to justify a substantial expenditure of public funds.

Mr. HONEY: Do I take it from what you said, Sir Kenneth, that in each case before a suit is instituted the couple are required to be referred to a marriage counsellor?

Sir Kenneth BAILEY: No, "referred to" goes too far. Under rule 15, the existence of the facilities has to be brought to their notice, and their solicitor has to certify that he has done so. In fact, the marriage guidance organizations do have people who become their clients as a result of this procedure. But of course, they are always available, and many people are sent to them by solicitors, family friends, relatives, medical practitioners, clergymen, quite apart from any actual proceedings.

Mr. HONEY: They are not in the strict sense of the word agents of the court?

Sir Kenneth BAILEY: No, unless at a later stage a judge makes an appointment with the consent of the parties, under section 14 of the Act.

Mr. HONEY: I assume they make a report. If an action is instituted for dissolution of the marriage, does the report form part of the court record?

Sir Kenneth BAILEY: No.

Mr. HONEY: But it is given in a formal manner to the judge, he is apprised of it? Or is he not?

Sir Kenneth BAILEY: He would not be apprised of the terms of any report. He would be apprised simply by the parties, through their counsel, whether or not reconciliation had been effected, and whether or not the parties wished the matter to proceed. That I think is the effect of section 14 of the act.

Mr. HONEY: The judge would not have knowledge of the terms of the recommendation, if one was made?

Sir Kenneth BAILEY: No.

Co-CHAIRMAN (*Mr. Cameron*): If there are no more questions, may I say that Sir Kenneth has very kindly indicated that as he lives in Ottawa he would be very glad to come back at any time if the committee wanted to continue with questions or to hear anything further about the law of divorce in Australia.

Senator Roebuck, would you be good enough to thank our speaker?

Co-CHAIRMAN (*Senator Roebuck*): It would take me a long time to do so adequately, because we have been very much impressed, Sir Kenneth, with your distinguished career. I also notice that you are here with the consent of your home government, and I think we would all be pleased if you would convey to the Prime Minister of Australia, and anyone else who is involved in that consent, our recognition of and our thanks for the privilege of having you here.

You have given us many practical thoughts. The Australian act is different from ours in many material respects. It contains a wealth of suggestions, such as the certificate with regard to conciliation and the fact that the thought of conciliation continues right up until the final decree, the question of domicile and quite a number of other thoughts, including those with regard to the causes or grounds for divorce. These are all subjects which are before us, and I can assure you that what you have said and what you have pointed out in the Australian act will be of value to us, that it will all be thoroughly considered, and we thank you for bringing it before us.

CO-CHAIRMAN (*Mr. Cameron*): We next have before us representatives from the Barristers' Society of New Brunswick in the persons of John P. Palmer, Q.C., and Benjamin R. Guss, Q.C.

Mr. Palmer was born on August 17, 1916, at Dorchester, New Brunswick. He is married and has five children. He attended Ottawa public schools, Glebe Collegiate, Ottawa, Osgoode Hall Law School in 1937, the University of New Brunswick Law School from 1945 to 1946, and became a Bachelor of Civil Law in 1946. He was called to the New Brunswick Bar in 1946 and was made Q.C. in 1962. He served in the Canadian Army from 1940 to 1945.

He was employed by Sanford and Teed, Saint John, New Brunswick, from 1954 to 1957. He was a member of Teed Palmer O'Connell, later Teed Palmer O'Connell and Leger, from 1957 to 1966, and Palmer O'Connell Leger Turnbull 1966 and following. He practices law at Saint John, New Brunswick. He was part-time lecturer on law at the University of New Brunswick from 1947 to 1949 and from 1954 to 1956. He was President of the Saint John Law Society, 1965-67, and he is a member of the council of the New Brunswick Barristers' Society and a member of the Canadian Bar Association.

Our other witness is Mr. Benjamin R. Guss, Q.C., who received his B.A. degree in 1928, and was made LL.B. in 1930 from Dalhousie University. He read law with the Honourable J.B.M. Baxter, Premier and Attorney-General of New Brunswick, and later Chief Justice. He was President of the Saint John Law Society, Chairman of the Junior Bar of Canada, Chairman of the Legal Aid Committee of the Canadian Bar Association, a founder and President of the Medico-Legal Society of Saint John, Vice-President for New Brunswick of the Canadian Bar Association, solicitor for the municipality of the County of Saint John, Chairman of the Commission to Establish Hospital Insurance in New Brunswick, counsel for the delegation representing Saint John before the Joint International Waterways Commission. He is a member of the Council of the Canadian Bar Association, member of the Council of the New Brunswick Barristers' Society, secretary to the Municipalities Section of the Canadian Bar Association, Chairman of the Defence Research Institute (Atlantic provinces), Master of the Supreme Court of New Brunswick, honorary solicitor to the Animal Rescue League, honorary solicitor to the Saint John Tuberculosis Association, and other organizations.

Those are our two distinguished witnesses.

Mr. John P. Palmer, Q.C., Member of Council, New Brunswick Barristers' Society: Mr. Chairman, we are here to speak on behalf of the bar of the Province of New Brunswick, and perhaps a few preliminary remarks would be in order. The first is that New Brunswick is Canada in microcosm, because, although a small province, it has the marked racial complexion that is a feature of Canadian society: 38 per cent of our citizens in New Brunswick are of French descent, and I suppose 35 per cent. of them use French as their language of the home. The great majority of our French citizens in New Brunswick are members of the Roman Catholic faith. Again among the English speaking citizens of New

Brunswick we have a very considerable Roman Catholic element; probably one-third of the primarily English speaking families would be of the Roman Catholic faith. New Brunswick is not as highly urbanized, of course, as much of the rest of Canada.

The background to this report arises from a speech Mr. Guss made in July, 1965, at the annual meeting of the New Brunswick Bar. We have a very democratic Bar Society in New Brunswick; we have a meeting which all are free to attend, at which we get perhaps a quarter of our practising bar, and Mr. Guss spoke on the subject of broadening the grounds for divorce at that time. Consequently, he was appointed chairman of a committee in September, 1965, to draft report on this subject, of which I was made a member, together with Professor D. M. Hurley of the Law Faculty of the University of New Brunswick. We met several times, a draft report was prepared and eventually finalized, and it was presented to the Barristers' Society of New Brunswick at its annual meeting in July, 1966. The report of this committee of Professor Hurley, Mr. Guss and myself is attached to the society's submission.

The meeting of the Barristers' Society of New Brunswick at which this matter was considered was the largest meeting the society had ever seen; we had a very wide representation present, and I would think between one-quarter and one-third of the practising lawyers in New Brunswick were there; all elements, such as religious and language elements, were well represented. A point I wish to stress is that the resolutions which form the basis of the society's report were adopted unanimously at that meeting, so this is a very wide consensus of opinion of our bar. Those are the preliminary remarks that I wish to make.

The Co-CHAIRMAN (*Mr. Cameron*): All the members of the committee have a copy of the presentation by the society, and we will print it as part of the record.

Mr. PALMER: Do you wish me to read it?

The Co-CHAIRMAN (*Mr. Cameron*): You present it in the way you feel you should. You know what we are trying to find out about grounds and reasons. You tell us why you are advocating the broadening of the grounds, and generally what you feel on the subject-matter of divorce.

Mr. PALMER: The reason we advocated it as a committee was certainly because of our own observation of these cases and the very serious hardships which come to the attention of every lawyer. It is obvious that a great number of the lawyers in New Brunswick subscribe fully to these feelings, and this is a series of unanimous resolutions appearing in our report.

The Co-CHAIRMAN (*Senator Roebuck*): There are only two pages in the first report, and I would suggest that they be read with such comments as you wish to make as you go along, if that meets with your approval.

The Co-CHAIRMAN (*Mr. Cameron*): I think that would be a very good idea.

Mr. PALMER: The first resolution was a preliminary one, to see whether it was worth while going any further with our resolution, namely:

That this society does support legislation leading to a broadening of the grounds for divorce in Canada.

When that passed we felt we could go on with the details. If that one did not pass we would have backed away from the meeting. This was the feeling of the meeting.

The second resolution deals with various additional grounds in addition to adultery:

- (a) The commission of an act of sexual or deviate sexual intercourse voluntarily performed by the defendant after marriage with a person other than the plaintiff (petitioner) or with an animal.

This is an adaptation of the New York State language. The committee felt, and apparently the society agreed with us, that adultery is probably no more offensive to a spouse, or not as offensive, as some other forms of deviate sexual conduct which could be even more repugnant to many people.

The second ground is cruelty, which is a ground known in Nova Scotia. Many of our bar were trained at Dalhousie and it was agreed that this could well become a ground in Canada.

The Co-CHAIRMAN (*Senator Roebuck*): Did you define it?

Mr. PALMER: No, we did not define it.

The Co-CHAIRMAN (*Senator Roebuck*): Why not?

Mr. PALMER: We felt it was very well defined by the courts. We were not drafting legislation anyway, and at a meeting of a hundred people you cannot draft legislation. The meeting debated whether it should be persistent, but it was left as just cruelty.

(c) Separation pursuant to judicial decree for a period of not less than three years.

At this meeting, which went on for an afternoon and a good deal of the following morning, five hours being devoted to the debate, many members of the bar, particularly those of the Roman Catholic faith, wanted to avoid any suggestion of divorce by consent; that was obviously their sentiment. There was discussion of marital breakdown, but it was apparent that a strong element of our bar was not prepared to go that far at this time. In the committee's report separation pursuant to a separation agreement was recommended as a ground for divorce, and that did pass by a very narrow margin. However, for the sake of unanimity that resolution was rescinded and this unanimous resolution adopted.

The Co-CHAIRMAN (*Senator Roebuck*): Your suggested grounds (c) and (d) are the same thing, are not they, separation pursuant to a judicial decree and separation, both for a period of not less than three years?

Mr. PALMER: Ground (d) is desertion, Mr. Chairman. Separation by agreement was not recommended because it was so close to divorce by consent.

Mr. McCLEAVE: Could I ask one question for clarification? You say "Separation pursuant to judicial decree". On what grounds would the judicial decree be granted?

Mr. PALMER: Divorce *a mensa et thoro* or judicial separation in New Brunswick is granted on grounds of cruelty or adultery. I think that various sexual acts which are not sufficient for divorce fall within "cruelty", such as bestiality; they consider that cruelty, and therefore give a divorce *a mensa et thoro*.

On "Insanity" there was great debate about time, but that was eventually left this way. Then we have "Persistent criminality" and "Persistent and wilful failure to support dependent children." Those were the grounds.

Co-CHAIRMAN (*Senator Roebuck*): What about the wife?

Mr. PALMER: That was not adopted anyway. It is felt in this generation by many people that a wife is no longer as dependent as she was thirty years ago.

Co-CHAIRMAN (*Senator Roebuck*): If she has children she is.

Mr. PALMER: While she has children, yes, while the children are young certainly.

Co-CHAIRMAN (*Senator Roebuck*): It seems strange that "Persistent and wilful failure to support dependent children" stops there without any mention of the wife.

Mr. PALMER: Well, that was the resolution of the society, I think as proposed by our committee. It was felt that the wife without the children may well be able

in this generation to fend for herself, but it is needed when there are young children.

The third item in the report concerns jurisdiction.

upon proof of domicile within Canada where there has been residence by either party to the suit in the province where action is brought for more than one year of the three years prior to commencement of the action.

That refers to the deserted wife and so on. There shall be Canadian domicile and a definite residence requirement to give jurisdiction to the provincial court.

Then we recommend that collusion be a discretionary bar only.

Co-CHAIRMAN (*Senator Roebuck*): You mean the domicile of the husband as applied to the wife, do you? You mean that residence in Canada should be considered the domicile of the wife?

Mr. PALMER: The society's report is proof of domicile within Canada and then residence within the province. The matrimonial domicile would have to be Canada, except perhaps in the case of a deserted wife, which we already have.

Co-CHAIRMAN (*Senator Roebuck*): Do you mean the present rule with regard to domicile? That is, that the domicile of the wife is the domicile of the husband?

Mr. PALMER: The basis of the recommendation is that there be a Canadian domicile for the purposes of divorce.

Co-CHAIRMAN (*Senator Roebuck*): For both of them?

Mr. PALMER: Yes. This report does not deal with the possibility of separate domicile, of a married woman retaining her own domicile, except that we hope there will be a Canadian domicile.

Co-CHAIRMAN (*Mr. Cameron*): That applies to both spouses?

Mr. PALMER: Yes. By that time the society had received a communication from this committee, and the resolution was adopted at this general meeting that the society do submit a brief to this joint committee of the Senate and House of Commons and send a delegation here.

The report continues with a brief summary of the discussion. The society felt that the broader grounds were required to meet the social needs of the people in this generation, but that divorce by consent was not acceptable to a very large element of our number.

The time for desertion or for separation pursuant to judicial decree as a ground for divorce was set at three years. That was the committee's recommendation. There was a great deal of debate; many wanted to reduce it to as low as one year, many wanted to extend it to five, and finally the three-year provision was adopted.

There was some discussion about making a term of imprisonment of itself—for instance, life imprisonment or a 20-year sentence—ground for divorce, but that was not adopted, it was not acceptable to a great many at the meeting. It was not recommended by the committee, and it was not accepted by the majority. They felt that a criminal way of life, persistent criminality, might be a ground for divorce, but that certainly just one sentence of itself would not be sufficient.

Co-CHAIRMAN (*Senator Roebuck*): Even if it were for life?

Mr. PALMER: Even if it were for life. That was the feeling of the meeting, that it would inhibit any chance of rehabilitation and so on; that was one of the arguments against it.

On insanity, certainly they felt that the bare word would not be sufficient, but the feeling of the society was that unsoundness of mind at some point should be made a ground for divorce. We could not get a consensus on the time and conditions; that was felt to the legislative draftsmen.

There was considerable discussion of a definition of "cruelty", which was finally abandoned, because it was a large meeting.

I think that is all I want to say, Mr. Chairman. I do not know whether Mr. Guss would like to amplify any points.

Mr. Benjamin R. Guss, Q.C., Member of Council, New Brunswick Barristers' Society: Messrs. Chairmen and honourable members of the committee, I think Mr. Palmer has dealt properly with the report of the New Brunswick Barristers' Society. The hour is late; I was to read or discuss the report of our committee, but I note that it is an exhibit to the society's report.

The Co-CHAIRMAN (*Mr. Cameron*): You make whatever comments you think necessary. We do not want to limit your time. This is a very important organization, the Barristers' Society of New Brunswick, and we certainly want to hear their views on this.

Mr. McCLEAVE: Don't make your speech on the train going back, Mr. Guss.

Mr. GUSS: I must say, you are all very kind, and I do have a sense of privilege at being invited to be here to be part of this serious investigation in depth of a serious social problem that faces the country.

I think that perhaps the recitals to the draft resolutions as they appeared when the report was presented to the New Brunswick Barristers' Society might well go on the record, and if you will permit me I will read them, because they give the background of our thinking.

Whereas, in the opinion of this society, the grounds for divorce presently available within the Province of New Brunswick do not meet the social needs of the public;

And whereas the narrow grounds for divorce which the present law admits may be conducive to perjured evidence, collusion, suppressed testimony and other offenses and devices, the effect of which could be to induce in the public a lack of respect for and of confidence in our courts generally;

And whereas this society is concerned to bring law into accord with social need and to uphold and maintain public confidence in and respect for the administration of justice in the province,

and then follow the suggestions of our committee.

Another appendix to the report of our committee dealt with the grounds for divorce in New York State. We felt that the conditions which prevailed in New York State paralleled similar conditions which existed in New Brunswick, and perhaps throughout Canada. It might be well at this point to quote the *New York Times* on Pope John, because the *New York Times* attributed this whole new wave of the future (as I think Mr. Fairweather, my friend the Member for Royal, called it) as follows:

It began with Pope John. Almost every politician here agrees that the reform could never have taken place if the Roman Catholic clergy and laity had not been in a state of ferment in which old dogmas were undergoing an agonizing re-examination—as one Liberal Democratic Assembly man put it: "What really got this divorce bill off the ground was a man named John—Pope John."

It was startling at first to read this, but when the discussion before the New Brunswick Barristers' Society proceeded it was obvious that the Roman Catholic lawyers had had a change of heart, and in deference to them we agreed that only those recommendations which received unanimous consent would be the ones we would advocate, and that is exactly what happened.

I would like to mention another point. There was considerable discussion about the breakdown of marriage idea as opposed to the guilt idea. I understand statistics show that there are fewer divorces, at least up to present time, amongst Jewish people than there are amongst other ethnic groups. A husband and wife go to a rabbi, who ascertains whether the spiritual and physical basis of the marriage has broken down. If he decides that the spiritual and physical basis of the marriage has broken down he buzzes for the scribe, the scribe comes in with a piece of parchment and a feathered pen and proceeds to write a bill of divorcement; the rabbi then hands the bill of divorcement to the husband, the husband hands the bill of divorcement to the wife, and that is it. Now, it has not caused a breakdown of marriage, it has not caused any greater number of divorces, because, as we say in our original report, by the time they come to the lawyers or the rabbi there is in fact no marriage, all sane communication has broken down between husband and wife. There have been no ill effects on family life amongst the Jewish people because of what some people call "easy divorce".

It is the stiff and tough grounds that cause the trouble and heartache, the conditions which some people say exist in our courts and before the senate, when you have to spy, have a proctor or somebody to try to find out "Are you kidding us or not?" which are the wrong attitudes in the case of tragic breakdown in marriage. I know some people do not think that this should be done. I understand that the Member for Royal has presented a bill on this "new wave." I say, however, it is not a new wave; it has been honoured now among the Jewish people for over 3000 years, and family life still runs strong.

I want to follow the precedent set by the previous two speakers. I am married, I have a nice wife who is a B.A. from McGill. I have three daughters and a son. The three girls are graduates of Dane Hall in Wellesley; one is a graduate of Vassar, another is a graduate of Goucher and the third is a graduate of Bradford Junior College in the Boston University School of Fine Arts. My son is a graduate of Phillips Academy in Andover, and is now a junior in economics at Harvard. I pay them respect, as did the previous speakers, this being also St. Valentine's Day. With those few remarks I will stop.

The CO-CHAIRMAN (*Mr. Cameron*): Perhaps the honourable Member for Royal has a question.

Mr. FAIRWEATHER: I wanted to clear the record. I seconded a bill of Mr. Brewin, the honourable Member for Greenwood. I accept the appellation of "new wave", but I cannot accept the credit for introducing this bill.

Mr. HONEY: There are two matters I would like to ask a few questions on. One concerns paragraph 2(c) of the brief. I listened with interest to the reasons why the society considered not making divorce by consent available. There is a problem, I think, in some jurisdictions, in Ontario for example, where separation by judicial decree is not available. Have you considered that? In other words, you have been occupied—and I think in most jurisdictions quite properly—with the situation where there can be a judicial decree prior to the institution of divorce. What would happen in other jurisdictions where this remedy is not available?

Mr. PALMER: If I might venture to answer that, it seems to me that the Parliament of Canada might well make provision in any divorce measure for divorce *a mensa et thoro* as well as final divorce.

The CO-CHAIRMAN (*Senator Roebuck*): You have that in your province, have you not?

Mr. PALMER: The courts exercise this jurisdiction, yes, without hesitation, although the statutory basis for it is very vague.

The CO-CHAIRMAN (*Mr. Cameron*): Based on the common law.

Mr. PALMER: They seem to apply the common law, yes. The basis of our divorce jurisdiction is the statute of 1792, which established the Lieutenant-Governor in Council as the divorce court, and that jurisdiction was later, before Confederation, transferred to a court. The grounds for divorce so declared were very restricted, but the court has nevertheless always granted divorce *a mensa et thoro* on the grounds accepted in England by the church courts at the time the province was founded.

Mr. WAHN: Could the witness tell us what additional grounds are covered by paragraph 2(c) over and above those contained in the other paragraphs?

Mr. PALMER: I think once there has been a divorce *a mensa et thoro*, as we would still call it, or separation pursuant to judicial decree, the guilty party can after the three years bring a petition for divorce absolute based on the fact that they have been separated by judicial decree.

Mr. WAHN: My question is: what grounds would justify a judicial decree of separation which are not already included in (a), (b), (d), (e), (f) or (g)?

Mr. PALMER: There would be none. I do not think there are any grounds for a judicial separation that would not be grounds for divorce if these were all adopted. Nevertheless, you might have a situation where the wife, for perhaps religious reasons, would not petition for an absolute divorce. The husband, after this judicial separation for three years, could then petition for divorce on the ground of this prolonged period of separation pursuant to judicial decree.

Mr. WAHN: Either party could get it instead of just the innocent party?

M. PALMER: That is right.

Mr. HONEY: After the three-year period?

Mr. PALMER: Yes.

Mr. GUSS: I know of a case now where a woman will not take proceedings against her husband for divorce and she is planning to take proceedings against him for judicial separation *a mensa et thoro*. He is now living with another woman and the wife out of spite—as was said before the committee by another witness—will not take any action against him for divorce, but she proposes to take action against him for judicial separation. On that same subject I might refer to *Hunter v. Hunter* (1863) 10 N.B.R., 593, which deals with divorce *a mensa et thoro*, and various grounds are given there.

Mr. HONEY: Referring to paragraph 3, do you suggest that we should enlarge the law, as I think it is now, and provide for a domicile in Canada for either the husband or wife? For example, suppose the husband moved to the United Kingdom but was still supporting the wife. If he had deserted her in that sense possibly she would be able to institute an action under the existing legislation, but would she not be barred from instituting a suit if her domicile at that point was in the United Kingdom, even though she was resident in New Brunswick?

Mr. PALMER: I think that is true, and I think that is probably an oversight. We spent a long time debating other aspects of this. Perhaps Mr. Guss and myself do not represent the society in this matter, but we would feel that the wife's domicile following the husband's can cause many hardships.

Mr. HONEY: Do you think it should be changed?

Mr. PALMER: Mr. Guss and I would agree with that. I would not like to speak for the society.

Mr. FAIRWEATHER: I was at the meeting of the society and I remember this discussion. I agree this might have been an oversight, because to anybody with whom I spoke about this it was almost self-evident, and probably because it was self-evident the society, of which I am a member, did not spend quite as much time on it as it should. Certainly there was a wide consensus of opinion in this direction, particularly in the maritimes, where there is a great exodus.

Mr. McCLEAVE: "Cultural influences abroad" I think is the correct description.

Mr. FAIRWEATHER: It means a great deal of hardship for many wives.

Mr. GUSS: I personally would like to go on record as saying that I strongly believe every woman should be able to make her own domicile. It is because of this question of domicile that there are many hardships. I know of a case where the husband is now an engineer in Tanganyika. One of my partners took the case to Fredericton, because the man was born in New Brunswick and had never made a real home anywhere else. His lawyer, when written to, sent a solemn declaration from Tanganyika saying that the husband owns a little farm in New Brunswick and intends to come back to New Brunswick, but the judge did not accept it. That is a real hardship in that case, and I know of several somewhat similar cases. I believe that a woman should be able to have her own domicile. If you want to limit it to divorce only, that is all right. I think perhaps we should limit it in that way and then the professors can argue it.

Co-CHAIRMAN (*Senator Roebuck*): Could not we avoid the subject of domicile entirely and simply give her the right of access to the courts? We have done that in our present act. We have not changed the rules of domicile. We have simply given her access to the court.

Mr. GUSS: Are you referring to Chapter 84 of the Revised Statutes of Canada, 1952?

Co-CHAIRMAN (*Senator Roebuck*): That is right.

Mr. GUSS: That is a very hard section and I do not think it does much good to the woman, because it says the husband must have deserted her in the province in which she brings the action, and I think that is abominable.

The Co-CHAIRMAN (*Senator Roebuck*): But, you see, it gives her access to the courts without any mention of domicile.

Mr. GUSS: But if they were in Tanganyika and parted in Tanganyika and she comes home to Saint John, New Brunswick, what good is that to her? Is she to go back to Tanganyika?

Co-CHAIRMAN (*Senator Roebuck*): I thoroughly agree with you on that.

Co-CHAIRMAN (*Mr. Cameron*): You want the offending words removed?

Mr. GUSS: Yes.

Senator FERGUSON: This has been my contention, that a married woman should have her own domicile the same as a married man. There is no difference. I am very glad to hear those from the New Brunswick Bar supporting that.

Mr. GUSS: I think it was the feeling of the entire bar that that is what was meant. I appreciate Mr. Fairweather's explanation.

Co-CHAIRMAN (*Mr. Cameron*): Are there any more questions? This is an opportunity for the lawyers on the committee to cross-examine lawyers who are giving evidence.

Mr. McCLEAVE: I have one question on attitudes. Was the fact that judicial decree was mentioned in paragraph 2 (c) the factor that persuaded the Roman Catholic members of the bar to accept the whole resolution, or did they see beyond it and approve of these other extra grounds such as cruelty and insanity?

Mr. PALMER: They approved of all those additional grounds. What they did not want was divorce by consent; that is what they drew the line at. I would say that the Roman Catholic element, and perhaps some others, felt upon religious grounds that they could not recommend divorce by consent, and that it would be offensive to a great many people in the province. Almost anything short of that they seemed to accept. There was a lot of debate about time. This went on for five hours; it was not just run through in a few minutes; this was a very prolonged debate.

Mr. McCLEAVE: Had there been previous debates on a divorce resolution at meetings of the Barristers' Society of New Brunswick which had foundered because of the religious question or attitudes?

Mr. GUSS: I had spoken to successive presidents over a number of years and they had said: "Cut it, don't embarrass me; we're going to have trouble." In 1965 I told the president that I wanted to speak to it, that I was not just going to introduce a resolution, and I did so; I spoke to it, a committee was appointed and this is what followed. I want to say that the committee was a working committee; it was not just a case of the chairman working. Professor Hurley corresponded with me on it regularly; he was in Fredericton; Mr. Palmer and myself had many discussions in Saint John, and Mr. Palmer acted as editor, he edited and re-edited.

Mr. PALMER: I acted as secretary to the committee.

Mr. WAHN: Was there any discussion of the possibility of a sacramental form of marriage which would be indissoluble on any ground, and also a form of civil marriage which could be dissolved quite readily? Was this possibility discussed at all?

Mr. PALMER: No.

Mr. GUSS: We have civil marriage in New Brunswick though.

Mr. MACEWAN: This is not dealt with in the brief but I would like to ask Mr. Palmer and Mr. Guss about it. It has been suggested to this committee that the proper court for hearing divorce cases could be the family court; another suggestion was that perhaps the county court could be given concurrent jurisdiction with the Supreme Court—that is county court judges and Supreme Court judges—on divorce cases. I wondered if you had any ideas on that, as to whether in your own province cases should continue to be heard by the Supreme Court judges, or in what form they should be heard.

Mr. PALMER: It should be explained that in New Brunswick we have a separate court called the Court of Divorce and Matrimonial Causes; that is a pre-Confederation court. The judge who sits is a judge of the Supreme Court of New Brunswick, who is appointed for the purpose, I think by the province rather than by the federal authority, though he is also a judge of the Supreme Court. You do get just one judge. I think they now arrange for a deputy in case that judge is absent through illness, or if in some case he felt unfit to try it because of relationship or something of that sort. In effect we have just one divorce judge in New Brunswick. The registrar of the Supreme Court acts as registrar of that divorce court, he uses the same office and so on.

I think the bar of New Brunswick is very, very satisfied with this system. This has not been discussed by the society, but it is my impression that no one in New Brunswick would like to have divorce cases handled at the circuit court in with damage actions. This court sits only in Fredericton, which means that, except when it is a Fredericton case, it is some little distance to travel for anybody who wants to listen in on the dirt. The statute limits publication of proceedings in the divorce court by the local newspapers to the bare fact of a decree. This has proved very successful, and I think almost all lawyers subscribe to it. In a small province, having all the trials in Fredericton is not a big problem; it is within five hours drive of any place in New Brunswick, and you do not get all that many divorces in your life that it is a real hardship to drive that far.

Mr. MACEWAN: This one judge can hear the divorce cases expeditiously, render decisions and so on? There is no hold-up in giving decisions?

Mr. PALMER: No. The judge told me that the divorce work he does takes 90 sitting days a year. The rest of the time he is available for other duties of the Supreme Court of New Brunswick.

Mr. McCLEAVE: Would he take four cases a day?

Mr. PALMER: No, he takes eight uncontested cases a day. They are set down in the calendar; we have a precise hour set for the case; there are four uncontested cases in the morning and four in the afternoon, and it is rarely that the time of an uncontested case has to be varied. With a contested case the judge finds out from the counsel how long it is likely to take and allots the appropriate time to it. On top of actually hearing the cases he has chambers applications, commission evidence and so on.

The judge says that in the aggregate, including decrees and reasons for judgment in contested cases and so on, or cases where there are real problems of domicile, in which case he might write reasons for granting or refusing the application, the work occupies about ninety days. It is my impression that the bar of New Brunswick would not want to have these cases tried by the county court or by the Supreme Court along with damage actions.

Mr. McCLEAVE: Or by family courts?

Mr. PALMER: Or by family courts, which are not nearly so highly qualified as a Supreme Court judge.

Mr. GUSS: I agree wholeheartedly about who should try divorce cases, that it should continue in New Brunswick as it is now. When I became chairman of the committee a number of members of the junior bar questioned the superiority of the Supreme Court judge to hear divorce cases. One man in particular, who spoke for a number of the younger men over coffee at a coffee shop one day when this was debated, said that about seven of the younger lawyers thought it could be a more or less administrative thing, with perhaps three people sitting, such as a social service worker, possibly a magistrate of the juvenile court and perhaps a woman who worked in welfare. He said he spoke for about seven junior members of the bar and we debated it thoroughly. I did not convince him, and he did not convince me.

If you are going to enlarge the scope and the grounds for divorce, I think you must maintain the dignity, decorum and solemnity that pervades a hearing before the Supreme Court judge, where you are gowned and he is gowned, which makes people realize that something serious is going on and it is not just a little chit-chat around the table, which I think would be wrong.

Co-CHAIRMAN (*Mr. Cameron*): That is a matter of procedure, is it not?

Mr. GUSS: That is right.

Co-CHAIRMAN (*Mr. Cameron*): Are there any more questions?

Senator BELISLE: I was going to ask whether the judge is a roving judge or whether he attends courts in every city, but that has been partly answered. He sits only in one city?

Mr. PALMER: He sits only in Fredericton.

Senator BELISLE: And there has been no objection to it?

Mr. PALMER: No serious objection has been heard to that. Reverting to the point raised by Mr. Guss, that is a different concept of divorce and judicial trial, that there should be a psychological examination of the breakdown really rather than establishment of a fact. If that were the test, maybe a court is not the best tribunal to plumb it in depth.

Mr. PETERS: Was the breakdown of marriage theory discussed?

Mr. PALMER: Yes, it was discussed at that meeting.

Mr. PETERS: What was the conclusion? That it was only another ground?

Mr. PALMER: The conclusion was that it was too close to divorce by consent for a considerable element of our membership, and they thought of the population as well. That is why there is nothing in the brief resembling it. Mr. Guss and

I would both have advocated that, of course, but even in our committee this was not acceptable to Professor Hurley.

Mr. GUSS: What we tried to do was to accomplish the possible and get a consensus, which I think is an important aspect of the whole question. You have got to take it phase by phase and step by step. When the breakdown of marriage theory was being discussed one very distinguished lawyer, when I was on my feet, pulled a postcard out of his pocket and said, "Are you going to send your wife a postcard saying you are divorced?" That was how he looked at it, and we appreciated that some people would take that view, although I do not myself.

Mr. PETERS: I should not really ask this because it is obviously asking for an opinion, but are you of the opinion that the courts as now constituted are in a position to exercise the social control that would be necessary for the operation of the breakdown theory, which really has no offending parties and no specific grounds, except the total dissipation of the contract as it would apply between two people?

Mr. GUSS: It would seem to me that a judge could not decide it on a whim. He would have to hear the parties. There might still be opposition. The husband might come forward and say, "I am disenchanted with my wife", but the wife might come forward and say, "Well, I'm not disenchanted with my husband." In such cases the judge would have to sit in judgment and make a judicial decision as to whether there has been a breakdown or not, and he could take into consideration any of the grounds we have suggested as a basis for coming to the conclusion that the marriage has in fact broken down. But it would not be on a whim; it would be on a consideration of judicial facts.

Mr. PETERS: Which in effect requires a stronger judicial position than in the case even of the present law, where everybody knows it is not a fact, yet they all agree.

Mr. GUSS: Well, they do not know it is not a fact. They may guess.

Mr. PETERS: It is a supposition.

Co-CHAIRMAN (*Mr. Cameron*): Are there any more questions?

Co-CHAIRMAN (*Senator Roebuck*): I wanted to point out to the committee that these gentlemen have come here under somewhat different circumstances from some others. They have come at our request, because in the brief that was submitted to us I noticed this phrase:

if the Council deem advisable, the society do send a delegation to make representations to such committee on behalf of the society.

I brought that to the attention of the Steering Committee, and we decided that we would invite these gentlemen to come and talk to us. That was after we had read the brief. These two distinguished lawyers from that territory are here at our request, and I think I should extend our thanks to them personally, and to the society who sent them here whom they represent. If you gentlemen would convey that message to the society at some convenient time, I think it would be appropriate and would be approved by us here. You have spoken in a most practical way, not so much theoretically, because you know what you are doing from practice, from experience, and that is of real assistance to us. I speak for everyone here when I say "Thank you".

The committee adjourned.

APPENDIX "37"

THE COMMONWEALTH OF AUSTRALIA MATRIMONIAL CAUSES ACT 1959.

An Act relating to Marriage and to Divorce and Matrimonial Causes and, in relation thereto, Parental Rights and the Custody and Guardianship of Infants.

Be it enacted by the Queen's Most Excellent Majesty, the Senate, and the House of Representatives of the Commonwealth of Australia, as follows:—

Part III.—RECONCILIATION.

Recon-
ciliation.

14.—(1.) It is the duty of the court in which a matrimonial cause has been instituted to give consideration, from time to time, to the possibility of a reconciliation of the parties to the marriage (unless the proceedings are of such a nature that it would not be appropriate to do so), and if at any time it appears to the Judge constituting the court, either from the nature of the case, the evidence in the proceedings or the attitude of those parties, or of either of them, or of counsel, that there is a reasonable possibility of such a reconciliation, the Judge may do all or any of the following:—

- (a) adjourn the proceedings to afford those parties an opportunity of becoming reconciled or to enable anything to be done in accordance with either of the next two succeeding paragraphs;
- (b) with the consent of those parties, interview them in chambers, with or without counsel, as the Judge thinks proper, with a view to effecting a reconciliation;
- (c) nominate—
 - (i) an approved marriage guidance organization or a person with experience or training in marriage conciliation; or
 - (ii) in special circumstances, some other suitable person, to endeavour, with the consent of those parties, to effect a reconciliation.

(2.) If, not less than fourteen days after an adjournment under the last preceding sub-section has taken place, either of the parties to the marriage requests that the hearing be proceeded with, the Judge shall resume the hearing, or arrangements shall be made for the proceedings to be dealt with by another Judge, as the case requires, as soon as practicable.

Hearing
when
recon-
ciliation
fails.

15. Where a Judge has acted as conciliator under paragraph (b) of sub-section (1.) of the last preceding section but the attempt to effect a reconciliation has failed, the Judge shall not, except at the request, arrangements shall be made for the proceedings to be dealt with, or determine the proceedings, and, in the absence of such a request, arrangements shall be made for the proceedings to be dealt with by another Judge.

Statements,
&c., made in
course of
attempt to
effect recon-
ciliation.

16. Evidence of anything said or of any admission made in the course of an endeavour to effect a reconciliation under this Part is not admissible in any court (whether exercising federal jurisdiction or not) or in proceedings before a person authorized by a law of the Commonwealth or of a State or Territory of the Commonwealth, or by consent of parties to hear, receive and examine evidence.

17. A marriage conciliator shall, before entering upon the performance of his functions as such a conciliator, make and subscribe, before a person authorized under the law of the Commonwealth or of a State or a Territory to which this Act applies to take affidavits, an oath or affirmation of secrecy in accordance with the form in the First Schedule to this Act.

Marriage
conciliator
to take
oath of
secrecy.

PART V.—JURISDICTION.

24.—(1.) For the purposes of this Act, a deserted wife who was domiciled in Australia either immediately before her marriage or immediately before the desertion shall be deemed to be domiciled in Australia.

Special
provisions
as to wife's
domicile.

(2.) For the purposes of this Act, a wife who is resident in Australia at the date of instituting proceedings under this Act and has been so resident for the period of three years immediately preceding that date shall be deemed to be domiciled in Australia at that date.

PART VI.—MATRIMONIAL RELIEF.

Division 1.—Dissolution of Marriage.

28. Subject to this Division, a petition under this Act by a party to a marriage for a decree of dissolution of the marriage may be based on one or more of the following grounds:—

Grounds for
dissolution
of marriage.

- (a) that, since the marriage, the other party to the marriage has committed adultery;
- (b) that, since the marriage, the other party to the marriage has, without just cause or excuse, wilfully deserted the petitioner for a period of not less than two years;
- (c) that the other party to the marriage has wilfully and persistently refused to consummate the marriage;
- (d) that, since the marriage, the other party to the marriage has, during a period of not less than one year, habitually been guilty of cruelty to the petitioner;
- (e) that, since the marriage, the other party to the marriage has committed rape, sodomy or bestiality;
- (f) that, since the marriage, the other party to the marriage has, for a period of not less than two years—
 - (i) been a habitual drunkard; or
 - (ii) habitually been intoxicated by reason of taking or using to excess any sedative, narcotic or stimulating drug or preparation,
 or has, for a part or parts of such a period, been a habitual drunkard and has, for the other part or parts of the period, habitually been so intoxicated;
- (g) that, since the marriage, the petitioner's husband has, within a period not exceeding five years—
 - (i) suffered frequent convictions for crime in respect of which he has been sentenced in the aggregate to imprisonment for not less than three years; and
 - (ii) habitually left the petitioner without reasonable means of support;
- (h) that, since the marriage, the other party to the marriage has been in prison for a period of not less than three years after conviction for an offence punishable by death or imprison-

ment for life or for a period of five years or more, and is still in prison at the date of the petition;

- (i) that, since the marriage and within a period of one year immediately preceding the date of the petition, the other party to the marriage has been convicted, on indictment, of—
 - (i) having attempted to murder or unlawfully to kill the petitioner; or
 - (ii) having committed an offence involving the intentional infliction of grievous bodily harm on the petitioner or the intent to inflict grievous bodily harm on the petitioner;
- (j) that the other party to the marriage has habitually and wilfully failed, throughout the period of two years immediately preceding the date of the petition, to pay maintenance for the petitioner—
 - (i) ordered to be paid under an order of, or an order registered in, a court in the Commonwealth or a Territory of the Commonwealth; or
 - (ii) agreed to be paid under an agreement between the parties to the marriage providing for their separation;
- (k) that the other party to the marriage has, for a period of not less than one year, failed to comply with a decree of restitution of conjugal rights made under this Act;
- (l) that the other party to the marriage—
 - (i) is, at the date of the petition, of unsound mind and unlikely to recover; and
 - (ii) since the marriage and within the period of six years immediately preceding the date of the petition, has been confined for a period of, or for periods aggregating, not less than five years in an institution where persons may be confined for unsoundness of mind in accordance with law, or in more than one such institution;
- (m) that the parties to the marriage have separated and thereafter have lived separately and apart for a continuous period of not less than five years immediately preceding the date of the petition, and there is no reasonable likelihood of concurrently,
- (n) that the other party to the marriage has been absent from the petitioner for such time and in such circumstances as to provide reasonable grounds for presuming that he or she is dead.

Constructive
desertion.

29. A married person whose conduct constitutes just cause or excuse for the other party to the marriage to live separately or apart, and occasions that other party to live separately or apart, shall be deemed to have wilfully deserted that other party without just cause or excuse, notwithstanding that that person may not in fact have intended the conduct to occasion that other party to live separately or apart.

Refusal to
resume
cohabitation.

30.—(1.) Where husband and wife are parties to an agreement for separation, whether oral, in writing or constituted by conduct, the refusal by one of them, without reasonable justification, to comply with the other's bona fide request to resume cohabitation constitutes, as from the date of the refusal, wilful desertion without just cause or excuse on the part of the party so refusing.

(2.) For the purposes of the last preceding sub-section, "reasonable justification" means reasonable justification in all the circumstances, including the conduct of the other party to the marriage since the marriage, whether that conduct took place before or after the agreement for separation.

31. Where a party to a marriage has been wilfully deserted by the other party, the desertion shall not be deemed to have been terminated by reason only that the deserting party has become incapable of forming or having an intention to continue the desertion, if it appears to the court that the desertion would probably have continued if the deserting party had not become so incapable.

Desertion continuing after insanity.

32. A decree of dissolution of marriage shall not be made upon the ground specified in paragraph (c) of section twenty-eight of this Act unless the court is satisfied that, as at the commencement of the hearing of the petition, the marriage had not been consummated.

Restriction on dissolution of marriage on ground of wilful refusal to consummate.

33. Where—

- (a) a person has been sentenced to imprisonment in respect of each of two or more crimes that, in the opinion of the court hearing the petition, arose substantially out of the same acts or omissions; and
- (b) the sentences were ordered to be served, in whole or in part, concurrently,

Aggregation of concurrent sentences.

then, in reckoning for the purposes of paragraph (g) of section twenty-eight of this Act the period for which that person has been sentenced in the aggregate, any period during which two or more of those sentences were to be served concurrently shall be taken into account once only.

34. A decree of dissolution of marriage shall not be made upon the ground specified in paragraph (j) of section twenty-eight of this Act unless the court is satisfied that reasonable attempts have been made by the petitioner to enforce the order or agreement under which the maintenance was ordered or agreed to be paid.

Restriction on dissolution of marriage on ground of failure to pay maintenance.

35. A decree of dissolution of marriage shall not be made upon the ground specified in paragraph (l) of section twenty-eight of this Act unless the court is satisfied that, at the commencement of the hearing of the petition, the respondent was still confined in an institution referred to in that paragraph and was unlikely to recover.

Restriction on dissolution of marriage on ground of insanity.

36.—(1.) For the purposes of paragraph (m) of section twenty-eight of this Act, the parties to a marriage may be taken to have separated notwithstanding that the cohabitation was brought to an end by the action or conduct of one only of the parties, whether constituting desertion or not.

Provisions relating to ground of separation.

(2.) A decree of dissolution of marriage may be made upon the ground specified in paragraph (m) of section twenty-eight of this Act notwithstanding that there was in existence at any relevant time—

- (a) a decree of a court suspending the obligation of the parties to the marriage to cohabit; or
- (b) an agreement between those parties for separation.

Court to refuse to make decree on ground of separation in certain circumstances.

37.—(1.) Where, on the hearing of a petition for a decree of dissolution of marriage on the ground specified in paragraph (m) of section twenty-eight of this Act (in this section referred to as "the ground of separation"), the court is satisfied that, by reason of the

conduct of the petitioner, whether before or after the separation commenced, or for any other reason, it would, in the particular circumstances of the case, be harsh and oppressive to the respondent, or contrary to the public interest, to grant a decree on that ground on the petition of the petitioner, the court shall refuse to make the decree sought.

(2.) Where, in proceedings for a decree of dissolution of marriage on the ground of separation, the court is of opinion that it is just and proper in the circumstances of the case that the petitioner should make provision for the maintenance of the respondent or should make any other provision for the benefit of the respondent, whether by way of settlement of property or otherwise, the court shall not make a decree on that ground in favour of the petitioner until the petitioner has made arrangements to the satisfaction of the court to provide the maintenance or other benefits upon the decree becoming absolute.

(3.) The court may, in its discretion, refuse to make a decree of dissolution of marriage on the ground of separation if the petitioner has, whether before or after the separation commenced, committed adultery that has not been condoned by the respondent or, having been so condoned, has been revived.

(4.) Where petitions by both parties to a marriage for the dissolution of the marriage are before a court, the court shall not, upon either of the petitions, make a decree on the ground of separation if it is able properly to make a decree upon the other petition on any other ground.

Provisions relating to presumption of death.

38.—(1.) Where proceedings are brought upon the ground specified in paragraph (n) of section twenty-eight of this Act, proof that, for a period of seven years immediately preceding the date of the petition, the other party to the marriage was continually absent from the petitioner and that the petitioner has no reason to believe that the other party was alive at any time within that period is sufficient to establish the ground of the petition unless it is shown that the other party to the marriage was alive at a time within that period.

(2.) A decree upon the ground specified in paragraph (n) of section twenty-eight of this Act shall be in the form of a decree of dissolution of marriage by reason of presumption of death.

Condonation or connivance to be an absolute bar to relief.

39. A decree of dissolution of marriage shall not be made upon a ground specified in any of paragraphs (a) to (k), inclusive, of section twenty-eight of this Act, if the petitioner has condoned, or has connived at, the ground.

Collusion to be an absolute bar.

40. A decree of dissolution of marriage shall not be made if the petitioner, in bringing or prosecuting the proceedings, has been guilty of collusion with intent to cause a perversion of justice.

Discretionary bars.

41. The court may, in its discretion, refuse to make a decree of dissolution of marriage upon a ground specified in any of paragraphs (a) to (l), inclusive, of section twenty-eight of this Act, if, since the marriage—

- (a) the petitioner has committed adultery that has not been condoned by the respondent or, having been so condoned, has been revived;
- (b) the petitioner has been guilty of cruelty to the respondent;
- (c) the petitioner has wilfully deserted the respondent before the happening of the matters constituting the ground relied

upon by the petitioner or, where that ground involves matters occurring during, or extending over, a period, before the expiration of that period; or

- (d) the habits of the petitioner have, or the conduct of the petitioner has, conduced or contributed to the existence of the ground relied upon by the petitioner.

Court not to make decree of dissolution where petition for decree of nullity before it.

42. Where both a petition for a decree of nullity of a marriage and a petition for a decree of dissolution of that marriage are before a court, the court shall not make a decree of dissolution of the marriage unless it has dismissed the petition for a decree of nullity of the marriage.

43.—(1.) Subject to this section, proceedings for a decree of dissolution of marriage shall not be instituted within three years after the date of the marriage except by leave of the court.

Petition within three years of marriage.

(2.) Nothing in this section shall be taken to require the leave of the court to the institution of proceedings for a decree of dissolution of marriage on one or more of the grounds specified in paragraphs (a), (c) and (e) of section twenty-eight of this Act, and on no other ground, or to the institution of proceedings for a decree of dissolution of marriage by way of cross-proceedings.

(3.) The court shall not grant leave under this section to institute proceedings except on the ground that to refuse to grant that leave would impose exceptional hardship on the applicant or that the case is one involving exceptional depravity on the part of the other party to the marriage.

(4.) In determining an application for leave to institute proceedings under this section, the court shall have regard to the interests of any children of the marriage and to the question whether there is any reasonable probability of a reconciliation between the parties before the expiration of the period of three years after the date of the marriage.

(5.) Where, at the hearing of proceedings that have been instituted by leave of the court under this section, the court is satisfied that the leave was obtained by misrepresentation or concealment of material facts, the court may—

- (a) adjourn the hearing for such period as the court thinks fit; or
(b) dismiss the petition on the ground that the leave was so obtained.

(6.) Where, in a case to which the last preceding sub-section applies, there is a cross-petition, if the court adjourns or dismisses the petition under that sub-section, it shall also adjourn for the same period, or dismiss, as the case may be, the cross-petition, but if the court, having regard to the provisions of this section, thinks it proper to proceed to hear and determine the cross-petition, it may do so, and in that case it shall also proceed to hear and determine the petition.

(7.) The dismissal of a petition or a cross-petition under sub-section (5.) or (6.) of this section does not prejudice any subsequent proceedings on the same, or substantially the same, facts as those constituting the ground on which the dismissed petition or cross-petition was brought.

(8.) Nothing in this section prevents the institution of proceedings, after the period of three years from the date of the marriage, based upon matters which have occurred within that period.

(9.) In this section, a reference to the leave of the court shall be deemed to include a reference to leave granted by a court on appeal.

Division 6.—General.

Decree *nisi*
in first
instance.

70. A decree of dissolution of marriage or nullity of a voidable marriage under this Act shall, in the first instance, be a decree *nisi*.

Decree
absolute
where
children
under six-
teen years
&c.

71.—(1.) Where there are children of the marriage in relation to whom this section applies, the decree *nisi* shall not become absolute unless the court, by order, has declared—

(a) that it is satisfied that proper arrangements in all the circumstances have been made for the welfare and, where appropriate, the advancement and education of those children; or

(b) that there are such special circumstances that the decree *nisi* should become absolute notwithstanding that the court is not satisfied that such arrangements have been made.

(2.) In this section, “children of the marriage in relation to whom this section applies” means—

(a) the children of the marriage who are under the age of sixteen years at the date of the decree *nisi*; and

(b) any children of the marriage in relation to whom the court has, in pursuance of the next succeeding sub-section, ordered that this section shall apply.

(3.) The court may, in a particular case, if it is of opinion that there are special circumstances which justify its so doing, order that this section shall apply in relation to a child of the marriage who has attained the age of sixteen years at the date of the decree *nisi*.

PART VIII.—MAINTENANCE, CUSTODY and SETTLEMENTS.

Definition.

83. In this Part, “marriage” includes a purported marriage that is void.

Powers of
court in
maintenance
proceedings.

84.—(1.) Subject to this section, the court may, in proceedings with respect to the maintenance of a party to a marriage, or of children of the marriage, other than proceedings for an order for maintenance pending the disposal of proceedings, make such order as it thinks proper, having regard to the means, earning capacity and conduct of the parties to the marriage and all other relevant circumstances.

(2.) Subject to this section and to the rules, the court may, in proceedings for an order for the maintenance of a party to a marriage, or of children of the marriage, pending the disposal of proceedings, make such order as it thinks proper, having regard to the means, earning capacity and conduct of the parties to the marriage and all other relevant circumstances.

(3.) The court may make an order for the maintenance of a party notwithstanding that a decree is or has been made against that party in the proceedings to which the proceedings with respect to maintenance are related.

(4.) The power of the court to make an order with respect to the maintenance of children of the marriage shall not be exercised for the benefit of a child who has attained the age of twenty-one years unless the court is of opinion that there are special circumstances that justify the making of such an order for the benefit of that child.

85.—(1.) In proceedings with respect to the custody, guardianship, welfare, advancement or education of children of a marriage—
 (a) the court shall regard the interests of the children as the paramount consideration; and

Powers of court in custody, &c., proceedings.

(b) subject to the last preceding paragraph, the court may make such order in respect of those matters as it thinks proper.

(2.) The court may adjourn any proceedings referred to in the last preceding sub-section until a report has been obtained from a welfare officer on such matters relevant to the proceedings as the court considers desirable, and may receive the report in evidence.

(3.) In proceedings with respect to the custody of children of a marriage, the court may, if it is satisfied that it is desirable to do so, make an order placing the children, or such of them as it thinks fit, in the custody of a person other than a party to the marriage.

(4.) Where the court makes an order placing a child of a marriage in the custody of a party to the marriage, or of a person other than a party to the marriage, it may include in the order such provision as it thinks proper for access to the child by the other party to the marriage, or by the parties or a party to the marriage, as the case may be.

86.—(1.) The court may, in proceedings under this Act, by order require the parties to the marriage, or either of them, to make, for the benefit of all or any of the parties to, and the children of, the marriage, such a settlement of property to which the parties are, or either of them is, entitled (whether in possession or reversion) as the court considers just and equitable in the circumstances of the case.

Powers of court in proceedings with respect to settlement of property.

(2.) The court may, in proceedings under this Act, make such order as the court considers just and equitable with respect to the application for the benefit of all or any of the parties to, and the children of, the marriage of the whole or part of property dealt with by ante-nuptial or post-nuptial settlements on the parties to the marriage, or either of them.

(3.) The power of the court to make orders of the kind referred to in this section shall not be exercised for the benefit of a child who has attained the age of twenty-one years unless the court is of opinion that there are special circumstances that justify the making of such an order for the benefit of that child.

87.—(1.) The court, in exercising its powers under this Part, may do any or all of the following:—

General powers of court.

(a) order that a lump sum or a weekly, monthly, yearly or other periodic sum be paid;

(b) order that a lump sum or a weekly, monthly, yearly or other periodic sum be secured;

(c) where a periodic sum is ordered to be paid, order that its payment be wholly or partly secured in such manner as the court directs;

(d) order that any necessary deed or instrument be executed and that such documents of title be produced or such other things be done as are necessary to enable an order to be carried out effectively or to provide security for the due performance of an order;

(e) appoint or remove trustees;

- (f) order that payments be made direct to a party to the marriage, or to a trustee to be appointed or to a public authority for the benefit of a party to the marriage;
 - (g) order that payment of maintenance in respect of a child be made to such person or public authority as the court specifies;
 - (h) make a permanent order, an order pending the disposal of proceedings or an order for a fixed term or for a life or during joint lives or until further order;
 - (i) impose terms and conditions;
 - (j) in relation to an order made in respect of a matter referred to in any of the last three preceding sections, whether made by that court or by another court and whether made before or after the commencement of this Act—
 - (i) discharge the order if the party in whose favour it was made marries again or if there is any other just cause for so doing;
 - (ii) modify the effect of the order or suspend its operation wholly or in part and either until further order or until a fixed time or the happening of some future event;
 - (iii) revive wholly or in part an order suspended under the last preceding sub-paragraph; or
 - (iv) subject to the next succeeding sub-section, vary the order so as to increase or decrease any amount ordered to be paid by the order;
 - (k) sanction an agreement for the acceptance of a lump sum or periodic sums or other benefits in lieu of rights under an order made in respect of a matter referred to in any of the last three preceding sections, or any right to seek such an order;
 - (l) make any other order (whether or not of the same nature as those mentioned in the preceding paragraphs of this sub-section, and whether or not it is in accordance with the practice under other laws before the commencement of this Act) which it thinks it is necessary to make to do justice;
 - (m) include its order under this Part in a decree under another Part; and
 - (n) subject to this Act, make an order under this Part at any time before or after the making of a decree under another Part.
- (2). The court shall not make an order increasing or decreasing an amount ordered to be paid by an order unless it is satisfied—
- (a) that, since the order was made or last varied, the circumstances of the parties or either of them, or of any child for whose benefit the order was made, have changed to such an extent as to justify its so doing; or
 - (b) that material facts were withheld from the court that made the order or from a court that varied the order or material evidence previously given before such a court was false.
- (3.) The court shall not make an order increasing or decreasing—
- (a) the security for the payment of a periodic sum ordered to be paid; or
 - (b) the amount of a lump sum or periodic sum ordered to be secured,

unless it is satisfied that material facts were withheld from the court that made the order or from a court that varied the order or that material evidence given before such a court was false.

88.—(1.) Where a person who is directed by an order under this Part to execute a deed or instrument refuses or neglects to do so, the court may appoint an officer of the court or other person to execute the deed or instrument in his name and to do all acts and things necessary to give validity and operation to the deed or instrument.

Execution of deeds, &c., by order of court.

(2.) The execution of the deed or instrument by the person so appointed has the same force and validity as if it had been executed by the person directed by the order to execute it.

(3.) The court may make such order as it thinks just as to the payment of the costs and expenses of and incidental to the preparation of the deed or instrument and its execution.

89.—(1.) Except as provided by this section, the court shall not make an order under this Part where the petition for the principal relief has been dismissed.

Power of court to make orders on dismissal of petition.

(2.) Where—

(a) the petition for the principal relief has been dismissed after a hearing on the merits; and

(b) the court is satisfied that—

(i) the proceedings for the principal relief were instituted in good faith to obtain that relief; and

(ii) there is no reasonable likelihood of the parties becoming reconciled,

the court may, if it considers that it is desirable to do so, make an order under this Part, other than an order under section eighty-six of this Act.

(3.) The court shall not make an order by virtue of the last preceding sub-section unless it has heard the proceedings for the order at the same time as, or immediately after, the proceedings for the principal relief.

(4.) In this section, “principal relief” means relief of a kind referred to in paragraph (a) or (b) of the definition of “Matrimonial cause” in sub-section (1.) of section five of this Act.

PART XII.—ENFORCEMENT OF DECREES.

102.—(1.) Subject to the rules, a court having jurisdiction under this Act may enforce by attachment or by sequestration an order made by it under this Act for payment of maintenance or costs or in respect of the custody of, or access to, children.

Attachment.

(2.) The court shall order the release from custody of a person who has been attached under this section upon being satisfied that that person has complied with the order in respect of which he was attached and may, at any time, if the court is satisfied that it is just and equitable to do so, order the release of such a person notwithstanding that he has not complied with that order.

(3.) Where a person who has been attached under this section in consequence of his failure to comply with an order for the payment of maintenance or costs becomes a bankrupt, he shall not be kept in custody under the attachment longer than six months after he becomes a bankrupt unless the court otherwise orders.

Enforcement
of decrees
by other
Supreme
Courts.

103.—(1) A decree made under this Act by a court having jurisdiction under this Act may, in accordance with the rules, be registered in another court having jurisdiction under this Act.

(2.) A decree registered in a court under this section may, subject to the rules, be enforced as if it had been made by the court in which it is registered.

(3.) A reference in this Part to the court by which a decree was made shall be read as including a reference to a court in which the decree is registered under this section.

Recovery of
moneys as
judgment
debt.

104.—(1.) Where a decree made under this Act orders the payment of money to a person, any moneys payable under the decree may be recovered as a judgment debt in a court of competent jurisdiction.

(2.) A decree made under this Act may be enforced, by leave of the court by which it was made and on such terms and conditions as the court thinks fit, against the estate of a party after that party's death.

Summary
enforce-
ment
of orders
for main-
tenance.

105.—(1.) Where a court has made under this Act an order for payment of maintenance, the order may be registered, in accordance with the rules, in a court of summary jurisdiction of a State or of a Territory to which this Act applies, and an order so registered may, subject to the rules, be enforced in the same manner as if it were an order for maintenance of a deserted wife made by the court of summary jurisdiction.

(2.) The several courts of summary jurisdiction of the States and of the Territories to which this Act applies are authorized to do all things necessary for the purposes of the last preceding sub-section.

(3.) In this section, "court of summary jurisdiction of a State or of a Territory to which this Act applies" has the same meaning as in section eight of this Act.

Enforce-
ment of
maintenance
orders by
attachment
of earnings.

106. An order under this Act for the payment of maintenance may be enforced in accordance with the Third Schedule to this Act and the provisions of that Schedule have effect in relation to the enforcement of such orders.

Restric-
tions on
publication
of evidence.

123.—(1.) Except as provided by this section, a person shall not, in relation to any proceedings under this Act, print or publish, or cause to be printed or published, any account of evidence in the proceedings, or any other account or particulars of the proceedings other than—

- (a) the names, addresses and occupations of the parties and witnesses, and the name or names of the members or members of the court and of the counsel and solicitors;
- (b) a concise statement of the nature and grounds of the proceedings and of the charges, defences and counter-charges in support of which evidence has been given;
- (c) submissions on any points of law arising in the course of the proceedings, and the decision of the court on those points; or
- (d) the judgment of the court and observations made by the court in giving judgment.

(2.) The court may, if it thinks fit in any particular proceedings, order that none of the matters referred to in paragraph (a), (b), (c) or (d) of the last preceding sub-section shall be printed or published or that any matter or part of a matter so referred to shall not be printed or published.

(3.) A person who contravenes sub-section (1.) of this section, or prints or publishes, or causes to be printed or published, any matter, or part of a matter, in contravention of an order of a court under the last preceding sub-section, is guilty of an offence punishable, on conviction—

- (a) in the case of a first offence, or a second or subsequent offence prosecuted summarily—by a fine not exceeding Five hundred pounds or imprisonment for a period not exceeding six months; and
- (b) in the case of a second or subsequent offence, being an offence prosecuted on indictment—by a fine not exceeding One thousand pounds or imprisonment for a period not exceeding one year.

(4.) Proceedings for an offence against this section shall not be commenced except by, or with the written consent of, the Attorney-General.

(5.) The preceding provisions of this section do not apply to or in relation to—

- (a) the printing of any pleading, transcript of evidence or other document for use in connexion with proceedings in any court or the communication of any such document to persons concerned in the proceedings;
- (b) the printing or publishing of a notice or report in pursuance of the direction of a court;
- (c) the printing or publishing of any publication *bona fide* intended primarily for the use of members of the legal or medical profession, being—
 - (i) a separate volume or part of a series of law reports; or
 - (ii) any other publication of a technical character; or
- (d) the printing or publishing of a photograph of any person, not being a photograph forming part of the evidence in proceedings under this Act.

(6.) In this section, “court” includes an officer of a court investigating a matter in accordance with the rules and “judgment of the court” includes a report made to a court by such an officer.

APPENDIX "39"

COMMONWEALTH OF AUSTRALIA

MATRIMONIAL CAUSES ACT 1965

No. 99 of 1965

AN ACT

To amend the *Matrimonial Causes Act 1959*

[Assented to 13th December, 1965]

Be it enacted by the Queen's Most Excellent Majesty, the Senate, and the House of Representatives of the Commonwealth of Australia, as follows:—

9. Section 39 of the Principal Act is repealed and the following sections are inserted in its stead:—

Condonation or connivance to be an absolute bar to relief.

"39. A decree of dissolution of marriage shall not be made upon a ground specified in any of paragraphs (a) to (k), inclusive, of section twenty-eight of this Act if—

(a) the petitioner has condoned the ground and the ground has not been revived; or

(b) the petitioner has connived at the ground,

Presumption as to condonation to be rebuttable.

"39A. For the purposes of any provision of this Part referring to continuance, any presumption of condonation that arises from the continuance or resumption of sexual intercourse may be rebutted on the part of a husband, as well as on the part of a wife, by evidence sufficient to negative intent to condone."

10. After section 41 of the Principal Act the following section is inserted:—

Effect of cohabitation with a view to reconciliation.

"41A.—(1) For the purposes of section thirty-nine of this Act, a ground shall not be deemed to have been condoned, and, for the purposes of sub-section (3.) of section thirty-seven of this Act and of section forty-one of this Act, adultery of the petitioner shall not be deemed to have been condoned, by reason only of a continuation or resumption of cohabitation between the parties (whether with or without acts of sexual intercourse between them) for one period not exceeding three months if the court is satisfied that—

(a) the cohabitation was continued or resumed, as the case may be, with a view, on the part of the party to whom condonation might otherwise be attributed, to effecting a reconciliation; and

(b) a reconciliation was not effected during that period.

"(2) For the purposes of proceedings on the ground specified in paragraph (b) of section twenty-eight of this Act, where—

(a) before the desertion had continued for two years, the parties, on one occasion, resumed cohabitation (whether with or without acts of sexual intercourse between them), but the deserting party, within a period of three months after the resumption of cohabitation, again, without just cause or excuse, wilfully deserted the other party; and

(b) the court is satisfied that—

(i) the resumption of cohabitation was with a view, on the part of the deserted party, to effecting a reconciliation; and

(ii) a reconciliation was not effected during the period of cohabitation,

the periods of desertion before and after the period of cohabitation may be aggregated as if they were one continuous period, but the period of cohabitation shall not be deemed to be part of the period of desertion.

“(3.) For the purposes of proceedings on the ground specified in paragraph (m) of section twenty-eight of this Act, where—

(a) since the separation, the parties, on one occasion, resumed cohabitation (whether with or without acts of sexual intercourse between them), but, within a period of three months after the resumption of cohabitation, they again separated and thereafter lived separately and apart up to the date of the petition; and

(b) the court is satisfied that—

(i) the resumption of cohabitation was with a view, on the part of either party, to effecting a reconciliation; and

(ii) a reconciliation was not effected during the period of cohabitation

the periods of living separately and apart before and after the period of cohabitation may be aggregated as if they were one continuous period, but the period of cohabitation shall not be deemed to be part of the period of living separately and apart.

“(4.) For the purposes of the preceding provisions of this section, a period of cohabitation shall be deemed to have continued during any interruption of the cohabitation that, in the opinion of the court, was not substantial.

“(5.) The operation of this section extends to things that occurred before the commencement of this section.”

12.—(1.) Section 71 of the Principal Act is amended by omitting sub-section (1.) and inserting in its stead the following sub-sections:—

Decree
absolute
where chil-
dren under
sixteen
years, &c.

“(1.) A decree *nisi* of dissolution of a marriage or of nullity of a voidable marriage, being a decree made on or after the date of commencement of the *Matrimonial Causes Act 1965*, does not become absolute unless the court, by order, has declared that it is satisfied—

(a) that there are no children of the marriage in relation to whom this section applies; or

(b) that the only children of the marriage in relation to whom this section applies are the children specified in the order and that—

(i) proper arrangements in all the circumstances have been made for the welfare of those children; or

(ii) there are special circumstances by reason of which the decree *nisi* should become absolute notwithstanding that the court is not satisfied that such arrangements have been made.

“(1A.) For the purposes of the last preceding sub-section, the court shall, where the circumstances make it appropriate to do so, treat the welfare of a child as including its advancement and education.”.

(2.) Subject to the next succeeding sub-section, section 71 of the Principal Act continues to apply in relation to a decree *nisi* made before the date of commencement of this Act.

(3.) In relation to a decree *nisi* made before the date of commencement of this Act, section 71 of the Principal Act has effect, and shall be deemed to have had effect, as if the only children of the marriage who are or were under the age of sixteen years at the date of the decree *nisi* are or were the children of the marriage specified in the petition (either as originally filed or as amended) and appearing from the petition not to have attained the age of sixteen years before the date of the decree *nisi*.

APPENDIX "39"

COMMONWEALTH OF AUSTRALIA

MATRIMONIAL CAUSES ACT 1966

No. 60 of 1966

AN ACT

To amend the *Matrimonial Causes Act* 1959-1965 in relation to the Enforcement of Orders for Maintenance and in relation to Decimal Currency.

[Assented to 29th October, 1966]

Be it enacted by the Queen's Most Excellent Majesty, the Senate, and the House of Representatives of the Commonwealth of Australia, as follows:—

4. The Third Schedule to the Principal Act is repealed and the ^{Third} Schedule set out in the Schedule to this Act inserted in its stead. _{Schedule.}

Section 4

THE SCHEDULE

Schedule Inserted in the Principal Act by this Act

“Third Schedule”

Section 196

Enforcement of Orders for Maintenance

1. In this Schedule, unless the contrary intention appears—

“attachment of earnings order” means an order under paragraph 5 of this Schedule;

“defendant”, in relation to a maintenance order or to proceedings in connexion with a maintenance order, means the person liable to make payments under the order;

“earnings”, in relation to a defendant, means any moneys payable to the defendant—

(a) by way of wages or salary (including any fees, bonus, commission, overtime pay or other emoluments payable in addition to wages or salary); or

(b) by way of pension, including—

(i) an annuity in respect of past services, whether or not the services were rendered to the person paying the annuity; and

(ii) periodical payments in respect of or by way of compensation for the loss, abolition or relinquishment, or any diminution in the emoluments, of any office or employment,

but not including any pay or allowances as a member of the Defence Force or any moneys payable to the defendant under the *Social Services Act 1947-1966*, the *Repatriation Act 1920-1966*, the *Repatriation (Far East Strategic Reserve) Act 1956-1964*, the *Repatriation (Special Overseas Service) Act 1962-1965* or the *Seamen's War Pensions and Allowances Act 1940-1966*:

“employer”, in relation to a defendant, means a person (including the Crown in right of the Commonwealth or a State, the Administration of a Territory to which this Act applies and any authority of the Commonwealth, of a State or of a Territory to which this Act applies) by whom, as a principal and not as a servant or agent, earnings are payable or are likely to become payable to the defendant;

“maintenance order” means an order under this Act for the payment of maintenance, and includes such an order that has been discharged if any arrears are recoverable under the order;

“net earnings”, in relation to an attachment of earnings order and in relation to a pay-day, means the amount of the earnings becoming payable on that pay-day to the defendant by the employer to whom the order is directed, after deduction from those earnings of—

(a) any sum deducted from those earnings under Division 2 of Part VI of the *Income Tax Assessment Act 1936-1966*;

(b) any sum of a kind referred to in section 82H of that Act deducted from those earnings, not being a sum deducted in respect of a life

insurance premium other than a life insurance premium payable under a superannuation or retirement benefit scheme; and

- (c) any sum of a kind referred to in section 82HA of that Act deducted from those earnings;

“normal deduction”, in relation to an attachment of earnings order and in relation to a pay-day, means an amount representing a payment at the normal deduction rate specified in the order, or at the normal deduction rate so specified that is applicable to that pay-day, as the case may be, in respect of the period between that pay-day and either the last preceding pay-day, or, where there is no last preceding pay-day, the date on which the employer became, or last became, the defendant’s employer;

“pay-day” means an occasion on which earnings to which an attachment of earnings order relates become payable;

“protected earnings”, in relation to an attachment of earnings order and in relation to a pay-day, means the amount representing a payment at the protected earnings rate specified in the order in respect of the period between that pay-day and either the last preceding pay-day, or, where there is no last preceding pay-day, the date on which the employer became, or last became, the defendant’s employer.

2. In this Schedule—

- (a) a reference to an order includes, in relation to an order that has been varied, a reference to the order as so varied;
- (b) a reference to a person entitled to receive payments under a maintenance order is a reference to a person entitled to receive payments under the maintenance order either directly or through another person or for transmission to another person;
- (c) a reference to proceedings relating to an order includes a reference to proceedings in which the order may be made; and
- (d) a reference to costs incurred in proceedings relating to a maintenance order shall be read, in the case of a maintenance order made by the Supreme Court of a State or of a Territory to which this Act applies, as a reference to such costs as are included in an order for costs relating solely to that maintenance order.

3. Subject to this Schedule, a person entitled to receive payments under a maintenance order may apply to—

- (a) the court that made the order; or
- (b) the court in which the order is for the time being registered under section 103 or section 105 of this Act,

for an attachment of earnings order.

4. An application under the last preceding paragraph may be made *ex parte* and without specifying the name of any employer of the defendant.

5. If the court is satisfied that the defendant is a person to whom earnings are payable or are likely to become payable and—

- (a) that, at the time when the application was made, there was due under the maintenance order and unpaid an amount equal to not less than—
 - (i) in the case of an order for weekly payments—four payments; or
 - (ii) in any other case—two payments; or
- (b) that the defendant has persistently failed to comply with the requirements of the order,

the court may, in its discretion, by an order require a person who appears to the court to be the defendant’s employer in respect of those earnings or a part of

those earnings to make out of those earnings or that part of those earnings payments in accordance with paragraph 13 of this Schedule.

6. The court shall not make an attachment of earnings order if it appears to the court, in a case to which sub-paragraph (a) of the last preceding paragraph applies, that the failure of the defendant to make payments under the maintenance order was not due to his wilful refusal or culpable neglect.

7. An attachment of earnings order shall specify a normal deduction rate or normal deduction rates and, where it specifies two or more such rates, it shall also specify the pay-day or pay-days to which each of those rates is applicable.

8. The rate to be specified as a normal deduction rate shall be the rate at which the court considers it to be reasonable that the earnings to which the order relates should, or should on the pay-day or pay-days to which the rate is to be applicable, as the case may be, be applied in satisfying the requirements of the maintenance order but not exceeding the rate that appears to the court to be necessary for the purpose of—

- (a) securing payment of the sums from time to time falling due under the maintenance order; and
- (b) securing payment within a reasonable time of any sums already due and unpaid under the maintenance order and any costs incurred in proceedings relating to the maintenance order that are payable by the defendant.

9. An attachment of earnings order shall also specify the protected earnings rate, that is to say, the rate below which, having regard to the resources and needs of the defendant and of any person for whom he must or reasonably may provide, the court considers it to be reasonable that the net earnings of the defendant on any pay-day should not be reduced by a payment under the order.

10. An attachment of earnings order shall provide that payments under the order are to be made to an officer of the court specified in the order.

11. An attachment of earnings order shall contain such particulars as the court thinks proper for the purpose of enabling the person to whom the order is directed to identify the defendant.

12. An attachment of earnings order does not come into force until the expiration of seven days after the day on which a copy of the order is served on the person to whom the order is directed.

13. An employer to whom an attachment of earnings order is directed, being an attachment of earnings order that is in force, shall, in respect of each pay-day, if the net earnings of the defendant exceed the sum of—

- (a) the protected earnings of the defendant; and
- (b) so much of any amount by which the net earnings that became payable on any previous pay-day were less than the protected earnings in relation to that pay-day as has not been made good on any other previous pay-day,

pay, so far as that excess permits, to the officer specified for the purpose in the order—

- (c) the normal deduction in relation to that pay-day; and
- (d) so much of the normal deduction in relation to any previous pay-day as was not paid on that pay-day and has not been paid on any other previous pay-day.

14. A payment made by the employer under the last preceding paragraph is a valid discharge to him as against the defendant to the extent of the amount paid.

15. Where proceedings for attachment are brought in a court under section 102 of this Act, or where proceedings are taken in a court of summary jurisdiction to enforce an order registered in that court under section 105 of this Act, the court may, instead of making any other order, make an attachment of earnings order.

16. Where an attachment of earnings order is in force, no writ, order or warrant of commitment or attachment shall be issued or made in proceedings for the enforcement of the maintenance order that were begun before the making of the attachment of earnings order unless the court in which those proceedings were taken otherwise orders.

17. The court by which an attachment of earnings order has been made may, in its discretion, on the application of the defendant or a person entitled to receive payments under the maintenance order, make an order discharging, suspending or varying the attachment of earnings order.

18. An order suspending or varying an attachment of earnings order shall not come into force until the expiration of seven days after the date on which a copy of the order is served on the person to whom the attachment of earnings order is directed.

19. An attachment of earnings order ceases to have effect—

- (a) upon the issuing or making of a writ, order or warrant of commitment or attachment for the enforcement of the maintenance order in relation to which the attachment of earnings order applies;
- (b) upon the discharge of the attachment of earnings order; or
- (c) subject to the next succeeding paragraph, upon the discharge or variation of that maintenance order.

20. Where it appears to the court discharging a maintenance order that arrears under the order will remain to be recovered under the order, the court may, in its discretion, direct that the attachment of earnings order shall not cease to have effect until those arrears have been paid.

21. Where an attachment of earnings order ceases to have effect, the proper officer of the court by which the order was made shall forthwith serve notice in writing accordingly on the person to whom the order was directed.

22. Where an attachment of earnings order ceases to have effect, the person to whom the attachment of earnings order is directed does not incur any liability in consequence of his treating the order as still in force at any time before the expiration of seven days after the date on which the notice required by the last preceding paragraph is served on him.

23. A person to whom an attachment of earnings order is directed shall, notwithstanding anything in any other law, but subject to this Schedule, comply with the order.

24. Where, on any occasion on which earnings become payable to a defendant, there are in force two or more attachment of earnings orders in relation to those earnings, the person to whom the orders are directed—

- (a) shall comply with those orders according to the respective dates on which they came into force and shall disregard any order until an earlier order has been complied with in relation to those earnings; and
- (b) shall comply with any order as if the earnings to which the order relates were the residue of the defendant's earnings after the making of any payment under any earlier order.

25. Where, on any occasion on which earnings become payable to a defendant, there is in force, in addition to an attachment of earnings order under this Act, a State attachment of earnings order directed to the employer in respect of the defendant, being an order that came into force before the order under this Act came into force, the employer shall—

- (a) disregard the order under this Act for the purpose of complying with the State attachment of earnings order; and
- (b) comply with the order under this Act as if the earnings to which the order related were the residue of the defendant's earnings after the making of any payment under the State attachment of earnings order.

For the purposes of this paragraph—

'maintenance order', means an order for the payment of money made under, or enforceable under, a law of a State or Territory of the Commonwealth that makes provision in relation to the maintenance of wives, children or other persons including an order for payment of expenses of any kind or for payment of costs and an order for the recoupment of moneys spent in, or provided for, the maintenance of a person or meeting expenses of any kind;

'State attachment of earnings order' means an order called an attachment of earnings order made, for the purpose of enforcement of a maintenance order, in accordance with the law of a State or Territory of the Commonwealth, including an order made by virtue of the *Maintenance Orders (Commonwealth Officers) Act 1966*.

26. For the purposes of paragraphs 24 and 25 of this Schedule, where a variation of an order has come into force, the order shall be deemed to have come into force as so varied on the day upon which the order came into force.

27. A person who makes a payment in compliance with an attachment of earnings order shall give to the defendant a notice in writing specifying particulars of the payment.

28. Where a person on whom a copy of an attachment of earnings order that is directed to him is served—

- (a) is not the defendant's employer at the time when the copy of the order is served on him; or
- (b) is the defendant's employer at that time but ceases to be the defendant's employer at any time before the order ceases to have effect,

the person shall give notice in writing accordingly to the proper officer of the court that made the order and shall so give notice—

- (c) in a case to which sub-paragraph (a) of this paragraph applies—forthwith after the copy of the order is served on the person; and
- (d) in a case to which sub-paragraph (b) of this paragraph applies—forthwith after the person ceases to be the defendant's employer.

29. Where proceedings relating to an attachment of earnings order are brought in any court, the court may, either before or after the hearing—

- (a) order the defendant to furnish to the court, within a specified period, a statement signed by the defendant specifying—
 - (i) the name and address of his employer, or, if he has more employers than one, of each of his employers;
 - (ii) particulars as to the defendant's earnings; and
 - (iii) such particulars as are necessary to enable the defendant to be identified by any of his employers; and

- (b) order any person who appears to the court to be an employer of the defendant to give to the court, within a specified period, a statement signed by him or on his behalf containing such particulars as are specified in the order of all earnings of the defendant that became payable by that person during a specified period.

30. A document purporting to be a statement referred to in the last preceding paragraph shall, in any proceedings relating to an attachment of earnings order, be received in evidence and shall, unless the contrary is shown, be deemed without further proof to be such a statement.

31. The court by which an attachment of earnings order has been made shall, on the application of the person to whom the order is directed, of the defendant or of the person in whose favour the order was made, determine whether payments to the defendant of a particular class or description specified in the application are earnings for the purposes of that order.

32. A person to whom an attachment of earnings order is directed who makes an application under the last preceding paragraph does not incur any liability for failing to comply with the order with respect to any payments of the class or description specified in the application that are made by him to the defendant while the application, or any appeal from a determination made on the application, is pending.

33. The last preceding paragraph does not apply in respect of any payment made after the application has been withdrawn or any appeal from a determination made on the application has been abandoned.

34. The officer to whom an employer pays any sum in pursuance of an attachment of earnings order shall pay that sum to such person entitled to receive payments under the maintenance order as is specified by the attachment of earnings order.

35. Any sum received by virtue of an attachment of earnings order by the person entitled to receive it shall be deemed to be a payment made by the defendant to that person, so as to discharge first any sums due and unpaid under the maintenance order (a sum due at an earlier date being discharged before a sum due at a later date) and secondly any costs incurred in proceedings relating to the maintenance order that were payable by the defendant when the attachment of earnings order was made or last varied.

36. A copy of an order or other document that is required or permitted to be served on a person other than an incorporated company, society or association under this Schedule may be served on the person—

- (a) by delivering the document to the person personally;
- (b) by leaving the document at the usual place of residence or business of the person, or at the last place of residence or business of the person known to the person on whose behalf the document is being served, with a person who apparently resides in, or is employed at, that place and is apparently over sixteen years; or
- (c) by properly addressing and posting (under prepaid postage) the document as a registered letter to the person at any place referred to in the last preceding sub-paragraph.

37. A copy of an order or other document that is required or permitted to be served on an incorporated company, society or association under this Schedule may be served on the company, society or association—

- (a) by leaving the document at any place of business of the company, society or association, or at any place that is the registered office of the company, society or association under the law of any State or

Territory to which this Act applies, with a person who is apparently employed at that place and is apparently over the age of sixteen years; or

- (b) by properly addressing and posting (under prepaid postage) the document as a registered letter to the company, society or association at any place referred to in the last preceding sub-paragraph.

38. Service of a document in accordance with sub-paragraph (c) of paragraph 36, or sub-paragraph (b) of paragraph 37, of this Schedule shall, unless the contrary is proved, be deemed to have been effected at the time at which the letter would be delivered in the ordinary course of post.

39. The rules may make provision for or in relation to the service on the Commonwealth, on a State, on the Administration of a Territory to which this Act applies or on a body corporate (not being an incorporated company, society or association) incorporated for a public purpose by or under a law of the Commonwealth, of a State or of such a Territory of copies of orders or other documents that are required or permitted to be so served under this Schedule.

40. A person who—

- (a) fails to comply with a requirement of this Schedule, or of an order under this Schedule, that is applicable to him;
- (b) in any statement or notice furnished to a court under this Schedule or in compliance with an order made under this Schedule makes a statement that he knows to be false or misleading in a material particular; or
- (c) recklessly furnishes such a statement or notice that is false or misleading in a material particular,

is guilty of an offence punishable, on conviction, by a fine not exceeding Two hundred dollars.

41. It is a defence if a person charged with an offence arising under sub-paragraph (a) of the last preceding paragraph proves that he took all reasonable steps to comply with the requirement or order.

42. A person who dismisses an employee, or injures him in his employment, or alters his position to his prejudice, by reason of the circumstance that an attachment of earnings order has been made in relation to the employee or that the person is required to make payments under such an order in relation to the employee is guilty of an offence punishable, on conviction, by a fine not exceeding Two hundred dollars.

43. In any proceedings for an offence arising under the last preceding paragraph, if all the facts and circumstances constituting the offence, other than the reason for the action of the person charged with having committed the offence, are proved, the burden lies upon that person to prove that he was not actuated by the reason alleged in the charge.

44. Where a person is convicted of an offence arising under paragraph 42 of this Schedule, the court by which he is convicted may order that the employee be reimbursed any wages lost by him and may also direct that the employee be reinstated in his old position or in a similar position.

45. Where a court has made an order under the last preceding paragraph for the reimbursement of any wages lost by an employee, a certificate under the hand of the clerk or other proper officer of the court specifying the amount ordered to be reimbursed and the persons by whom and to whom the amount is payable, may be filed in a court having civil jurisdiction to the extent of that amount and is thereupon enforceable in all respects as a final judgment of that court.

46. The several courts of the States are invested with federal jurisdiction, and jurisdiction is conferred on the courts of the Territories to which this Act applies, in matters arising under this Schedule.

47. The jurisdiction with which the several courts of the States are invested by the last preceding paragraph is subject to the conditions and restrictions specified in subsection (2.) of section 39 of the *Judiciary Act* 1903-1966 so far as they are applicable.

48. Notwithstanding anything contained in the *Judiciary Act* 1903-1966, an appeal does not lie to the High Court from an order of a court of summary jurisdiction under this Schedule.

49. This Schedule has effect in relation to a defendant notwithstanding any law that would otherwise prevent the attachment of his earnings or limit the amount capable of being attached."

APPENDIX "40"

Brief to the Special Joint Committee of the Senate and House of Commons on Divorce

by

BARRISTERS' SOCIETY OF NEW BRUNSWICK

BRIEF ON DIVORCE

At the annual meeting of the Barristers' Society of New Brunswick the following resolution was passed unanimously.

Resolved

1. That this Society does support legislation leading to a broadening of the grounds for divorce in Canada.

2. That, in particular, this Society is in favour of legislation extending the grounds for divorce to include the following grounds, in addition to adultery:—

- (a) The commission of an act of sexual or deviate sexual intercourse voluntarily performed by the defendant after marriage with a person other than the Plaintiff (Petitioner) or with an animal;
- (b) Cruelty;
- (c) Separation pursuant to judicial decree for a period of not less than three years;
- (d) Desertion for a period of not less than three years;
- (e) Insanity;
- (f) Persistent criminality;
- (g) Persistent and wilful failure to support dependent children.

3. That the Society does recommend that provision be made by the Parliament of Canada to give jurisdiction to provincial or territorial courts (otherwise having jurisdiction in cases of divorce) upon proof of domicile within Canada where there has been residence by either party to the suit in the province where action is brought for more than one year of the three years prior to commencement of the action.

4. That the Society does recommend that collusion be a discretionary bar only.

5. That the Council do submit a brief incorporating these resolutions to the Special Joint Committee of the Senate and House of Commons of Canada on Divorce and, if the Council deem advisable, the Society do send a delegation to make representations to such Committee on behalf of the Society.

This resolution was the result of a study made by a Committee appointed by the Society. The complete report is hereto annexed. The report was discussed before all the members at the annual meeting for a period of more than five hours.

The many arguments as to why the original report was amended will be commented upon briefly.

In addition to adultery the New Brunswick Society felt that other grounds were necessary to meet the social needs of the public, however, it was strongly argued by the members that such grounds should not be broadened to the extent that divorce became a matter of mere consent between the parties. For that reason paragraph 2(d) was deleted and no divorce should be granted unless the separation is pursuant to a judicial decree and only after three years. This clause 2(c) was retained in the resolution.

You will note that the times of separation and desertion have been set forth as 3 years. There is no reason for this extension other than that the majority of the members of the Society felt that this gives the parties an extra year to attempt to resume married life.

Some of the strongest arguments heard, were both "pro" and "con" with respect to a petitioner obtaining a divorce when the other party was imprisoned for a term certain (allowing for parole). It was eventually agreed that there should be no grounds for divorce for imprisonment and the paragraph was deleted despite the fact that the members agreed that "*persistent*" criminality should be a ground.

The committee and members of the Society felt that insanity as a ground for divorce must be clearly defined and hoped that Parliament would clarify this by defining insanity with respect to certification and duration of the unsoundness of mind.

The ground of cruelty was felt to be a necessity but after considerable discussion the definition of cruelty was considered to be a matter to be decided by the court.

C. T. Gilbert
Secretary-Treasurer,
Barristers' Society of New Brunswick.

REPORT OF COMMITTEE ON GROUNDS FOR DIVORCE

To the President, Council and
Members of the Barristers' Society
of New Brunswick:

Your Committee begs leave to report as follows:

PART I ESTABLISHMENT

Your Committee was established by the Council of the Society pursuant to resolution adopted at the 1965 annual meeting.

PART II MARRIAGE AS AN INSTITUTION

The members of your Committee believe and have a firm faith in the institution of marriage and in the maintenance of the family unit.

They believe in the value of the stability and endurance of marriages.

They believe in marriages as being important to the social well-being of the state.

They believe there should be no relaxation in the rules of evidence or the modicum of proof required in divorce cases nor in the dignity, decorum or solemnity with which our divorce cases are tried.

They hope that they may be spared the unwarranted criticism that the Society is in favour of breaking up happy homes. It should not be necessary to state—but unfortunately it must be re-iterated—that the individual members of this Society are not responsible for breaking up the homes of the parties who come to them seeking advice in their tragedies, but that it is after the home has broken down, it is after sane and logical communication between the spouses has come to an end, that the unfortunate victims must come to the lawyer.

PART III CONSTITUTIONAL POSITION

Your Committee has concluded that under the provisions of the British North America Act, Section 91 (26) the matter of divorce is completely assigned to the Parliament of Canada and any change in legislation must be enacted by the Parliament of Canada.

By Section 129 of the British North America Act the laws in force in New Brunswick at the time of Confederation were continued in effect. The Legislature of New Brunswick has, however, no power to amend or repeal the statutes which were in effect at the time of Confederation, including in particular those sections declaring grounds for divorce and annulment which are reproduced as part of Section 37 of the Divorce Court Act, R.S.N.B. (1952) c. 63. Similarly, the

Court of Divorce and Matrimonial Causes as established by the statute 1860 (23 Victoria) c. 37 has continued in existence by virtue of the provisions of Section 129 of the British North America Act with no more than administrative changes.

PART IV

PRESENT GROUNDS FOR DIVORCE

IN NEW BRUNSWICK

The effective words of the pre-Confederation statute which is re-stated in the Divorce Court Act, R.S.N.B. (1952) c. 63, section 37, read as follows:

“the causes for divorce from the bond of matrimony and of dissolving and annulling marriage are and shall be frigidity or impotence, adultery and consanguinity within the degrees prohibited by . . . (32 Henry VIII)”

There has been only one reported decision on the language of this rather ambiguous section. In the case of *Babineau v Babineau*, 51 N.B.R. 501, it was held that the word “adultery” was not broad enough to include bestiality, and that no more than a judicial separation (or divorce a mensa et thoro) could be granted on such grounds.

Despite the apposition of the words, there is no reported case where a decree of divorce a vinculo was granted on the grounds of frigidity or impotence which might have supervened after a duly consummated marriage.

Your Committee concludes that adultery is the sole effective ground for divorce a vinculo in the Province.

It is to be noted that despite the restricted language of the section quoted above, it is the understanding of your Committee that the New Brunswick Court of Divorce and Matrimonial Causes have never hesitated to grant decrees of divorce a mensa et thoro on any of the grounds permitted by the law of England at the time of the establishment of the Province; (See *Hunter v Hunter* (1863) 10 N.B.R. 593); nor has it hesitated to grant annulments on any other grounds permitted by the Common Law. There are, however, very few reported cases which so declare.

PART V

PROBLEMS OF DOMICILE

Under the decisions of the Courts it is well established that a divorce a vinculo can only be lawfully granted by the Courts of the province of the matrimonial domicile, which is generally taken to be the province of the husband's domicile. By the Divorce Jurisdiction Act of Canada, R.S.C. (1952) c. 84, a limited jurisdiction is accorded to the province of residence in certain cases of desertion.

It is the opinion of this Committee that, in view of the increasing mobility of the Canadian population, the determination of domicile becomes more and more difficult in many cases.

It is the opinion of your Committee that a statute should be enacted stating that (for the purposes of divorce only) a domicile anywhere in Canada will give jurisdiction to a Court of residence and that the residential requirements should be spelled out in liberal terms, and that, for this purpose, a wife may have a separate domicile.

PART VI

OBSERVATIONS OF COMMITTEE

Your Committee has not called evidence nor has it made a study of any reports on the subject which might be available. At the same time it is the observation of all members of the Committee that the narrow grounds presently available for divorce in this Province have led to cases of great hardship. It is not uncommon for an unhappy husband to desert his wife and children and to disappear completely and for a prolonged period of years. In these circumstances it is often difficult or impossible for the deserted wife to lawfully establish a new and stable relationship. A protracted period of desertion should, in the opinion of your Committee, be grounds for divorce a vinculo.

The members of your Committee have, from discussions with members of the public and other members of the Bar, reached the conclusion that in many divorce actions, while true grounds may exist, the evidence adduced is not representative of the true facts of the case. It is felt that such practices cannot but lead to disrespect for the law and for the Courts generally.

The Chairman of your Committee has received a number of letters (one from as far as Victoria, B.C.) urging persistence in the effort to enlarge the grounds for divorce in this Province.

PART VII

DEVELOPMENTS IN OTHER JURISDICTIONS

Your Committee has been greatly impressed with the action taken in England by the Matrimonial Causes Act of 1937 and subsequent additions thereto. Your Committee is also much impressed with the recent enactment in the State of New York of a new divorce code which greatly broadens the grounds for divorce in that jurisdiction. Some comments on the New York legislation are incorporated in Appendix "B" to this report.

It is the view of your Committee that the social requirements which led to the changes in England and in New York State are in large measure also operative in New Brunswick. It is pointed out that a divorce decree (which may not be valid but which would still have some effect in a prosecution for bigamy) can be obtained by any New Brunswicker who has the money and time to go to Nevada or Idaho or Mexico or any other jurisdiction which gives easy divorces. The result is that the law of New Brunswick bears most harshly on the poorer residents of the Province.

PART VIII

JOINT PARLIAMENTARY COMMITTEE

Your Committee has been made aware that a Joint Committee of the Senate and the House of Commons of Canada has been convened to consider the law relating to divorce in Canada and that the Society has been requested to make a submission to this Committee if it wishes to do so.

In the opinion of the undersigned, the establishment of this parliamentary Committee gives new urgency to consideration of this report. It is the hope of the undersigned that the Society will respond to the parliamentary request for a submission.

PART IX

RECOMMENDATIONS

The Committee recommends for the consideration of the Council and the Society the draft resolutions hereto annexed as Appendix "A".

Respectfully submitted,

(Sgd) *B. R. Guss*
(B. R. Guss, Q.C.)

(Sgd) *D. M. Hurley*
(Professor D. M. Hurley)

(Sgd) *J. P. Palmer*
(J. P. Palmer, Q.C.)

June 27th, 1966.

APPENDIX "A"

DRAFT RESOLUTIONS

WHEREAS, in the opinion of this Society, the grounds for divorce presently available within the Province of New Brunswick do not meet the social needs of the public;

AND WHEREAS the narrow grounds for divorce which the present law admits may be conducive to perjured evidence, collusion, suppressed testimony and other offences and devices, the effect of which could be to induce in the public a lack of respect for and of confidence in our Courts generally;

AND WHEREAS this Society is concerned to bring law into accord with social need and to uphold and maintain public confidence in and respect for the administration of justice in the Province;

NOW THEREFORE BE IT RESOLVED:

1. That this Society does support legislation leading to a broadening of the grounds for divorce in Canada.

2. That, in particular, this Society is in favour of legislation extending the grounds for divorce to include the following grounds, in addition to adultery:

- (a) The commission of an act of sexual or deviate sexual intercourse voluntarily performed by the defendant after marriage with a person other than the Plaintiff (Petitioner) or with an animal;
- (b) Cruelty;
- (c) Separation pursuant to judicial decree for a period of not less than three years;
- (d) Desertion for a period of not less than three years;
- (e) Insanity;
- (f) Persistent criminality;
- (g) Persistent and wilful failure to support dependent children.

3. That the Society does recommend that provision be made by the Parliament of Canada to give jurisdiction to provincial or territorial courts (otherwise having jurisdiction in cases of divorce) upon proof of domicile within Canada where there has been residence by either party to the suit in the province where action is brought for more than one year of the three years prior to commencement of the action.

4. That the Society does recommend that collusion be a discretionary bar only.

5. That the Council do submit a brief incorporating these resolutions to the Special Joint Committee of the Senate and House of Commons of Canada on Divorce and, if the Council deem advisable, the Society do send a delegation to make representations to such Committee on behalf of the Society.

APPENDIX "B"

NEW YORK STATE

New York State had a divorce law that was 179 years old. Recently, at the end of April, 1965, the divorce law was extended and grounds were added in addition to adultery as follows:

1. Cruel and inhuman treatment...of the plaintiff by the defendant;
2. The abandonment of plaintiff by defendant for a period of two years or more;
3. The confinement of defendant to prison for a period of three or more consecutive years;
4. The commission of an act of adultery; but it is to be noted that adultery is defined as the commission of an act of sexual or deviate sexual intercourse voluntarily performed by defendant with person other than the plaintiff or with an animal after marriage;
5. The husband and wife have lived apart pursuant to a decree of separation for a period of two years after the granting of such decree;
6. The husband and wife have lived separate and apart pursuant to a written agreement of separation subscribed and acknowledged by the parties in the form required to entitle a deed to be recorded, for a period of three years after execution of such agreement...such agreement filed in the office of the Registrar of Divorce Court within thirty days after execution.

In New York State it is admitted openly that the new legislation is in large measure attributable to "...the help in recent weeks of legislative leaders who are Catholics themselves but lawmakers first....."

The *New York Times* asked—"what wrought this change?" We think the words of Richard Cardinal Cushing of Boston, uttered in 1965 in another context, may give a clue:

"Catholics do not need the support of civil law to be faithful to their own religious convictions and they do not seek to impose by law their moral views on other members of society".

The *New York Times*, under date of 30th April 1966, stated under a sub-heading:

"BEGAN WITH POPE JOHN

Almost every politician here agrees that the reform could never have taken place if the Roman Catholic Clergy and laity had not been in a state of ferment in which old dogmas were undergoing an agonizing re-examination—as one Liberal Democratic Assemblyman put it:

'What really got this divorce bill off the ground was a man named John—Pope John'."



First Session—Twenty-seventh Parliament

1966-67

PROCEEDINGS OF
THE SPECIAL JOINT COMMITTEE OF THE SENATE
AND HOUSE OF COMMONS ON
DIVORCE

No. 16

THURSDAY, FEBRUARY 16, 1967

Joint Chairmen

The Honourable A. W. Roebuck, Q.C.

and

A. J. P. Cameron, Q.C., M.P.

WITNESS:

Douglas A. Hogarth, Barrister at law, *on behalf of* Mothers Alone Society, All Lone Parents Society (ALPS), Canadian Single Parents and Parents without Partners.

APPENDICES:

- 41.—Brief of the Mothers Alone Society, All Lone Parents Society (ALPS), Canadian Single Parents and Parents without Partners.
- 42.—Brief of the majority members of a Committee appointed by the Bar of Montreal to examine into the question of divorce.
- 43.—Brief of the minority report submitted by Bernard M. Deschênes, Q.C., member of a Committee appointed by the Bar of Montreal to examine into the question of divorce.
- 44.—Brief of the Manitoba Bar Association.

ROGER DUHAMEL, F.R.S.C.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1967

MEMBERS OF THE
SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS
ON DIVORCE

FOR THE SENATE

Hon. A. W. Roebuck, Q.C., Joint Chairman

The Honourable Senators

Aseltine	Connolly (<i>Halifax North</i>)	Flynn
Baird	Croll	Gershaw
Belisle	Denis	Haig
Burchill	Fergusson	Roebuck—(12).

FOR THE HOUSE OF COMMONS

A. J. P. Cameron, Q.C. (*High Park*), Joint Chairman

Members of the House of Commons

Aiken	Forest	McQuaid
Baldwin	Goyer	Otto
Brewin	Honey	Peters
Cameron (<i>High Park</i>)	Laflamme	Ryan
Cantin	Langlois (<i>Mégantic</i>)	Stanbury
Choquette	MacEwan	Trudeau
Chrétien	Mandziuk	Wahn
Fairweather	McCleave	Woolliams—(24).

(Quorum 7)

ORDERS OF REFERENCE

Extracts from the Votes and Proceedings of the House of Commons:

March 15, 1966:

"On motion of Mr. McIlraith, seconded by Mr. Hellyer, it was resolved—that a Special Joint Committee of the Senate and the House of Commons be appointed to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either House;

That 24 Members of the House of Commons, to be designated by the House at a later date, be members of the Special Joint Committee, and that Standing Order 67(1) of the House of Commons be suspended in relation thereto;

That the Committee have power to engage the services of such technical, clerical and other personnel as may be necessary for the purpose of the inquiry;

That the Committee have the power to send for persons, papers and records, to examine witnesses, to report from time to time, and to print such papers and evidence from day to day as may be ordered by the Committee, and that Standing Order 66 be suspended in relation thereto; and

That a Message be sent to the Senate requesting Their Honours to unite with this House for the above purpose, and to select, if the Senate deems it so advisable, some of its Members to act on the proposed Special Joint Committee."

"By unanimous consent, on motion of Mr. McIlraith, seconded by Mr. Hellyer, it was ordered—That the order of the House of Monday, February 21, 1966 referring the subject-matter of the following bills to the Standing Committee on Justice and Legal Affairs, namely:—

Bill C-16, An Act to provide in Canada for the Dissolution of Marriage (Additional Grounds for Divorce).

Bill C-19, an Act to provide in Canada for the Dissolution and the Annulment of Marriage.

Bill C-41, An Act to amend the British North America Acts, 1867 to 1965, (Provincial Marriage and Divorce Laws).

Bill C-44, An Act to provide in Canada for the Dissolution of Marriage.

Bill C-55, An Act to provide in Canada for the Dissolution of Marriage.

Bill C-58, An Act respecting Marriage and Divorce.

Bill C-79, An Act to amend the Dissolution and Annulment of Marriages Act (Additional Grounds for Divorce).

be discharged, and that the subject-matter of the same bills be referred to the Joint Committee of the Senate and House of Commons on Divorce".

March 16, 1966:

"By unanimous consent, on motion of Mr. Stewart, seconded by Mr. Byrne, it was ordered—That the subject-matter of Bill C-133, An Act to extend the grounds upon which courts now have jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief, be referred to the Special Joint Committee on Divorce".

"By unanimous consent, on motion of Mr. Stewart, seconded by Mr. Byrne, it was ordered—That the subject-matter of Notice of Motion No. 11 be referred to the Special Joint Committee on Divorce."

March 22, 1966:

"On motion of Mr. Pilon, seconded by Mr. McNulty, it was ordered—That a Message be sent to the Senate to acquaint Their Honours that this House will unite with them in the formation of a Joint Committee of both Houses to inquire into and report upon divorce in Canada, and that the Members to serve on the said Committee, on the part of this House, will be as follows: Messrs. Aiken, Baldwin, Brewin, Cameron (*High Park*), Cantin, Choquette, Chrétien, Fairweather, Forest, Goyer, Honey, Laflamme, Langlois (*Mégantic*), MacEwan, Mandziuk, McCleave, McQuaid, Otto, Peters, Ryan, Stanbury, Trudeau, Wahn and Woolliams."

LÉON-J. RAYMOND,
Clerk of the House of Commons.

Extracts from the Minutes of the Proceedings of the Senate:

March 23, 1966:

"Pursuant to the Order of the Day, the Senate proceeded to the consideration of the Message from the House of Commons requesting the appointment of a Special Joint Committee of the Senate and House of Commons on Divorce.

The Honourable Senator Connolly, P.C., moved, seconded by the Honourable Senator Roebuck:

That the Senate do unite with the House of Commons in the appointment of a Special Joint Committee of both Houses of Parliament to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either House;

That twelve Members of the Senate, to be designated at a later date, act on behalf of the Senate as members of the said Special Joint Committee;

That the Committee have power to engage the services of such technical, clerical and other personnel as may be necessary for the purpose of the inquiry;

That the Committee have the power to send for persons, papers and records, to examine witnesses, to report from time to time, and to print such papers and evidence from day to day as may be ordered by the Committee, and to sit during sittings and adjournments of the Senate; and

That a Message be sent to the House of Commons to inform that House accordingly.

After debate, and—

The question being put on the motion, it was—

Resolved in the affirmative."

March 29, 1966:

"With leave of the Senate,

The Honourable Senator Beaubien (*Provencher*) moved, seconded by the Honourable Senator Inman:

That the following Senators be appointed to act on behalf of the Senate on the Special Joint Committee of the Senate and House of Commons to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, namely, the Honourable Senators Aseltine, Baird, Belisle, Bourget, Burchill, Connolly (*Halifax North*), Croll, Fergusson, Flynn, Gershaw, Haig, and Roebuck; and

That a Message be sent to the House of Commons to inform that House accordingly.

The question being put on the motion, it was—

Resolved in the affirmative."

May 10, 1966:

"Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Roebuck, seconded by the Honourable Senator Croll, for the second reading of the Bill S-19 intituled: "An Act to extent the grounds upon which courts now having jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief".

The question being put on the motion—

In amendment, the Honourable Senator Connolly, P.C., moved, seconded by the Honourable Senator Hugessen, that the Bill be not now read the second time, but that the subject-matter be referred to the Special Joint Committee on Divorce.

After debate, and—

The question being put on the motion, it was—

Resolved in the affirmative."

J. F. MACNEILL,
Clerk of the Senate.

MINUTES OF PROCEEDINGS

THURSDAY, February 16, 1967.

Pursuant to adjournment and notice, the Special Joint Committee of the Senate and House of Commons on Divorce met this day at 3:30 p.m.

Present: For the Senate: The Honourable Senators Roebuck (*Joint Chairman*), Aseltine, Baird, Bélisle, Denis, Fergusson and Haig—7.

For the House of Commons: Messrs. Cameron (*High Park*) (*Joint Chairman*), Baldwin, Cantin, Forest, Honey, McQuaid, Otto, Peters and Stanbury—9.

In attendance: Peter J. King, Ph.D., Special Assistant.

The following witness was heard:

Douglas A. Hogarth, Barrister at law, *on behalf of* Mothers Alone Society, All Lone Parents Society (ALPS), Canadian Single Parents, Parents without Partners.

Briefs submitted by the following are printed as Appendices:

41. Mothers Alone Society, All Lone Parents Society (ALPS), Canadian Single Parents and Parents without Partners.
42. Majority members of a Committee appointed by the Bar of Montreal to examine into the question of divorce.
43. Minority report submitted by Bernard M. Deschênes, Q.C., member of a Committee appointed by the Bar of Montreal to examine into the question of divorce.
44. The Manitoba Bar Association.

At 5:30 p.m. the Committee adjourned until Tuesday next, February 21, 1967 at 3:30 p.m.

Attest.

Patrick J. Savoie,
Clerk of the Committee.

THE SENATE

SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS ON DIVORCE

EVIDENCE

OTTAWA, Thursday, February 16, 1967.

The Special Joint Committee of the Senate and House of Commons on Divorce met this day at 3.30 p.m.

Senator Arthur W. Roebuck and Mr. A. J. P. Cameron (*High Park*), Co-Chairmen.

The Co-CHAIRMAN (*Senator Roebuck*): Ladies and gentlemen of the committee, we have a quorum. It does not look like a very thriving audience but, as I was explaining to Mr. Hogarth, it is not so much the numbers who are here as it is—

Senator BAIRD: The quality.

The Co-CHAIRMAN (*Senator Roebuck*): Yes, the quality, but I was about to say it is the record. We have a very considerable distribution of the record; not only that, but the record is the basis upon which we shall make our report to Parliament in due season, and I hope to bring about the necessary legislation, as may be determined by what we hear.

For the sake of the record I should like to introduce our main witness for today and give you some idea of who he is. Mr. Douglas Hogarth was born in 1927 in the City of Saskatoon, so that he is a western man. He was educated in the public schools of that city and at the University of Saskatchewan.

Towards the end of World War II he served briefly in the Canadian Army in Canada, and upon discharge moved to the Province of British Columbia, where he received a law degree at the University of British Columbia in 1950. He was called to the bar in 1951 and practised in the City of Prince Rupert for two years, thereafter with Mr. Alistair Fraser who is now, as you all know, Clerk Assistant to the House of Commons.

Since 1954 Mr. Hogarth has been engaged in the general practice of law in the City of New Westminster. He is presently a partner of Mr. Michael G. Oliver of that city and his work has particular emphasis in the field of criminal and civil litigation.

Mr. Hogarth is a past president of the New Westminster Bar Association and an elected member of the Council of the Canadian Bar. He is chairman of the British Columbia section of the Criminal Justice Committee of the Canadian Bar Association and has been such for the past year and a half.

Mr. Hogarth is a resident of the District of Coquitlam and an elected member of the Municipal Council of the Corporation of the District of Coquitlam. He is married and has four children—I do not know what that has to do with it but we always mention it, and it is to his credit—the eldest of whom is eleven and the youngest is two.

May I say, Mr. Hogarth, this is a very informal proceeding and if you care to sit down while you are talking to us, that is all right; or you can stand, as you wish.

Mr. Douglas A. Hogarth, Barrister-at-Law, (on behalf of Mothers Alone Society, All Lone Parents Society, Canadian Single Parents, Parents Without Partners): That is very good of you, Mr. Chairman. Messrs. Chairmen, honourable senators and members of the House of Commons, at the outset of my remarks I should like to say how grateful my clients are that you have made possible my appearance here today to speak on behalf of the brief that has been filed by them. For the people who form the societies mentioned in the brief divorce reform is much like the cure for cancer; they are looking forward to it very, very much, because all of them have suffered the problems arising from marital discord.

I regret to say that I have not got any special qualifications in the field of divorce law or constitutional law, but can only offer the views of a general legal practitioner with a modest amount of experience in these matters. The individuals who comprise these associations, however, that have banded together to prepare this brief have all, with the exception of those who are widowed of course, suffered from marital discord and can tell you of all its many and varied forms. I think you would find that they would complain in the main that their marriages have broken down to a large extent because one or other partner to the marriage failed to live up to the commitments that are made when the marital bond is entered into.

If they were here themselves to say it, they would not complain that they were inadequately prepared for marriage; I do not think they would complain that they lacked any education with regard to getting into marriage, that they did not know what it was all about. It is just that the day to day tensions during the course of their marriage eventually brought about a failure of the marriage and, as the expression goes, it "broke down," and in the literal and figurative sense died. The results are of course very obvious. They seem to run into a pattern. First of all the bickering and quarrelling, then the separation, and for some there is divorce, but many of them get hung up at that place where they are merely separated from their respective spouses.

It has been advocated before you a great deal, as I have read in the proceedings, that there be legislation pertaining to reconciliation procedures, that people be brought together to talk it all over. However, I think my clients when considering this brief suggested that so far as they are concerned reconciliation has pretty well gone by the board; the lines of battle, so to speak, have been drawn and reconciliation from a judicial point of view would not be of much assistance to them. Their great problem is that very often they cannot find their respective spouses, that the husband left the wife ten years ago and they have not seen each other for ten years. Some of them complain that they can find their spouses but half the time they cannot find them sober. They have real fundamental problems. Reconciliation in that type of situation is just a waste of legislative and judicial time. Their real problem is that they want to be freed from these bonds which have long since died so that there is no hope of re-establishing a valid marriage.

I discussed this matter with Mr. Kincaid, the social welfare director in the municipality in which I am a counsellor. In our municipality we have 42,000 people, of whom about 6,000 to 8,000 speak French, they are French Canadian people. In January we had 88 single parent families on welfare, and Mr. Kincaid estimated that those 88 families were paid \$15,000 for the month of January. Mr. Kincaid has had extensive experience in this field, and we discussed this and concluded that if there were adequate divorce laws these women—and they are mostly women who are on welfare of course—could remarry and get off welfare. They do not want to be on welfare. They could get off it and we could save our municipality up to about \$60,000 a year if one-third of them could remarry.

The lack of divorce reform has brought about tremendous welfare costs in our country. The husbands of these women are long gone, they cannot find them.

The police help and assist all they can, but they have gone to other provinces, they have even gone to other countries and they cannot be found. These women cannot remarry because of the existence of their original marital bonds. That means over a mill on our municipal tax roll, which is extremely important. Multiply that throughout the country and I think you will find that this is an extensive financial problem. My clients cannot remarry because they cannot find their respective spouses, husband or wife as the case may be; or, in the alternative, if they do know where they are they cannot find them in a situation where there is evidence on which they can get a divorce; they know adultery is taking place, I do not think there is much doubt in their minds about that, but they just cannot get the evidence, and they have not got the money to employ detectives to get it anyhow. That is one of their great problems—maintenance.

The second great problem is this. I do not think there is any doubt that the crime rate in this country is sustained by the children of broken homes. I do not think there is any doubt about that. I have prosecuted for over ten years in juvenile courts, police courts, county court judges criminal courts and in assize courts, and I do not think there is any doubt that the crime rate is sustained by children coming from broken homes. If these women who are trying to rear these children could form stable second marriages, if they could get their divorces and remarry, the stability of their homes would be such that the children would not tend to go into crime, they would have the parental influence of the mother and father type in the home and there would be discipline within the home to a greatly improved extent.

I was in a juvenile court in January in New Westminster prosecuting a young chap who had breached his curfew; he was on probation for the theft of a camera. His mother had been separated from her husband for many, many years. He was fifteen years old and stood about 5' 10", a big boy, his mother was about the size of a half-pint milk bottle, and the magistrate was complaining to the mother that she should get this boy in the house before ten o'clock according to the terms of the curfew. The tears were just streaming down the woman's face; physically she could not handle the boy. That woman should have been freed from her marital bond, she should have been able to remarry so that somebody would have been in the house to get the boy in, and that is what would happen if we had adequate divorce reform.

Those are the two salient problems my clients face, but there are many others. They face the problems of constant poverty, constant loneliness, constant frustration from trying to get maintenance and locate their departed spouse. There is complete despair about the existing divorce laws and maintenance laws. Think of the predicament of the soldiers who married overseas; then came back with their wives who then deserted and went back to England and divorced their husbands under the laws of England. Those men are in a hopeless predicament; if their wives do not remarry they will never get divorces.

There is complete despair about relief under our existing laws, and this is breeding among many people an infectious cynicism that is penetrating their own lives, the lives of their children and the lives of many people with whom they are daily associating. It is very morally and spiritually destructive.

Some of these people—though certainly not among the people I represent, because they are the ones who are complaining—have sought relief through common-law marriages. You have had the figure of 400,000 common-law marriages in this country given to you; some through "cooked" divorces, some through invalid American divorces, to give their relationships an aura of respectability. But these solutions are no answer to morally responsible people.

The Co-CHAIRMAN (*Senator Roebuck*): I think we settled on about 50,000.

Mr. HOGARTH: That got cut down, did it?

The Co-CHAIRMAN (*Senator Roebuck*): Yes. Four hundred thousand is too high. But 50,000 is enough to impress anybody, I should think.

Mr. HOGARTH: I should think it would, Mr. Chairman, and I think the government should be most concerned about the fact, and the dangerous fact, that it is becoming morally acceptable in the community.

The inability of reform to have taken place in the past is, I think, felt by many to be the result of the strong influence of the Roman Catholic church and the concept held by that church that marriage is indissoluble. I think there can be no doubt that divorce was given to the federal government in the first instance because it was advocated at the time that if it was given to the federal government it would be far more difficult to have marriages dissolved. I think that is what was meant by the honourable Solicitor General Langevin when he spoke in the Confederation debate of 1865, saying that in the Quebec conference it had been decided that divorce would go to the federal government to make the dissolution of marriage extremely difficult to bring about.

In my submission it is quite clear that, in so far as that may have been an extension of a religious tenet at the time, the Catholic church is no longer interested in imposing its principles upon all the people of this country. In short, I doubt if you would find any evidence of that at all. It is, if I may put it this way, apathetic towards divorce reform. Certainly the brief put forward by Mr. Carter for the Catholic Women's League and the comments made by the Catholic bishops of Canada, as outlined in the brief we have filed, would indicate that contemporary Roman Catholic thought in this country does not sustain the suggestion that divorce reform should not take place.

My clients recognize, however, that individual provinces, particularly Quebec and Newfoundland, might well prefer to have their own divorce laws concerning the grounds upon which divorce might be granted. In addition, the people of the Province of Alberta might want fewer grounds than the people of the Province of British Columbia. In conjunction with my appearance here today, I wrote to Dr. Gilbert Kennedy, the Deputy Attorney General of the Province of British Columbia—who is one of the leading lawyers in the province, and I would suggest one of the leading lawyers in Canada today—asking him if I could possibly mention to this committee the position of the Attorney General of British Columbia with respect to divorce reform, and I further asked him to comment on the brief we have filed before you. He was good enough to write to me under cover of February 7 as follows:

I now have an opportunity of examining your letter of January 27 and a copy of your brief to the Joint Senate and House Committee on Divorce reform, presented on behalf of the Mothers Alone Society and three other societies.

The honourable the Attorney General has authorized me to say that he is in full support of proposals for enlarging the grounds for divorce. In fact the Attorney General, without going into details other than a discussion of your proposed grounds, questions whether you have gone far enough.

May I, for my own part, indicate my own support for the move to enlarge the grounds for divorce. Both the Attorney General and I prefer the concept which you have to a large extent adopted, namely retain parliament's control of this matter constitutionally but allow a certain amount of local option similar to the Juvenile Delinquents Act and Part II of the Narcotics Control Act, as you illustrate by way of example on page 14. To that extent, therefore, we would not think of powers of divorce being granted to the provinces but an enlarged national basis. I concur in a need for the proposal in paragraph 56 until the legislation is operative to grant divorces in all provinces.

The proposal in paragraph 56 dealt with a suggestion that parliamentary divorce might be retained for the provinces of Quebec and Newfoundland if they did not

adopt any grounds whatsoever. I will comment on that in a few moments. I do point out that it shows that the individual provinces might well select some grounds and others might not select as many, and our suggestion is that there be broad grounds provided by the federal government for selection by the provinces.

We do not suggest, however, that there be an amendment to the British North America Act to bring this about. We make this suggestion, and do so with the greatest respect to Senate Commissioner Mr. Justice Walsh when he suggests that divorce grounds should be on a national basis, as I understand his proposal. It is certainly with the greatest deference to his suggestion that we put forward what we have to say. If we have to wait for the reform of the constitution to bring about this situation we will have to wait an awfully long time, and my suggestion is that it can be done, and done immediately, by a method other than making an amendment to the British North America Act.

We are also concerned that if it became a matter of constitutional amendment it might well become a question of bartering political powers one for the other, trading in the different fields in which the respective governments are concerned. Therefore, it is our suggestion that whatever reform does take place—and that reform should take place—it should take place immediately, and take place within the framework of the existing constitution and existing legislative and judicial institutions.

The recommendations that my clients are putting forward are further based upon the assumption that the federal government's powers under Section 91 of the British North America Act extend to granting ancillary relief such as maintenance and custody and divorce legislation, and also ancillary relief by way of costs. Mr. Power in his work on divorce—and you have heard earlier in these proceedings from certain lawyers more learned than I with respect to this matter—suggests that this is an open question, as does Mr. Laskin in his work on constitutional law. It is interesting to me that it has not been suggested in this committee that Section 94 of the British North America Act might be utilized to effect the implementation of these ancillary powers on a national basis.

However, I would suggest that if the Canada Shipping Act can provide for compensation to widows and children of the victims of disasters at sea, surely divorce and marriage in Section 91 should provide compensation to the women and children who are the victims of disastrous marriages. It seems inconceivable to me that on a constitutional basis the words "marriage and divorce" in Section 91 would not include ancillary provisions for maintenance, custody and costs flowing from the grant of a decree.

Mr. Power in his book on divorce also cites British authority for the suggestion that these are ancillary to and so closely coupled with divorce that they must necessarily be considered in the same field.

Therefore, the first recommendation my clients put before you is simply this. The federal government should pass a divorce code very similar to the criminal code, and that code should have broad and comprehensive provisions dealing with divorce, provided the grounds therein stated—there might be five, six, seven, eight or nine grounds—could be selected or rejected by the provinces in whole or in part as the various provincial legislatures think fit. This is not out of keeping with what the Law Society of British Columbia suggested in the brief they filed. However, their brief suggests that you would run across another constitutional hurdle when you were concerned with whether or not the provincial governments could select a part of the grounds in the federal legislation.

Mr. Justice MacIntyre, who was a bencher at the time that brief was proposed, discussed this matter with me the other day, and he told me they had no real case law authority for the suggestion that that was a constitutional problem. I discussed it briefly with Dr. Kennedy and, with the greatest respect to the view of the benchers, neither of us can see where that would be particularly

offensive from a constitutional point of view. It was our opinion that the Lord's Day Alliance legislation dealing with the Vancouver Charter pretty well answered the point. Certainly the Juvenile Delinquents Act and the Lord's Day Act are samples of legislation very similar to what we proposed, along with the Narcotics Control Act.

In any event, this whole problem, if it does exist, could be resolved by parts of the divorce code being expressly made applicable to various provinces. That happens now in, for instance, the Prisons and Reformatories Act, which has provisions applicable to New Brunswick and provisions applicable to British Columbia. Those provisions could be in the divorce code, and they could be put in there at the request of the various provincial governments. You will also note that in the Juvenile Delinquents Act, in Saskatchewan a juvenile is any person under the age of sixteen, but in British Columbia it is any person under the age of eighteen. The reason for that is that the provincial government of British Columbia has asked the federal government to proclaim the age as eighteen for British Columbia, and that results in the difference. That type of legislation could be put into our divorce act.

This type of legislation has several great advantages, in my submission. The first is that it recognizes the social and religious differences that we have throughout this country, and to deny that they exist is, of course, absurd. It would make enforceable the decrees of one province in every other province, and it could so provide that maintenance and custody orders made in Manitoba could be enforceable in British Columbia in a summary fashion. This, particularly in the custody field, is an extremely important point. The big problem now is that you get a custody order in British Columbia against a wife, when the kids get out of school she takes them from the school to the airport, she is in Calgary in two hours and you might as well tear the custody order up, because there is no reciprocity in the enforcement of custody orders. The brief we filed has a paragraph which suggests that there is, but that is an error; there is no reciprocity in the enforcement of custody orders. In addition to that, the reciprocity with regard to the enforcement of maintenance orders is extremely difficult and cumbersome to invoke.

The third great advantage of legislation of this nature is that it would have a common constitutional source, and amendments and changes would be uniform throughout the whole of the Dominion of Canada.

Quite frankly, the suggestion includes the abolition of the parliamentary divorce which presently exists. It seems very anomalous to many of us who are more or less away from government that parliament ever really got engaged in granting the dissolution of marriage between two conflicting spouses. It would appear to a great many of us that parliament has so much more to do that it could well, if I may use the expression, divorce itself from this function. Certainly the suggestion made in the brief might leave Quebec and Newfoundland without divorce, but the fundamental proposition we put forward before you is that if the majority of the people of the Province of Quebec do not want divorce, then that is something the Province of Quebec has to resolve, it is something that should be left with them to resolve. We suggest as an alternative, but only as an alternative, that parliamentary divorce, or alternatively a federal court proposal, could be constructed for the purpose of giving relief to any person of any province which has not adopted any ground for divorce as we suggest, or as the legislation provides.

My clients also suggest that the right of action which accrues under the statute be exercisable by either spouse in any province in which either might be domiciled. In short, separate domicile.

The Co-CHAIRMAN (*Senator Roebuck*): Or residence?

Mr. HOGARTH: No, we have stuck with domicile. Dr. Kennedy in his letter to me suggested that we might be prepared to go to other grounds such as

residence or even citizenship, but we have proposed domicile and we have stuck with the concept of domicile as we now know it. That has already been done in part by the Divorce Jurisdiction Act anyhow, and the federal government has given a married woman who is deserted by her husband for a period of time a separate domicile, and there is no real reason why that cannot be done in all instances pertaining to marital conflict. After all, I think a modern community recognizes the equal status of women, and this is not doing much more than realizing it in a legislative way.

We suggest that if a man and wife have separate domicile and should proceedings for divorce be commenced by each in their separate domiciles, then those commenced second in time would be automatically stayed by the statute until the first has been heard out. I certainly have not had extensive experience, but I know of no case under the Divorce Jurisdiction Act in which divorce proceedings have been commenced by the husband in a domicile to which he had fled and by the wife in a domicile in which she was left. I have never heard of that happening, but I submit that it could none the less be dealt with in a divorce code.

Together with this concept of separate domicile, my clients further suggest that matrimonial causes to be heard under this divorce code be heard in courts of uniform stature throughout the dominion, and we suggest the superior courts—Queen's Bench or Supreme Courts as the case may be, dependent upon the province; courts of what we refer to as original and inherent jurisdiction. Some of these procedures would probably be based on the old chancery practice of petitions and answers etcetera, but the courts are left to their own devices how they wish to proceed. In British Columbia we switched in 1961 from the old chancery practice of petition etcetera to the common law practice of writ and statement of claim. But this could be left to the courts. We see no need whatsoever, in our submission to you, why there should be special divorce courts or separate divorce courts in any province, or federal divorce courts in the national sense.

One advantage of courts of equal stature throughout the dominion hearing cases under this divorce code would be much like the courts hearing cases under the criminal code; there would be a uniformity of judicial interpretation of terms and a uniformity of judicial proof required, the degree of proof, the onus of proof, would be the same pretty well throughout the dominion. Then if a person in the Province of Ontario was subjected to an order that had been obtained in the Province of Nova Scotia, he could rest assured that it had been heard and determined in a court of responsibility—not that all our courts do not have responsibility—a court of stature and a court of inherent jurisdiction.

As I mentioned earlier when prefacing my remarks, to my clients it is inconceivable that divorce legislation would not include provisions for maintenance, custody and costs, which is tantamount to criminal legislation providing for the creation of an offence but not providing for any punishment to be imposed because of it. It is submitted that if the authorities were carefully gone into and reviewed it would be found that divorce and marriage are clearly within the ambit of the federal government. It is interesting to note the Canadian Bar Association's suggestion that no divorce be granted until custody has been dealt with satisfactorily; it is a negative suggestion in a sense, but it is our submission that certainly it must be within federal jurisdiction, and that this could in any event be determined by a reference to the Supreme Court.

The reason why my clients are so anxious to have this ancillary relief included in such a divorce code is so that these provisions can be enforceable throughout the whole of the dominion. The present law with regard to the enforcement of maintenance and custody is, as I have mentioned, extremely difficult from province to province. Our suggestion would prevent the abduction of children. Although section 236 of the criminal code does that now, I have

never heard it suggested that it forms a right of action to get the children back. This suggestion would permit people to enforce court orders throughout the whole dominion.

There is a reference in one paragraph in our brief which suggests that this enforceability throughout the whole dominion should apply only in provinces which have accepted the grounds, or any one of the grounds, for divorce provided in the statute. That is an error. Much like the Juvenile Delinquents Act, it is contemplated that aspects of this statute would be enforceable throughout the whole dominion, in every province, whether that province had accepted any part of the legislation for granting relief to persons domiciled within it.

The Co-CHAIRMAN (*Senator Roebuck*): That is the case in the states now, is it not?

Mr. HOGARTH: Yes. The American Constitution has a full-faith-in-credit clause. I think it is the *Williams v. Williams* decision pertaining to the acknowledgment of Nevada decrees by the State of Maryland or North Carolina, one of which had no divorce. Oddly enough, our constitution apparently did not provide for such a contingency. Dr. Kennedy suggested to me that a reference made to the Supreme Court enquiring what the nature of Confederation is might reveal that that is inherent in Confederation, that the orders are enforceable in each of the provinces. However, I think he at the same time admits that that might not be too fruitful.

On maintenance and support, my clients propose that the time has come when some teeth should be put into the laws of maintenance in this nation. They say that this is within the scope of dominion legislation, and that they are very much in need of assistance in this regard. If taxes in this nation were collected under the same legislation as maintenance is collected the nation would be bankrupt. Mind you, we would all be rich, but the nation would be completely bankrupt. The provisions that we have provided are deplorable. There is a great deal of criticism that can be directed at provincial legislatures in this regard too; this is not an attack on any particular government. The deficiencies in the law are deplorable.

Referring to the Reciprocal Enforcement of Maintenance Act, it is sometimes easier to collect maintenance from a foreign country within the Commonwealth than from another province of Canada because they have no reciprocity with other provinces. As I understand the procedure, what you have to do in British Columbia is to refer a transcript and a certified copy of the order from the court in which it was made to the Attorney General, who sends it to the Attorney General of the reciprocating state, who designates a court to hear the claim, then the husband is given a show cause summons. Of course, by this time he has got wind of it and has left for the next province. It is impossible.

My clients suggest that this could be very, very much improved. They suggest, first, once a maintenance order is made by a court of competent jurisdiction in the Dominion of Canada the defendant in that order is deemed to be able to pay the amount therein stated. If it says he is to pay \$50 a month, then he is deemed to be able to pay \$50 a month. They further suggest that if he cannot pay that \$50 a month, if he gets sick or loses his job, it is up to him to go back to the court and say, "Listen, give me some relief from this. I can't make it next month. I've lost my job." It is not up to the wife to be concerned with whether he has the ability to pay it once the order is made.

Secondly, they suggest that if he fails to pay any amount of that money it should automatically be an offence under summary conviction procedures of the criminal code, so that he can be dealt with immediately at the police court.

Next they suggest that this maintenance order should be a first charge on all the man's assets and incomes; that is to say, the wife and children should come first, next to taxes. One of the great problems in the enforcement of these maintenance orders is that you have to issue a summons to show cause—"Why

haven't you paid the amount?"—and the man comes back to the police court or to the Supreme Court and says, "Well, I tried to pay it last month, but I owed my brother \$3,000 on the car I bought six years ago and I just had to pay him something." Every excuse in the world is given to avoid paying that amount, and the result is complete frustration for the wife, endless proceedings in the police court, and of course she has long since exhausted any money she had for legal expenses. It is a completely frustrating experience.

In British Columbia, if it is in the Supreme Court, first of all the wife has to prove her entitlement, prove that she was deserted or prove the matrimonial offence; then the judge makes a reference to the registrar; then there is a hearing to determine the amount; then there is a reference back to the court to have it confirmed; then there is the process to obtain it if he goes into arrears, or alternatively there is a motion to cite him for contempt; then a show cause summons is issued and he comes back before the court and argues whether or not he can pay it; usually he is given a period of redemption, and it goes on endlessly. It is no wonder these women are all on social welfare. Where else would they be? Their husbands are not going to support them when they can evade it in this way. It is our submission that more teeth should be put into it, and they should be primarily responsible once that order is made.

The Co-CHAIRMAN (*Senator Roebuck*): Is not that purely provincial?

Mr. HOGARTH: It may be, sir.

The Co-CHAIRMAN (*Senator Roebuck*): As it is now.

Mr. HOGARTH: Yes, but it is our suggestion that in a divorce code under the auspices of the federal government this could be straightened out and could be provided for. It would be interesting to hear how, under the criminal code, a man would make out if he were ordered to pay a fine of \$250 for impaired driving, got two weeks or a month to pay and came back from time to time to the magistrate and offered the excuses some of these husbands offer, which really are endless. There is very little assistance to the wife in this regard. The police court remedies, although they offer a little more effectiveness, are not always the answer either.

My clients suggest that all that should have to be done, particularly if the man goes from one province to another, is that a court certified copy of the order from, say, Manitoba should be filed in the local registry of the Supreme Court of Ontario, or whatever the court may be, which automatically becomes the judgment of that court and the amount is automatically payable; once a certified copy is filed with the man's employer, that money is payable to the wife as the recipient. If the man needs relief he can go back to the court and ask to be relieved because of strained circumstances. This could apply within the province merely by filing a certified copy with the employer, and there should be an automatic garnishee created as soon as that is done.

I have left the suggestions about the grounds put forward in our brief to the latter stage of my remarks today, because I think you have probably heard so much about the grounds for divorce in this committee that there is not much new I could add. However, we thought that some aspects we have considered might be of interest to you.

Some attention has been paid before you to abandoning the concept of a matrimonial offence. This was discussed by the committee which instructed me with regard to our brief and it was suggested that the matrimonial offence concept should not be abandoned in its entirety. We do not agree with the suggestion made at one of the earlier hearings that in every case of marital breakdown there is a little bit of blame on both sides. If you look into some of these situations where you have psychopathic personalities involved, or where you have chronic alcoholism, you will see that there are spouses, both men and

women, who have done their best to try to keep the marriage together, and to suggest there is a little bit of blame on each side is unquestionably going too far.

With the marriage breakdown theory, when everything has been looked into by a psychiatrist, social welfare people and so on, in the end somebody has got to pay; somebody is going to lose the custody of the children they love very dearly and have only reasonable access to them; somebody is going to have to pay maintenance for the children, and probably for the wife because she has to look after the children. When you end up with the fact that somebody is going to be penalized you are going to want to equate that with fault and blame, so you get into a situation where you go right round again, and pretty soon the judiciary will build up a series of decisions on what constitutes blame; they will become matrimonial offences, and I think you will go right back almost to the basic matrimonial offences recognized by the law today.

Last Monday, in New Westminster there were at least ten divorces, and in Vancouver on Friday there would be about twenty to thirty heard. Let us say thirty-five to forty divorces per week in that part of British Columbia are heard in a summary fashion by a single judge of the Supreme Court, and they take fifteen to twenty minutes to present when undefended. These are divorces based on the present ground of adultery.

The United Church of Canada in their very splendid brief—and I do not want to criticize them unduly—suggested that we should have social and welfare workers, psychiatrists and other people examining reconciliation procedures, with delays in effecting divorces. I ask you to reflect for a moment on what will happen in the City of Vancouver, with twenty divorces a week now, if a number of social welfare people and psychiatrists are to be employed to examine these people to see if they cannot get them back together again, to see if their differences cannot be reconciled, whether the marriage is on the rocks or not. I am sure you will hear from jurisdictions where this procedure is being used and I would be most interested to learn how it is working out, because from a practical point of view it appears to me that the cost of divorce will become fantastic. After all, one of the litigants has to pay these costs; I am sure the state will not pay for psychiatric assistance to these people, and I do not think the state should be expected to pay for it. Somebody will have to pay, and the colossal cost of these things has to be borne in mind.

The Co-CHAIRMAN (*Senator Roebuck*): Where could you get the officials to do such work?

Mr. HOGARTH: Having trained officials is most important. Certainly we are using social welfare people extensively in British Columbia in custody cases, and they are of tremendous assistance, but when it comes to determining the respective problems of the adults I think a long training period would be necessary. It therefore seems to us that sooner or later you will go back to the matrimonial offence problems and theories.

My clients do suggest, though, that where a marriage is dead, where the parties have lived separate and apart for some time, even though there has been no matrimonial offence there should be a discretionary divorce granted by the court by consent. They say that where the matrimonial offence is proven there should be a divorce as of right in favour of the party who has not committed it. They further say that where no matrimonial offence is proven but the parties have lived separate and apart for two years and they acknowledge that their marriage is dead and both consent, then if custody, maintenance and all these matters have been satisfied, the court should have a discretion to grant that divorce. As you have heard earlier, courts are granting discretionary divorces now where each of the litigants has committed a matrimonial offence, so the concept of discretionary divorce is not new. But my clients suggest that all these ancillary things would have to be attended to to the satisfaction of the judge before this is done. In a way this is much in keeping with what Mr. Brewin has suggested in bill C-264, it is somewhat along that line.

The other grounds for divorce as of right that we have put forward are intended to reflect, we hope, a moderate and realistic point of view. They are not too great a departure from what you have heard from many who have submitted briefs to you—adultery, desertion, cruelty. Frankly we do not anticipate that there would be any great departure from the present judicial decisions and definitions pertaining to cruelty. We do not think that Canadian judges will very rapidly dissolve marriages on trivial matters on the ground of cruelty.

We put forward the suggestion that there should be a matrimonial offence of gross indecency. We think that gross indecency which does not amount to a matrimonial offence of adultery or cruelty should be a ground for divorce. Certainly in police court prosecutions and assize courts one sees many instances of this. I know it is not prevalent throughout the community, of course not; but in the police courts it comes up from time to time and it is tragic that no divorce is available.

In July I prosecuted a man on a charge of the grossest indecency with his seven-year old daughter. He was found to be unfit to stand trial and sent to Riverview Hospital. He came back in October, was found fit to stand trial but found not guilty by reason of insanity and committed to a mental institution, where he will remain, I am told by Dr. Thomas the provincial psychiatrist, for some time because of his paranoid delusions. It is tragic that this man's wife cannot get a divorce. The offence was committed on a seven-year old child of the marriage; it of course did not amount to adultery. It is just tragic. There she is, for the rest of her natural life—or for the rest of his, which will probably be longer—without remedy. Gross indecency within a family and insanity of that nature which will be permanent, or has been shown to be permanent, should certainly be a ground for divorce. It is hideous that it has not long since been attended to.

My clients think that mental illness is a ground which will cause you a great deal of concern because of the fact that such tremendous progress is being made in the treatment of mental illness. The phrases used certainly in the bills before you and the English statute, such as "chronically unsound mind" and so on, are extremely difficult things to conceive from a practical point of view when considering what proof is to be offered. My clients suggest that the important consideration in determining the extent of the mental illness should be: is the person so mentally ill that the marital commitments cannot be met, and has it been shown that the mental illness has existed for a considerable length of time?

The Co-CHAIRMAN (*Senator Roebuck*): Would not that apply to any illness?

Mr. HOGARTH: No, I do not think it would apply to any illness, with great deference. Although I saw that mentioned in the earlier proceedings, I think that a person who is physically ill can certainly live up to a great many of his commitments in the marriage, but when a person is mentally ill to the extent that he cannot, then I think the marriage is dead. Very few people get so physically ill that they cannot live up to many of their marital commitments. Again, they do not affect the marriage so deeply as happens with those who have the misfortune to be mentally ill.

The Co-CHAIRMAN (*Senator Roebuck*): But if they do affect the marriage deeply, as the other illness does, why should not they be included?

Mr. HOGARTH: I will put it this way, Mr. Chairman. They might well be included but we did not consider it in that light and I would like to think about that. Certainly we suggest that there would have to be committal to a mental institution. We cannot see mental illness without committal forming grounds for divorce. People will never seek or go for treatment if they know the chances of divorce are antedated to the first day they went to a doctor, because rarely does anybody admit he needs help of that nature.

We have also suggested that there be grounds for divorce on the basis of serving a sentence of penal servitude. We suggest that anyone whose spouse is serving a sentence of penal servitude, two years of which has been served, should be entitled to a divorce. A sentence of that nature would indicate, first that the sentence is being served in a penitentiary, and secondly that it was a serious offence or, alternatively, repetitive offences. We would submit that the two-year period would indicate that the National Parole Board had probably had an opportunity to review the sentence, and if the man was still serving the sentence it would further indicate that his rehabilitation was somewhat questionable.

It can be argued that sustaining the marital bond when a man is in prison is an inducement to the offender to correct his ways, and that by cancelling it you just make him a more sour and hostile individual. However, it is our submission that to impose on a woman the concept that she has to remain married to her husband who is an inmate in a penitentiary upon the basis that she will help rehabilitate him when he gets out is just asking a bit too much. It is our submission that she should have the right to be free. If she wants to stay with him she certainly can, and vice versa if it is the wife who is in prison.

Some thought might be given by the committee, if you consider this ground at all, to whether or not it should be for particular offences. We point out in our brief that it would be extremely odd if a man who had committed a gigantic fraud and given half the money to his wife should end up by being divorced while he was in prison serving time for the fraud. Then, of course, there would be an anomalous situation, because he could not testify against her and vice versa. We suggest that consideration might be given to that.

The Co-CHAIRMAN (*Senator Roebuck*): She might need to be free to be able to spend the money.

Mr. HOGARTH: That may be so, sir.

Mr. OTTO: He could sue for maintenance when he gets out.

Mr. HOGARTH: I mentioned the concept of discretionary divorce by consent and I do not think I need go back to that, but it will be noted that it is in addition to the grounds I have briefly covered. Other matters contained in our brief are well before you in other briefs and I do not think I need go into them.

There are provisions pertaining to nullity. We suggest that this be extended to wilful refusal to consummate.

In dealing with judicial separation, our brief suggests that this should be kept for the purpose of providing something for those provinces in which divorce has not been implemented by the act of the provincial legislature as contemplated by the brief. As far as I can see—and certainly my clients would agree—the remedy of judicial separation is completely useless. It is used in British Columbia when you have not got grounds for divorce so that you can get an injunction to restrain the husband from doing something or other, or the wife from taking the children etcetera. However, there are so many other provincial statutes—the Equal Guardianship of Infants Act, the Married Women's Property Act, the Wives and Children Maintenance Act—there are so many summary procedures available that to go through the Supreme Court procedure for judicial separation is expensive and completely and utterly useless.

Senator FERGUSON: On what grounds would a judicial separation be granted in British Columbia?

Mr. HOGARTH: I think it is extended to adultery, desertion and cruelty. I understand that Ontario has no judicial separation.

Mr. OTTO: Cruelty of a limited definition?

Mr. HOGARTH: A judicial definition, which means cruelty extending to actual physical detriment. Not the hiding of the toothbrush and that sort of nonsense. It

has to be along the lines on which I take it the Nova Scotia courts would interpret it.

The Co-CHAIRMAN (*Senator Roebuck*): The burning of the toast was one that I think was mentioned.

Mr. HOGARTH: Judicial separation is a remedy which is rarely used, and most lawyers will not pursue it, it is too expensive.

The Co-CHAIRMAN (*Senator Roebuck*): Section 717 is pretty useful.

Mr. HOGARTH: Section 717 of the criminal code is a very good remedy by way of injunction, but it has its problems of enforcement too. Mark you, it is rather effective. Under section 717 of the criminal code the wife can lay the complaint, a warrant issued and the man immediately imprisoned and brought up next day before the magistrate, by which time he has cooled off a little or perhaps come to his senses.

This committee is about the first real glimmer of hope to thousands of Canadians who find themselves in a predicament of marital discord and have all but lost hope. I cannot help but remember the remark made by one member of the associations I represent when this brief was being considered. She said, "It really isn't any use. It's no use compiling a brief and filing it because nobody will listen to it anyhow." I and many other members of the committee assured her that that just was not so, that there was no real reason for assuming that point of view, because this is an indication, certainly in the hearts of many of them, that something will be done.

It is difficult for me to say just how delicate your task might become from the political point of view. We recognize that there are many things to take into consideration. I note that your terms of reference are to consider divorce from its social and legal points of view. That is extremely interesting, because to my mind the political and religious implications are so very, very important. It is inconceivable to us who from time to time are involved in these problems that reform would not take place in the divorce laws of this country. You know, they are almost a national scandal. In addition to that, if reform did not take place it would be an unbelievable example of political decadence in this nation, which we do not believe exists.

I submit that it is largely a question of the nature, direction and extent to which change can be accomplished from a practical point of view, bearing in mind the constitutional limitations, the available institutions, judicial and otherwise, the economic factors and, what we think are most important, the religious and social backgrounds of the various people and parts of the nation. We submit that this can be done effectively and can be done immediately. We submit that legislation which is contrary to contemporary morality cannot exist too long and it becomes ignored. Section 150 of the criminal code is a prize example: banning the sale of contraceptives is absurd, but it still exists; it cannot continue, nor can our divorce laws continue as they now are.

We do not suggest for a moment that the morality in one part of the nation be imposed upon others, and we know that others do not suggest that about our province or the people in it. We look forward in the near future to a change which will bring happiness and a happy future for many, many people, many married people and their children.

I would like to make it clear, sir, that we are not here with any political or religious axe to grind, or any demands to make, and I hope the suggestions we put forward are of some assistance to you.

Senator HAIG: Have the organizations you represent given any thought to the question of a time element before divorce proceedings are started after marriage, and a time period after the decree absolute has been granted before remarriage?

Mr. HOGARTH: Along the lines of the old decree nisi?

Senator HAIG: No. You have to be married for, say, two or three years before you can apply for a decree, and after the decree absolute is granted should there be a period of waiting before the remarriage of either spouse?

Mr. HOGARTH: In British Columbia we have a period of forty-five days, but that is not what you are driving at; that is the appeal period. You mean a period of, say, two years before a spouse can remarry?

Senator HAIG: Yes, after the decree absolute is granted. Should there be a period of waiting before either divorced spouse can remarry?

Mr. HOGARTH: We did not consider that in our discussions or in what was put forward, and I do not think my clients would advocate it at all, certainly not the last suggestion. After all, if a man proves after three or four months of marriage to be completely irresponsible, pulls out and leaves his wife, going back to England or wherever he might have come from in the first place, we see no reason why she should have to wait; it is quite obvious he is not coming back. Similarly, if he moves in with another woman, we see no reason why she should have to wait. If a matrimonial offence is committed—

Senator HAIG: That is the end.

Mr. HOGARTH: We think that is the end, yes. I think my clients are of that view. As for remarriage, that is something they have not considered, but it may be a good idea.

The Co-CHAIRMAN (*Senator Roebuck*): It will contribute to the opportunity to get a few more illegitimate children.

Senator BELISLE: Are you saying that after three or four months trial on the first marriage, if he leaves her or she leaves him that should be the end?

Mr. HOGARTH: The suggestion is that if two people marry and after, say, five months of marriage the husband goes and lives with another woman, we do not think the woman he married should have to wait before she can exercise her rights for divorce.

Senator BELISLE: You are certainly asking for wholesale legislation.

Mr. HOGARTH: Well, I do not think that is any different from what the law is now.

Mr. MCQUAID: Rather than write this into the law, don't you think it is worth a chance to have the period longer than three months, in the hope that even in one case out of fifty you save a marriage? Is it not worth extending it for longer than three months? Three months seems an unreasonably short time. If you make this law it will mean as soon as a couple have separated for three months they will rush in and get a divorce. If there is a chance of saving even one marriage by extending that time, don't you think that chance should be taken?

Mr. HOGARTH: I looked at it from the point of view of what the attitude of a husband would be if five months after the marriage the wife goes off to live with another man. I do not think he would be interested in rehabilitating the marriage, certainly if she announced that she was not coming back to live with him. You have got a big hurdle to overcome in getting those two people back together, particularly if she says, "The child I am about to bear is the other man's." That marriage, even though of short duration, is obviously not going to work out.

Mr. MCQUAID: You are assuming she is going to bear a child.

Mr. HOGARTH: I am bringing in factors you did not propose, that is true.

Mr. BREWIN: You are assuming that within the three or four months offences have been committed which come within the limits you propose, which would constitute grounds for dissolution; you are not suggesting mere separation per se for three or four months?

Mr. HOGARTH: By no means. Indeed, with regard to the marriage breakdown theory and discretionary divorce by consent, our suggestion is that they have to be married at least two years before they can have any relief of that nature.

The Co-CHAIRMAN (*Senator Roebuck*): But where there are certain offences the woman or man should have an instant divorce?

Mr. HOGARTH: Yes.

The Co-CHAIRMAN (*Senator Roebuck*): We had an interesting case of a man who married a woman, kissed her goodbye on the church steps and took the boat to England. We got round it by giving a nullity on the ground that the fellow was crazy. We gave her an instant divorce, and she was certainly entitled to it.

Senator FERGUSON: I would like to ask about you clients. I was rather struck by the fact that the four organizations have all been set up in the last two years. Would you tell us how this came about? Also, the Vancouver Chapter of Parents Without Partners is Chapter 153. Where are the other chapters? Are they in Canada or elsewhere?

Mr. HOGARTH: They even have a chapter in California, and I think there are chapters throughout the whole of North America. My connection with all these societies has been through the committee of eleven or twelve people which was formed to work on this brief, and I do not have an intimate knowledge of the workings of each one of them in the sense that I have acted for them personally or individually.

Senator FERGUSON: I was struck by the fact that the four of them had been organized within such a short time.

Mr. HOGARTH: Certainly one of them was organized generally to try to do something in the first instance about maintenance within the provinces; they more or less evolved in the last three years, but why it has happened so suddenly I do not know.

Senator FERGUSON: We had before us Judge O Hearn from Halifax, who, as perhaps you know, recommended that divorce cases be assigned to family courts. You would not agree with that at all?

Mr. HOGARTH: No. I think that divorce should be kept in the superior courts, with great respect to his views, which I saw in the press.

The Co-CHAIRMAN (*Senator Roebuck*): Have you got the counterpart of our county courts in British Columbia?

Mr. HOGARTH: Yes.

The Co-CHAIRMAN (*Senator Roebuck*): What do you say about giving the county courts and the Supreme Court concurrent jurisdiction?

Mr. HOGARTH: Ours have, because divorces are heard by local judges of the Supreme Court, who are county court judges.

The Co-CHAIRMAN (*Senator Roebuck*): Does that work very well?

Mr. HOGARTH: Yes. In the County of Westminster divorces might come before Judge F.K. Grimmett or Judge G.W.B. Fraser, or if they are busy a Supreme Court judge will come over from Vancouver to hear them, so it works very well.

Mr. OTTO: Mr. Chairman, the witness is obviously a good lawyer because he argues the case from every point as long as it serves his clients. Mr. Hogarth, are you a practising solicitor?

Mr. HOGARTH: Yes.

Mr. OTTO: Have you had a lot of divorce cases, both contested and uncontested?

Mr. HOGARTH: No. I have had a lot of uncontested cases. The worst contested cases I have had have been custody cases, but they are not very often divorces.

Mr. OTTO: Let me put it to you this way. If you have a contested divorce on the ground of adultery—that is the present law—where the accused guilty party says “I did not commit adultery”, do you think there is much chance of a divorce being granted on circumstantial evidence?

Mr. HOGARTH: The first case I had at the bar was in Prince Rupert and it was a contested divorce. I acted for the husband respondent. The judge was Mr. Justice Manson. The evidence with regard to adultery was extremely slim and the whole contention was on the custody of the child. The result was that Mr. Justice Manson ruled, after hearing a day’s evidence, that so far as he was concerned adultery had been proven and the marriage was on the rocks. After the case he wanted to hear counsel in his chambers on custody. Mr. Justice Manson, now deceased, was one of the greatest judges in British Columbia, and at one time in the north country he had awarded custody of the child in the proceedings to the solicitor of the petitioner. The lawyer on the other side, now his Honour Judge Harvey, told me the judge had done this just as we went into his chambers and said, “Hogarth, one of us is going to have a baby.” This so disturbed me that I lost custody of the child for my client. I think I agree that contested divorce cases take on an entirely different complexion from uncontested cases.

Mr. OTTO: I am trying to recall the case heard in England, I believe of Lord Middleton, in which milady was caught in bed with her stablehand at midnight. Her explanation in answer to the charge of adultery was that since they were both interested in horses they were merely discussing horses. The judge thought there was nothing unusual about two people interested in horses discussing them and that there was no evidence of any kind of adultery. I am putting it to you in this way. Under the present law, if one of the parties contests adultery it is very, very, difficult and expensive to obtain a divorce strictly on circumstantial evidence. Would that be correct?

Mr. HOGARTH: No, I do not think so.

Mr. OTTO: I have probably had a few more contested cases than you, but perhaps I am not as good a lawyer.

Mr. HOGARTH: The lady you spoke of would not do too well in British Columbia.

Mr. OTTO: This is still the rule that is applied today. However, most of the cases are uncontested, but would you say that in reality they are consented divorces?

Mr. HOGARTH: No.

Mr. OTTO: I say consented, not collusive.

Mr. HOGARTH: I appreciate the difference.

Mr. OTTO: Both parties agree the marriage is on the rocks and one of the parties says, “I will supply the evidence”.

Mr. HOGARTH: I do not go along with that suggestion. I think they are consented to in the sense that all default judgements are consented to. I think that the husband or wife, the erring spouse, becomes reckless and indifferent as to whether they are seen in the association.

Mr. OTTO: Then indirectly it is still consent.

Mr. HOGARTH: That is not consent, no. It is indifference.

Mr. OTTO: Put it this way. They both agree to have a divorce, and if it is not contested the guilty party does not contest the adultery.

Mr. HOGARTH: Well, it is a question of syntax.

Mr. OTTO: I put it to you that in an uncontested divorce the evidence that is needed in court is an accusation of adultery, an admission of adultery by the

party concerned, with corroborative evidence of somebody who says, "Yes, I committed the act of adultery."

Mr. HOGARTH: As a matter of fact, the only time you have to have such corroboration is when you are relying on admission. You can rarely get a divorce on admissions of adultery alone by the opposite party; they must be corroborated. In so far as establishing adultery in the first instance is concerned, you have to have the admission of the other party, you just have to have evidence from which the court will infer that adultery took place.

Mr. OTTO: I am saying to you that in an uncontested case the court is usually satisfied with the act of adultery if there is enough simple evidence—the accusation of adultery, the admission of adultery and the corroborating evidence?

Mr. HOGARTH: Yes.

Mr. OTTO: If ground was, say, cruelty, do you think the court would accept an accusation of cruelty, an admission of cruelty, or would you say the court would try to be satisfied exactly what was cruelty in any given circumstances?

Mr. HOGARTH: I think the court would look into it and make sure that cruelty was established on the evidence.

Mr. OTTO: So in adultery it is a very simple thing, an admission, whereas the other grounds would require evidence by a psychologist or psychiatrist, because cruelty to one person may not necessarily be cruelty to another?

Mr. HOGARTH: That is so.

Mr. OTTO: Similarly with all the other grounds. I put it to you that if all these reforms were introduced, by and large most of the divorce actions would proceed on adultery?

Mr. HOGARTH: No, sir. Most of them would proceed on desertion; 98 per cent of them would proceed on desertion.

Mr. OTTO: I disagree, because we had evidence from an English barrister of some renown who said that although the new British act had been in force since 1947, 90 per cent—I believe he said—of divorces to this day are still based on adultery, and he admitted that it was because it is the simplest thing to prove. If you are a solicitor and a client says, "We want a divorce on the ground of cruelty" you would have to tell the client the evidence needed and the cost, whereas if one of the parties said the other spouse had committed adultery all you would have to say would be, "Where? Can we have a corroborative witness?" Taking those things into consideration, if you are a solicitor trying to do the best you can for a client, would you not then advise using adultery rather than cruelty?

Mr. HOGARTH: My view is simply this. First of all, I do not know what is going on in England from an adulterous point of view. However, from where I stand in New Westminster I would say that if the divorce reforms we anticipate went forward most actions would be based on desertion.

Mr. OTTO: Desertion?

Mr. HOGARTH: Desertion, because it is the most prevalent matrimonial offence.

Mr. OTTO: Desertion then would be a factual thing, just two parties separating, and there would be the question "Why desertion?" Who was responsible for desertion?

Mr. HOGARTH: This would have to be gone into.

Mr. OTTO: Again you are bringing evidence before the court to show this is the ground for the marriage breaking up. I want to continue a little further with a different aspect which you introduced, and that is the question of maintenance and alimony. Were you speaking almost entirely about maintenance for children or were you speaking of the wife?

Mr. HOGARTH: Both.

Mr. OTTO: So what you are saying is—and most of the evidence presented here has been—that the grounds for divorce should really be the breakdown of the marriage without pointing out particularly which of the parties was responsible, and you agree with this in a great part of your brief.

Mr. HOGARTH: Oh no; that is one of the things we did not agree with. We agree with divorce by consent, which is similar.

Mr. OTTO: You want women's rights protected as individuals rather than as chattels or possessions?

Mr. HOGARTH: That is right.

Mr. OTTO: Nevertheless, on the other hand you say that marital offences should be maintained?

Mr. HOGARTH: Yes.

Mr. OTTO: But marital offences are based on the possessory idea of law, that a man possesses the body of his wife, and therefore any infringement of that gives him a cause for divorce, and vice versa. How can you justify those two points of view?

Mr. HOGARTH: First of all, I do not think marital offences are based on proprietary rights at all. I think marriage is based on contract, and that is not necessarily proprietary rights.

Mr. OTTO: Contract based on what?

Mr. HOGARTH: Mutual obligation to perform certain things in respect of their marriage.

Mr. OTTO: Mutual obligation?

Mr. HOGARTH: That is not proprietary.

Mr. OTTO: You argue that women should have the same status as men and at the same time you also argue that nevertheless they should be paid for the period of coverture, the period of being married?

Mr. HOGARTH: No. I say they should be paid if they are left responsible. First of all, if they have an estate of their own they should not receive maintenance; but I say they should be paid if the husband has committed a matrimonial offence, for the principal reason that they have to keep the children going, and somebody has got to keep them going.

Mr. OTTO: This is based on maintenance for the children, and of course part for the wife. That is fine. Let us suppose the couple have no children.

Mr. HOGARTH: Then if the wife divorces her husband and the court finds that as far as it is concerned the wife has adequate estate or adequate means to work herself, I would be very reluctant to impose maintenance payments on the husband.

Mr. OTTO: Let us suppose the wife started the marriage without any estate and wound up without any estate. Would you still say maintenance and alimony was owing to her?

Mr. HOGARTH: I am not too sure what position I would take there. I would mention the *McMann v. McMann* decision, a case in which the wife released her husband in 1935 when he was broke and successfully sued him for maintenance in 1950 when he became a very wealthy man. I do not think contemporary morality goes along with such decisions.

Mr. OTTO: I was rather amazed at your very vehement expression of opinion towards the collection of money. I realize the problem; as a practising solicitor I think there is a problem, but you are surely not putting forward a reactionary point of view in favour of debtors' prisons and this type of thing, are you?

Mr. HOGARTH: Pretty close, sir. I do not think the taxpayers of this country should pay maintenance to deserted women and children. Speaking as one taxpayer—and I am sure the proponents of this brief back me 100 per cent, because they are fed up with the suggestion that it should be done—why should the remaining taxpayers of the nation support a woman with three children who has been deserted by her husband?

Mr. OTTO: I only point this out because all our evidence has been directed towards a break-up of the marriage which is not the responsibility of either party, and the whole brunt of the evidence has been that the state has this duty. Consequently, I was rather amazed to hear a completely opposite point of view, which I understand is your clients' point of view and not yours.

Mr. HOGARTH: It is mine too; you bet.

Mr. BALDWIN: I have two very brief questions, both on rather novel points which have been made. When you suggest making the judgment of the court of one province applicable to other provinces, your idea would be simply that a copy of the decree certified by the judge or clerk of the court making the decree would be filed with the court of another province, whereupon it would have all the effect of a judgment?

Mr. HOGARTH: Of that province, yes.

Mr. BALDWIN: My second question has already been referred to by Mr. Otto. I assume that a condition precedent of the granting of judgment concerning maintenance and alimony would be a most careful study by the court of the circumstances of both parties?

Mr. HOGARTH: I would hope so, yes.

Mr. BALDWIN: You know as well as anyone that too many hurried judgments are given on alimony and maintenance, and before a man is put into the position where he has to go to prison because he cannot pay there must be a most careful study of the position of both parties.

Mr. HOGARTH: That is inherent in my remarks.

The CO-CHAIRMAN (*Senator Roebuck*): The division bell is ringing so I suggest that we adjourn right now, but not before I thank Mr. Hogarth in order to get that on the record.

The CO-CHAIRMAN (*Mr. Cameron*): Thank you, Mr. Hogarth, and I am sorry we have not the time in which to do so adequately.

The committee adjourned.

APPENDIX "41"
TO THE SPECIAL JOINT COMMITTEE
OF THE SENATE AND
HOUSE OF COMMONS
on
DIVORCE
COMBINED BRIEF
of
MOTHERS ALONE SOCIETY
ALL LONE PARENTS SOCIETY (ALPS)
CANADIAN SINGLE PARENTS
PARENTS WITHOUT PARTNERS

Vancouver, B. C.
November, 1966

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SUMMARY OF MAIN CONCLUSIONS AND RECOMMENDATIONS

This brief recommends and urges:

1. That the Parliament of Canada enact a "Divorce Act" providing for the comprehensive treatment of all matters pertaining to the dissolution of marriage and containing moderate and realistic grounds for divorce that can be adopted in whole or in part by appropriate legislation in the various legislatures of the Provinces of Canada.

2. That the said grounds provide that a divorce be available as of right to either husband or wife acting as a party Plaintiff who establishes that since the solemnization of the marriage the other:

- (a) Has committed adultery;
- (b) Has deserted the Plaintiff, either actively or constructively for a period of two years or where the evidence is conclusive for such lesser time as the Court may in its discretion deem appropriate;
- (c) Has committed acts of cruelty upon the Plaintiff which have seriously impaired the Plaintiff's mental or physical health;
- (d) Has committed any act of gross indelicacy to which the Plaintiff has not been an active or consenting party and without limiting the generality of the definition of "gross indelicacy" the same shall be deemed to include acts of sexual perversion, homosexuality, lesbianism, bestiality, rape and sodomy;
- (e) Suffers and continues to suffer from an illness of the mind which prevents the subject from honoring his or her marital commitments to the Plaintiff and their children and which said illness has caused the subject to be committed to a Mental Institution for a period of at least two years or which has caused the subject to be repetitively committed to a Mental Institution over a similar period of time;
- (f) At the time of the commencement of the proceedings is serving a term of imprisonment in a Penitentiary and that two years of such sentence has been served.

3. It is submitted that the Courts should have a discretion to grant a divorce to any man and wife who, because of marital discord have been separated for two years or more and who consent thereto; provided, however, the Court is satisfied upon good grounds that:

- (a) The respective spouses have made every effort to rehabilitate their marital relationship and for valid reasons have been unable to do so; and
- (b) The public interest is best served by a dissolution of the marriage; and
- (c) The custody, welfare and maintenance of the infant children have been adequately provided for according to a report to be filed by the Superintendent of Child Welfare (or such other comparative agency that may exist in the particular province in which the proceedings are being heard).

4. A provision that:

- (a) Husbands and wives after separation may acquire a separate domicile in like manner and to like effect as if they were single persons; and
- (b) The Superior Courts of civil jurisdiction of each Province adopting the legislation shall have jurisdiction in all claims for relief under the Act, provided either party is domiciled in that Province.

5. A provision for relief by way of Judicial Separation upon the same grounds that are provided for a dissolution of marriage as of right.

6. A provision for relief by way of decree of nullity of marriage upon the grounds presently existing and with the additional ground of wilful refusal to consummate.

7. A provision that the Court may from time to time, before making its final Order, make such interim Orders and make such provisions in the final Order as it may deem just and proper with respect to the custody, maintenance and education of the children, inclusive of placing them under the protection of the Superintendent of Child Welfare and in addition thereto, permanent maintenance for the wife.

8. A provision that Orders involving custody, maintenance and costs pronounced in any one Province pursuant to proceedings under the Act shall be enforceable in any other Province by the filing of a Court certified copy of the Order in the Superior Court of the latter Province and thereupon such a Judgment or Order should be deemed to be a Judgment of the latter Court.

9. A provision that:

- (a) All Orders pertaining to custody, maintenance and costs include and contain liberty to apply to the Court in which the Order was made or in which the Order is sought to be enforced for a further Order reducing or relieving the Defendant from paying the amount stated therein, provided that until such application is made the said Order be enforceable without the necessity of any shew cause summons or contempt proceedings;
- (b) That a breach of any Judgment or Order made pursuant to the Act pertaining to maintenance or custody would constitute an offence under the Act punishable upon Summary Conviction pursuant to the provisions of the "Criminal Code";
- (c) That all Orders pertaining to the maintenance of a wife and/or children form a first charge on the income and property of the Defendant husband in priority to any other assignment, deduction or set-offs.

INTRODUCTION

10. This brief is submitted on behalf of the following Associations, which are respectively called:

Mothers Alone Society
 Canadian Single Parents
 Parents Without Partners
 All Lone Parents Society (ALPS)

and a brief history of each Association is set forth on Schedule "A" annexed hereto.

11. Each Society was formed independently of the other but their work and objectives are, to a large extent, very similar. Some of the Groups have enlarged their objectives to consider the problems created by the death of a husband or wife and, although these members support this brief in principle the problems of these persons are, of course, not under consideration at this time.

12. As to the majority of members, they have but one matter in their lives in common:

All have suffered the bitterness, loneliness and despair of chronic and acute marital discord; and All have suffered from the unjust and socially anachronistic legislation that prohibits any relief from their tragic predicament.

13. Much might be said by experts in the field of law and social and political sciences that would assist your Committee from the point of view of the general

effect of the existing provisions of the Law pertaining to divorce but no one can be more expert as to the effect that the existing legislation has had on individuals and their children than the subscribers to this brief.

14. Each one has a personal knowledge of the futility of being joined by a marital covenant that has long since ceased to exist, morally, socially, financially, spiritually, physically or emotionally.

15. Each one has a personal knowledge of the endless frustration of trying to achieve relief by way of divorce, custody applications, maintenance proceedings or simple declarations pertaining to proprietary rights or property acquired during marriage when the opposing spouse shows no adulterous inclinations and otherwise has set out to evade and avoid all responsibility towards his or her wife or husband.

16. This brief is expressly designed to avoid a long repetition of personal histories simply upon the basis that the legislators of this Nation must be well aware of the effect of the hopelessly inadequate provision of the existing law.

17. It is accepted at the outset by all the proponents of this brief that stable marriages within the community are the greatest source of the Nation's strength and a bond in which the whole community has an interest; however, the subscribers to this brief proclaim that unjust and unfair laws which prohibit the dissolution of marriages which have no hope of making any contribution to the welfare of the community create bitterness, cynicism and a contempt for the State and Courts which reflects and permeates not only the individual personalities affected, and those that they are in daily contact with, but all fair minded men and women in the community.

18. The subscribers to this brief decry the fact that those who have obtained relief through perjured testimony and commonlaw relationships are, to a large extent, deemed by the public to be justified in their actions because the obstructions that are in their way are the apparent result of religious intolerance and political pressures flowing therefrom.

19. It is frankly submitted that it is commonly felt throughout the Country that the resistance to change is solely due to the political influence of the Roman Catholic Church which holds marriage to be indissoluble. It is said that this influence has been largely expressed through the elected members from the Province of Quebec who are considered in this regard to be the Political Arm of the Church. It is cynically suggested that the political parties of the Nation are prepared to accede to this point of view in order to be assured of support from that Province which has such a large Parliamentary representation.

20. The extent to which this belief is true is a matter of conjecture but the fact remains that it is believed to be true by many Canadians and has probably for years been a substantial contributing factor to disunity between Catholic French speaking and Protestant English speaking Canadians. With the greatest respect to this view, and insofar as it condemns the Catholic Church, its advocates would appear to be out of touch with the contemporary Catholic approach to legislation dealing with the family in the community. To suggest that modern Catholic leaders are anxious to impose upon persons of other religious persuasion their religious principles is erroneous.

21. The modern Catholic approach was well expressed in a recent edition of the "The B. C. Catholic" which reported extracts from a brief presented by the Catholic Bishops of Canada to the House of Commons Health and Welfare Committee studying proposed amendments to Section 150 of the "Criminal Code" which presently bans the sale of contraceptives.

22. On October 13, 1966 it was reported that that brief contained the following remarks:

"The Christian legislator must make his own decision. The norm of his action as a legislator is not primarily the good of any religious group but the good of all society.

Religious and moral values are certainly a great importance for good Government. But these values enter into political decisions only insofar as they affect the common good.

Members of Parliament are charged with a temporal task. They may, and in fact, often will vote in line with what the Church forbids or approves because what the Church forbids or approves may be closely connected with the common good. Their standard always lies in this question:

Is it for or against the common good?

A willingness to honor this truth stressed by the Council and to trust the Christian legislator to fulfill his function in the light of his Christian conscience and his technical competence is the surest pledge of our desire to join with all men of good will in the building of a truly human world open to supernatural and Christian values."

23. Therefore, any impediment that might be said to arise from the suggestion that Roman Catholics in their contemporary approach are dogmatically and diametrically opposed to any divorce reform, is, with the greatest respect, untenable and must be considered to be coming from a reactionary or radical segment.

24. Another factor that might be said to be an impediment to change is the suggestion that adequate change would require the imposition of divorce laws upon the Province of Quebec which may or may not, according to the view of the majority of the people of that Province, desire same and the only alternative to this impasse is to amend the Constitution so that divorce and matrimonial causes come within Provincial jurisdiction. (In this connection see Bill C.41).

25. The subscribers to this brief want and plead for immediate relief. To them there is not time and no necessity to embark upon the intricate and endless considerations that come into play when Constitutional Amendments are being dealt with, particularly when the mechanics of such amendments are in the throes of change themselves.

26. It is submitted that to involve Constitutional questions without necessity is to invite a whole review of the present position of Provincial and Federal Powers which would be endlessly prolonged and would promulgate a problem that demands immediate solution.

27. Therefore, all that is herein contained is directed to the proposition that the majority of Canadians favor reform and reform can take place and should take place immediately without its progress being blocked or delayed by any considerations that do not arise out of the subject matter of divorce and matrimonial causes.

28. It is, therefore, a basic premise of this brief that divorce and matrimonial causes should emanate from the Federal Government in such a way that any Province can accept or reject the legislation in whole or in part as to the grounds for relief and that upon accepting same the Court Orders emanating therefrom for maintenance and custody become summarily enforceable in any other accepting Province.

29. It is felt that the elected legislators are responsible to the people who elected them to keep pace with social and moral changes within the community and to provide laws which reflect the mores of the community without adhering to reactionary pressures brought by any minority group in the community for

purposes of promulgating political power at the expense of the majority or for any other purpose whatsoever.

30. It is further submitted that for the past decade in Canada there has been an increasing concern with respect to the effectiveness of Parliament and among many persons, regardless of their marital status, the failure of Parliament to respond effectively, or at all, to the demands of the community in the field of marriage and divorce and in other allied fields, can be singled out as one of the principal reasons for this dangerous situation.

31. Speaking more specifically about the need for reformation, the exponents of this brief have acted upon certain basic premises with respect to the nature of marriage and marital discord.

32. Firstly, they suggest that it is not to be forgotten that a marital relationship imports responsibilities, objectives and duties and that many persons after entering into marriage by reason of native inability, personality defects, economic considerations and many other factors, absolutely refuse to accept and live up to any of the obligations thereby created.

33. It is further suggested that it is often impossible to detect in any given person the extent to which that person is capable of assuming a competent role in marriage as the defects of such person do not appear until the day to day tensions arise and the increased responsibilities exist.

34. It is further submitted that marriages die; and they die for a multiplicity of reasons of which adultery is probably, in many instances, the most remote.

35. It is further suggested that the theological import of marriage in the modern community is, in many cases, much less now than it was at the time our present divorce laws were formed and the tenets of most churches are compatible with the suggestion that, although it is vital to a happy marriage that it has spiritual and religious aspects, marriage is no longer, from a religious point of view, considered to be indissoluble when its continued existence brings about misery and unhappiness to those who are directly involved.

36. The exponents of this brief further suggest that the failure of a marriage often resolves itself into hatred and bitterness towards the opposite spouse and each will often take any action to prevent the freedom and eventual happiness of the other. In this respect, time and time again, errant spouses have used the law as a device to cause misery, hardship and loneliness merely out of spite and with a spirit of revenge.

37. It is further submitted that many persons remaining parties to a dead marriage could well, if free, remarry without problems and provide a happy and stable home environment for the children of the first marriage and those born of the second.

38. One of the most important elements under consideration is the fact that children reared by a "single" parent are in the main deprived of a balanced home environment by reason of the legal inability of the parent to provide a stable marriage, and the unhappiness, bitterness and lack of proportion and discipline that all too often results, tends to permeate their characters and all too often leads to juvenile delinquency and personality defect.

SPECIFIC COMMENTS ON CONCLUSIONS AND RECOMMENDATIONS

39. Bearing in mind the remarks heretofore made, this brief recommends and urges:

That the Parliament of Canada enact a "Divorce Act" providing for the comprehensive treatment of all matters pertaining to the dissolution of marriage and containing moderate and realistic grounds for divorce

that can be adopted in whole or in part by appropriate legislation in the various Legislatures of the Provinces of the Dominion.

40. The basis of this proposal lies in the suggestion that as much as we might desire an homogeneous Nation, from a social point of view, there are marked differences in the social, religious and cultural attitudes of the people in the various Provinces.

41. In addition, although the Provinces have been precluded from effecting substantive changes in the laws pertaining to divorce, there has emanated from the various Provincial legislatures a Body of Legislation that is closely linked with problems pertaining to marital discord. These are reflected in Provincial Statutes with regard to the equal guardianship of infants, the Marriage Acts, Wives and Children's Maintenance Acts, Wives' Protection Acts, Adoption Acts, Dower Acts, Legitimacy Acts, Married Women's Property Acts and similar Statutes.

42. The above Statutes differ from Province to Province and in each Province they are an integral part of the Social Welfare and Proprietary Rights Legislation and the various programs pertaining thereto that have been accepted and acted upon over the years.

43. Accordingly, this proposal is designed to permit the Provincial Legislatures to determine, within a framework provided by the Parliament of Canada, to what extent the people of any Province should be granted rights to relief in the field of divorce, bearing in mind the present provisions of the ancillary law within the Provinces and the needs and desires of the people.

44. It is felt that the laws of divorce need not necessarily be the same in each Province but all should have a common Constitutional source.

45. The concept embodied in this proposal that Parliament pass legislation for adoption by the individual Provinces as they see fit is not new to Canadian jurisprudence.

46. Both the "Juvenile Delinquents Act" and Part II of the "Narcotics Control Act" are examples of such Statutes.

47. In this way the Federal Government retains broad control from a constitutional point of view over the basic provisions of the law, but at the same time, Provincial Legislatures can be left to determine the extent of its suitability and applicability in any Province.

48. The great advantage of this type of legislation would lie in the fact that there would be a consistency of judicial interpretation of the provisions of the Statute throughout the Nation and, secondly, there would be adequate machinery for the implementation and enforcement of maintenance and custody Orders made pursuant to the Statute.

49. In a sense this concept grants to the Provinces, the powers pertaining to divorce that were originally granted to the Federal Government. Historically, however, the Provinces have always had all or a part of these powers by reason of the failure of the Federal Government to act in the field with the exception of the limited amendments to the Federal legislation.

50. As the Constitution in terms of union in the various Provinces empowers the Provinces to continue with their existing legislative provisions, it is submitted that there is every justification to empower them to adopt or reject, in whole or in part, Federal Legislation when the Federal Legislature chooses to enter the field.

51. This type of legislation gives the Provinces selective control and, at the same time, avoids the necessity of consideration of amendments to the British North America Act.

52. This proposal will greatly concern your Committee in that it might well be said that the Legislature of the Province of Quebec will never adopt any legislation that broadens the grounds for divorce, therefore persons living in Quebec will have no relief whatsoever.

53. The subscribers to this brief are confident in the view that the contemporary approach of French Canadians in Quebec to their own economic, cultural and political problems, and the contemporary view expressed by the Catholic Bishops of Canada (*supra*) would result in the near future in an Act of the Provincial Legislature adopting some part of the Dominion relief provided.

54. This would only be attained, however, by pressure on the legislators of Quebec, brought from within Quebec, and such pressure will only exist when the present system of Parliamentary divorce is discontinued and the problems in this regard in Quebec become acute.

55. A similar, but it is submitted, less difficult, situation would no doubt arise in Newfoundland, but it is suggested that this Province would not take long in providing the appropriate machinery for the implementation of all or part of the Statute.

56. As an alternative, and as a compromise only, a part of the proposed legislation could provide for a form of Parliamentary or Exchequer Court divorce for persons domiciled in any Province of Canada that had not adopted any of the provisions of the Federal Legislation. It would be then up to the Parliament of Canada in a sense to select what grounds it would deem adequate for the minority interests of the people in these Provinces, however, this alternative is not advocated by the proponents of this brief.

57. It has always been an anomalous function of Parliament that it should be active in the Judicial field of Matrimonial causes and it is respectfully suggested that the Parliament of the Nation should only provide the legislation in which the judiciary can act.

That the said grounds should provide that a divorce be available as of right to either husband or wife acting as a party plaintiff who establishes that since the solemnization of the marriage the other:

- (a) Has committed adultery;
- (b) Has deserted the plaintiff, either actively or constructively for a period of two years or where the evidence is conclusive for such lesser time as the court may in its discretion deem appropriate;
- (c) Has committed acts of cruelty upon the plaintiff which have seriously impaired the plaintiff's mental or physical health;
- (d) Has committed any act of gross indecency to which the plaintiff has not been an active or consenting party and without limiting the generality of the definition of "gross indecency" the same shall be deemed to include acts of sexual perversion, homosexuality, lesbianism, bestiality, rape and sodomy;
- (e) Suffers and continues to suffer from an illness of the mind which prevents the subject from honoring his or her marital commitments to the plaintiff and their children and which said illness has caused the subject to be committed to a mental institution for a period of at least two years or which has caused the subject to be repetitively committed to a mental institution over a similar period of time;
- (f) At the time of the commencement of the proceedings is serving a term of imprisonment in a penitentiary and that two years of such sentence have been served.

58. In dealing with the proposed grounds upon which a dissolution of marriage might lie, it should be noted that the proponents of this brief suggest that there should be two bases upon which divorce might be granted:

- (a) Divorce as of right arising out of marital misconduct on the part of the other spouse; and
- (b) A divorce in the discretion of the judiciary where each party consents and separation has taken place for a period of time and the interests hereinafter mentioned have been served.

59. This brief rejects the suggestion that the concept of matrimonial offences be discarded in its entirety, principally because of the imposition upon the Defendant in a divorce action of drastic consequences pertaining to maintenance custody and costs, and it is felt that these consequences should not be imposed without fault on the part of that person.

60. In short there is no justice in imposing upon a husband or wife the loss of the pleasure of their children, and upon the husband, high maintenance and costs, unless that spouse has done some act which is offensive in nature and which could be said to have brought about the Judgment or Order made.

61. It is further suggested that the rules of law pertaining to connivance, collusion and condonation and the discretionary relief when each spouse has been guilty of a matrimonial offence would continue to exist and be applicable to the various and sundry grounds proposed, although the import of these factors would, of course, in the main be obviously diminished.

62. Therefore, in the light of the above remarks, some comment might be made on each of the individual grounds:

ADULTERY

63. It is submitted that it is generally recognized that when adultery occurs during the course of marriage its far reaching adverse consequences upon the marriage are sufficient to warrant a dissolution. As adultery is now an acceptable ground for divorce, it is not anticipated that your Committee would ever recommend that it be discarded. It is, therefore, not the intention of the proponents of this brief to elaborate on this particular ground.

64. The defect in the concept that it be the only ground for divorce lies principally upon two premises:

- (a) No relief can be granted until proof of adultery can be established and this proof is often extremely difficult to obtain; and
- (b) Adultery does not as a general rule take place until after the separation of the spouses and after each has acknowledged that they have no intent of resuming their commitments under their marital bond.

65. There can be no doubt that adultery has serious consequences insofar as the marital bond is concerned, but the proponents of this brief find it almost ludicrous that an errant husband could commit many forms of sexual perversions short of adultery, inclusive of indecent assault on his wife and female children, acts of homosexuality and the like and yet only when he participates in one single natural act of sexual intercourse with someone not his wife a divorce is available (Provided of course his wife can prove the adultery).

DESERTION

66. All the pending bills which propose to broaden the grounds of divorce anticipate a desertion for some period of time as a basis upon which relief should be granted.

67. The proponents of this brief would suggest that both active desertion and constructive desertion as they are presently judicially defined be considered grounds, and that the prevailing judicial definitions of desertion would be utilized in determining the right to relief with respect to this particular ground.

68. It is suggested that desertion is probably the most prevalent matrimonial offence and the most realistic basis upon which a matrimonial bond should be dissolved.

69. If desertion is defined as the voluntary withdrawal from cohabitation by one spouse without excuse and contrary to the wishes of the other and that conclusive evidence exists to the effect that there is no intention of that spouse to return or endeavor to return, it is the suggestion of the proponents to this brief that there should be no necessity for any two year period or other period that the legislature might decide to lapse before relief can be granted.

70. One of the most drastic consequences of desertion is that it is almost always coupled with a withdrawal of support and a withdrawal of any exercise of parental control over the children. In addition there is always the factor of the evasion of the husband (should he be the deserter) to meet any responsibility in this regard, and it is respectfully submitted that a study of the work of any Family Court in a Metropolitan Area of the Nation would, in the vast majority of cases, indicate that desertion of one spouse by the other is the most prevalent matrimonial offence.

71. The results that flow from marital desertion by either spouse could be endlessly enumerated in this brief and it is submitted, are certainly extensive enough to be recognized as a form of social illness within the community.

72. Few people who are not engaged in Family Court work, Welfare work or Police work can truly appreciate the loneliness, bitterness and despair of a deserted wife who finds herself frustrated at very turn in endeavoring to obtain support from a husband whose whereabouts are unknown or, alternatively, who shifts from job to job, from place to place, without any regard whatsoever to his financial responsibilities. In addition to that, deserted wives are constantly faced with the argument that the cost incurred by the husband in keeping himself separate from his family, the vast accumulation of debts that occurred during the marriage and after the break-up thereof, and the limited source of income of the husband, makes it impossible for him to contribute substantially to the support of his wife and children.

73. More often than enough, many of the debts accumulated during the marriage have been guaranteed in good faith by the wife at the outset of the marriage and she is constantly called upon to pay from her limited resources, payment on these debts and economic recovery is almost completely impossible from any practical point of view.

74. In addition to this, the responsibility of raising children, particularly as they approach their teenage years, imposes upon a deserted wife an almost impossible task from a disciplinary, moral and economic point of view.

75. Recognizing the need of stable home environment for children and the need of some consistent source of support, together with their own emotional needs, many wives have sought out commonlaw relationships and even bigamous marriages to relieve them from their predicament.

76. These relationships, however, are inherently unstable and can eventually lead to tragic conclusions not only with regard to the parties themselves, but particularly with respect to the children.

77. An adequate solution to the problem of desertion, be it by the wife or the husband, would clearly lie in granting to the deserted spouse a divorce,

freeing them to marry on a more stable basis and consequently establishing a far healthier home environment for themselves and their children.

78. Although the above remarks emphasize the position of the deserted wife, the predicament of the deserted husband is probably, from many points of view, equally intense.

79. A husband who has been deserted faces extensive problems with regard to the care of his children and is often put to a fantastic expense to re-establish them in a home situation where their daily needs are properly met.

80. This brief further suggests that desertion does not normally occur until all the try and try again programs designed to rehabilitate the marriage have been exhausted.

CRUELTY

81. It seems inconceivable to the subscribers to this brief that a modern community would demand that a marital bond be sustained without cohabitation when cohabitation brings about a danger to the physical and mental health of the wife, and very often a similar danger to the physical and mental health of the children.

82. One of the dangers of broadening the grounds of divorce to include cruelty lies in the suggestion that the Judiciary might accept as a basis of cruelty the most trivial acts which could not, in any sense of the definition of the word, be considered to be cruel.

83. This could be guarded against by the insistence upon medical evidence showing the consequence of the acts deemed to be offensive.

84. It is respectfully suggested that a great many of the acts of cruelty which occur in marriage are the result of chronic alcoholism and are very often coupled with acts of desertion from time to time and, it is submitted, that the ground of cruelty and the ground of constructive desertion have very much in common in this regard.

GROSS INDECENCY

85. It is anomalous to the subscribers to this brief and certainly it must appear anomalous to the members of your Committee that sexual acts not encompassed within the definition of "adultery" pursued on an extra-marital basis consisting of the most flagrant perversions have never been grounds for divorce except those defined in certain Provinces as rape, sodomy and bestiality committed by a husband.

86. Homosexual and lesbian practices and sexual perversion, arising out of neurosis are as clearly immoral as the commission of an act of adultery and surely must be conceded to have the same effect on a marital bond.

87. The immorality of the nature of these acts is grossly amplified when they are perpetrated upon the female members of the family of the husband, including his wife, and it is appalling that divorce could not lie as a consequence thereof.

88. It is conceded that behaviour of this nature is perhaps relatively rare or, at least appears to be relatively rare, and possibly does not warrant extensive or detailed discussion, but in consideration of the subject matter of this brief these matters should not be overlooked or ignored as though they did not exist in the community or were not present in many cases of marital discord.

MENTAL ILLNESS

89. A considerable amount of time in the preparation of this brief was spent with regard to the problem of mental illness and the extent to which it should form a ground for divorce.

90. This ground has already been accepted in the English Jurisprudence (see proceedings Appendix IV) and is seen throughout the bills that have been proposed and are under consideration by your Committee.

91. The proposal that this brief suggests is somewhat different from that contemplated by the English Jurisprudence in that it does not contemplate a divorce upon this ground without the committal of the subject to a mental institution.

92. It is hoped that your Committee would consider any person suffering from incurable mental illness of an intensity sufficient to warrant his (or her) committal to an Institution, for all intents and purposes incapable of carrying out any of the obligations of the marriage, and similarly, incapable of embracing any of its benefits.

93. The loss of a spouse through divorce would be completely inconsequential to an incurably insane person.

94. It is submitted that one of the real problems that will confront your Committee will lie in endeavoring to define what is meant by the words "incurable mental illness" "incurably of unsound mind" or "unsound mind and unlikely to recover" and other similar descriptions as they appear in the various bills proposed and no doubt will be referred to in other briefs presented.

95. It is felt by this Committee that incurable mental illness or unsoundness of mind, such as epilepsy, can well come within these definitions, but at the same time, because it only on occasion prevents the subject from honoring his or her marital commitments, should hardly be considered a ground for the dissolution of the marriage.

96. Similarly, many mental illnesses can be well controlled by the use of drugs and it could hardly be said that such illnesses have been cured and, at the same time, they are sufficiently under control to permit the person sufficient control to be free in the community.

97. The subscribers to this brief felt that treatment for a mental illness taken by a husband or wife outside of a mental institution should not form a ground for a divorce as it apparently does in the English Legislation (see proceedings Appendix IV).

98. It is submitted that many persons are reluctant in the first instance to acknowledge that their abnormal conduct may be the first symptoms of the onset of incurable mental illness and if taking treatment or seeking medical advice pertaining to their condition were later to be used against them to establish that the incurable illness which eventually developed began at a particular time when they sought treatment, is part of a ground for divorce, such treatment would probably, in the first instance, in many cases be vigorously refused.

99. It is therefore suggested in this brief that there should be no ground for divorce unless a committal to a Mental Institution has taken place and unless the mental illness is of such an extent that it prohibits the patient from carrying out his (or her) marital commitments and that the committal and the condition have existed for a period of at least two years.

100. It is further suggested, and the experience of some of the subscribers to this brief, that many persons suffering from mental illness can go through repetitive committals to Mental Institutions and never become cured of their

sickness. These committals may last for periods of up to three or four months and are often coexistent with out-patient treatment and long periods on tranquilizing drugs.

101. It is therefore suggested that, where repetitive committals have taken place over a period of two years and the illness is such that it prevent the patient from honoring his or her commitments in the marriage, a dissolution of the marriage should be available to the other partner.

102. The Committee suggests that, if a husband or wife was aware that a committal to a Mental Institution might bring about a dissolution of their marriage, it would encourage such person to seek medical treatment at an early stage in the condition and nothing in the Legislation, it is suggested, should discourage this course of action.

PENAL SERVITUDE

103. Almost all the pending bills contemplate this form of conduct, to some extent, to form a ground for divorce.

104. An interesting observation was made by The Honourable Mr. Justice Walsh at the second sittings of your Committee:

“If the home is broken up while they are in prison, there is not much chance of rehabilitating them. That has to be weighed in the balance, the wife who has suffered as a result of her husband’s criminal career, as against the possibility of redeeming him.”

(see Tuesday, June 28, 1966, page 31)

105. The exponents of this brief contend that any wife or husband who seeks divorce on this ground is not likely prepared, regardless of any event, to be a person who would wait patiently for the return of her spouse to assist in the “possibility of redeeming him”.

106. Those that would be of assistance for this purpose would never divorce their husbands in the first instance because of their committal to prison and the suggestion that a woman must wait so she can assist in the rehabilitation of her husband upon his return to the community and is disallowed the right to rehabilitate her own marital situation and that of the children is somewhat divorced from reality.

107. It may be that your Committee would choose to specify the dissolution of marriage on this ground should only lie if the penal servitude has been for certain particular offences and some consideration might be given to this aspect of this ground.

108. It would be anomalous indeed if a man, sentenced to five years for fraud, found himself subjected to divorce proceedings at the end of the first two years of his imprisonment when all the proceeds of the fraud had been used to purchase expensive gifts for his wife.

It is submitted that the courts should have a discretion to grant a divorce to any man and wife who, because of marital discord have been separated for two years or more and who consent thereto: provided, however, the court is satisfied upon good grounds that:

- (a) The respective spouses have made every effort to rehabilitate their marital relationship and for valid reasons have been unable to do so; and
- (b) The public interest is best served by a dissolution of the marriage; and

- (c) The custody, welfare and maintenance of the infant children have been adequately provided for according to a report to be filed by the superintendent of child welfare (or such other comparative agency that may exist in the particular province in which the proceedings are being heard).

109. It is intended that this suggestion introduce a ground of divorce by mutual consent. It is interesting to note that as this brief is being prepared, a recommendation to this effect has been made by the Law Committee to the House of Commons in England.

110. In giving consideration to the history of divorce, Cartwright and Lovekin in their work on "The Law and the Practice of Divorce in Canada" (Third Edition) note that in the Civil Law a mutual consent was always a ground for divorce. They note further that under the Roman Law it was unthinkable to compel an unwilling party to marriage and just as unthinkable to compel an unwilling party to remain married. The authors quote "the Laws of Justinian" and mention that such laws permitting divorce by consent were not those of a pagan community, but those of a Christian Empire.

111. It must be conceded that in our contemporary community many marriages die for no other reason than the parties are basically and fundamentally incompatible. In these instances where often mature and morally responsible people are involved each spouse has tried and tried again to rejuvenate the affection and respect that each once held for the other or that each once thought they held for the other.

112. The husband, recognizing his obligation, provides adequate maintenance and support and each spouse shares as much respect and affection for the children as more happily married persons.

113. Often separation has taken place simply because the tensions of home life are reflecting adversely upon the children and the parties decide that in the interests of the welfare of their children it is best that they live separate and apart.

114. In these cases no heinous matrimonial offence has taken place. Neither party has shown a propensity towards immoral conduct which would lead to adultery and each, on many occasions, might well have strong moral and religious reasons why this should not be done.

115. Both the husband and wife in this particular situation might well desire to remarry and there is no reason to suspect that a new home so created could not be a happy one.

116. It is difficult if not impossible, to see what interest the State might have in the promulgation of this marital bond.

117. It is admitted that the State has an interest in the preservation of marriage; however, it is difficult to see what possible interest the State could have in endeavoring to re-unite or preserve the bond between two people who have absolutely no intention of resuming cohabitation.

118. This brief submits that each should be freed from their marital bond, providing all the ancillary obligations, such as custody, maintenance and property interests have been dealt with and each accepts and consents to the divorce.

119. This may appear to be a somewhat radical step but as much as it may be said to be radical, it must also be admitted that it is an honest step.

120. If divorces as of right can be obtained upon the commission of matrimonial offences without regard to the interests of the State and without a true

regard to the provisions for custody and maintenance, surely a discretionary divorce with consent should be available after all ensuing matters have been dealt with by agreement.

121. The important factor in considering this proposed ground is to emphasize that the divorce would be entirely discretionary. Discretionary divorces are a part of our present law when each party to the litigation has committed a matrimonial offence.

122. It is anticipated and suggested that the evidence that would support a divorce of this nature would, of necessity, involve a report from the Superintendent of Child Welfare in the same manner that is supplied in British Columbia under the provisions of the "Adoption Act" to ensure that a dissolution of the marriage would have no adverse effect on the children and would be for their ultimate benefit.

123. It is further suggested that the Court might be given the power to dispense with the consent of a spouse if the Court is of the opinion that the consent has been unreasonably withheld or is being withheld merely through spite or for no just cause whatsoever. It is submitted that if the Courts have the power under the various adoption acts to dispense with the consent of a mother and, in some instances, a father, to the adoption of a child, it is not too radical, a view to suggest they have the power to dispense with consent to a dissolution of marriage when the marriage is dead and one person merely wishes to keep it alive in name only for no just cause.

A provision that:

- (a) Husbands and wives after separation may acquire a separate domicile in like manner and to like effect as if they were single persons; and
- (b) The superior courts of civil jurisdiction of each province adopting the legislation shall have jurisdiction in all claims for release under the act, provided either party is domiciled in that province.

124. This relief has been partly provided by the Divorce Jurisdiction Act of 1952 and is contemplated in part in some of the bills presently pending before Parliament.

125. It is submitted that a modern society acknowledge the equal rights of women before the law and there is little or no justification for suggesting that a wife should take her husband's domicile any more than there is for the suggestion that the husband should take a wife's domicile.

126. It is suggested that after separation a married woman should be acknowledged to be legally entitled to retain her then existing domicile or to acquire a separate domicile of her choice in like manner and to like effect as if she were a single person.

127. Since World War II the movement of persons from Province to Province has become increasingly prevalent and it is not unusual for a person to acquire several domiciles in a life-time.

128. Similarly, after separation, it is not unusual for one party to move from one Province to the other and the criticism of the Divorce Jurisdiction Act in this regard lies in the fact that a domicile can well be established by a departing spouse without desertion and well within a two year period.

129. It is not contemplated in this brief that the rule of law that a divorce should be obtained in the Province of one's domicile is to be abrogated.

130. It is submitted that legislation of this nature should permit a husband or wife to seek recourse to the Courts of his or her own domicile and should claims for relief be commenced in separate Provinces by each, the husband and

the wife, those proceedings commenced second in time should be stayed until the first action is disposed of.

131. This brief anticipates that the Superior Courts of each Province adopting the legislation would have the jurisdiction in all claims for relief under the Statute, assuming, of course, that the party Plaintiff or Defendant was domiciled within that Province.

132. It is further anticipated, of course, that each Province would be free to establish in their rules of Court the particular procedures for divorce and matrimonial causes as is done in those Provinces with divorce courts at this time.

133. The proponents of this brief do not advocate that there be special divorce Courts or that divorce proceedings have any lesser degree of proof or formality than actions for damages in the Superior Courts of the Provinces.

134. As this brief is designed to endeavor to make divorce Orders, particularly with respect to maintenance and custody, enforceable in each Province of the Nation it is felt that it is desirable that the Judicial determinations take place in Courts of equal status throughout the Country.

A PROVISION FOR RELIEF BY WAY OF JUDICIAL SEPARATION

135. This cause of action which already exists in British Columbia is, with the greatest respect, considered to be almost completely useless save insofar as it is a judicial vehicle by which to obtain an injunction for the preservation of person or property. The end result of the action, however, rarely proves to be worth the legal expenses involved in having determinations of this nature in the Supreme Court.

136. The relief that would normally be brought in such proceedings can for the main part be readily obtained under the British Columbia Equal Guardianship of Infants Act, Wives and Children's Maintenance Act, Married Women's Property Act, Wife's Protection Act, and under Section 717 of the "Criminal Code" and the expensive Supreme Court proceedings completely avoided.

137. It is suggested, however, that some persons who have religious aversions to divorce or for those Provinces which might prefer merely to adopt this part of the Federal Legislation, some relief should be afforded to them by the inclusion of this cause of action which, it is suggested, should be based upon the same grounds as the divorce as of right.

A PROVISION FOR RELIEF BY WAY OF DECREE OF NULLITY

138. This brief proposes that all matters pertaining to the ceremony of marriage be omitted from Federal Legislation and the form and particulars thereof be left entirely in the hands of the Provinces as set out in Section 92(12) of the "B.N.A. Act". It further suggests that the present Provincial Statutory provisions for the settlement of disputes arising during marriage when same do not arise in divorce proceedings can be left entirely in the hands of the Provinces. In this regard it is submitted that such legislation as the Equal Guardianship of Infants Acts, Wives and Children's Maintenance Act, Married Women's Property Act, etc., continue to remain in effect as above noted.

139. However, it is urged that provision, for decrees of nullity be provided for in Federal Legislation on both the void and voidable basis that presently exist in the Provinces affected by the English Act of 1857.

140. In addition to this it is submitted that an additional ground should be added providing that a marriage might be deemed voidable upon it being established that there is a wilful refusal to consummate.

A provision that a court may from time to time before making its final decree make such interim orders and may make such provisions in the final decree as it may deem just and proper with respect to the custody maintenance and education of the children, inclusive of placing them under the protection of the superintendent of child welfare and for the maintenance of the wife.

141. This provision already exists in the Divorce and Matrimonial Causes Act of the Province of British Columbia.

142. It is felt that no legislation in the field of divorce can possibly be left devoid of granting to the Court appropriate powers to deal with these important aspects of the problem.

143. It is respectfully submitted that no constitutional question could possibly arise with respect to the inclusion of these matters in divorce legislation as they are necessary and incidental component of any claim for relief in divorce legislation.

144. It is emphasized again that this brief anticipates that there would be uniformity of judicial decisions pertaining to custody and maintenance and that Orders pertaining thereto would be enforceable in any Province of Canada and, therefore, the Constitutional authority for such processes should have its common ground in Federal Legislation.

145. It is anticipated that the present prevailing Judicial decisions pertaining to custody and maintenance would continue to apply and the root of such a provision in the Federal Statute would lie in very similar provisions to those found in the English Act of 1857.

A provision that judgments and orders for custody maintenance and costs pronounced in any one Province pursuant to proceedings under the Act shall be enforceable in any other Province by the filing of a Court certified copy of the judgment or order in the Superior Court of the latter Province and thereupon such judgment or order shall be deemed to be a judgment of the latter court.

146. It is respectfully suggested that at the present time the reciprocal enforcement of maintenance or judgment statutes that exist in many Provinces are cumbersome in their procedural aspects and create delays and difficulties that make recovery of maintenance provisions or enforcement of custody orders obtained in any divorce decree or similar order very difficult.

147. For instance, considerable amount of difficulty can be entailed arising out of the situation where the husband is given the custody of his children by virtue of a divorce order or decree in British Columbia and the wife, in complete contempt of such proceedings, spirits the children of the marriage off to Ontario or Nova Scotia, leaving the husband with only a cumbersome and difficult remedy to endeavor to have the children returned.

148. Similarly, the present procedure whereby maintenance orders must pass through the hands of the respective Attorneys-General of the Provinces before they can be enforced in a Province other than the one in which they were granted, creates long delays in their enforcement and often frustrates the very purpose for which the reciprocating acts were designed in the first instance.

149. It is respectfully suggested that if divorce, maintenance and custody orders are made by the Superior Courts in each of the Provinces and same are based on a common constitutional source the mere registration of a judgment in one Province from a Court in another Province should be a sufficient step to enforce the relief in the latter Province.

A provision that:

- (a) All orders pertaining to custody, maintenance and costs include and contain liberty to apply to the court in which the order was made or in which the order is sought to be enforced for a further order reducing or relieving the defendant from paying the amount stated therein, provided that until such application is made the said order be enforceable without the necessity of any shew cause summons or contempt proceedings:
- (b) That a breach of any judgment or order made pursuant to the Act pertaining to maintenance or custody would constitute an offence under the Act punishable upon summary conviction pursuant to the provisions of the "Criminal Code":
- (c) That all orders pertaining to the maintenance of a wife and/or children form a first charge on the income and property of the defendant husband in priority to any other assignment, deduction or set-offs.

150. The proponents of this brief urge and insist that some teeth should be put in the laws of Canada pertaining to effecting the collection of maintenance payments owing to wives and children by errant husbands.

151. At the present time in British Columbia the methods of enforcement of maintenance orders coupled in the divorce decrees issued by the Supreme Court leave much to be desired.

152. In directing suggestions in this regard same might be forwarded as much to the Provincial Legislature as the Federal Parliament, however, it is to be pointed out that the Federal Parliament has the power to establish the legislation on a National basis which would make same enforceable in each Province of the Country.

153. In many instances in British Columbia today where wives are seeking claims for a dissolution of their marriage from their husbands they will forego their right to relief in the Supreme Court proceedings insofar as maintenance for their children is concerned in favor of bringing maintenance proceedings for their children under the Wives and Children's Maintenance Act where the Police Court or Family Court procedures are summary, less expensive, and in a sense more effective.

154. The principal defects in the enforcement of maintenance orders lies in the fact that, before enforcing such orders, either in a divorce decree or under the Wives and Children's Maintenance Act, the husband must first be called upon to come before the Court and shew cause as to why the money should not be paid.

155. It is a basic suggestion of this brief that this is an entirely unnecessary step and that the ability to pay should be presumed to exist so long as the order is outstanding and that the burden of securing relief from the amount prescribed in the order be placed upon the husband who can make the appropriate application before arrears arise or immediately upon the happening of the event that might bring them about.

156. It is felt that if a husband could be imprisoned for non-support by reason of his disobeying an order for maintenance a far greater effort would be made by most errant husbands to provide the necessary funds to meet the order, as the present law permits them to attend Court and offer any number of excuses as to why the order, in the first instance, was too high and as to how their debts and other liabilities have accumulated since their departure from the matrimonial home, making payment impossible.

157. Although maintenance orders are enforceable in British Columbia by registration in the District Land Registry Office against any title to properties that the husband might own it is not until a substantial sum of arrears arises that it is worthy of taking proceedings by way of execution process to realize on these funds and these processes become, in themselves, expensive and costly items for a wife who has been deserted to bear.

158. If the failure to make any one payment were deemed to be a summary conviction offence, there would be far fewer deserted wives on social welfare and the work of present welfare agencies and Family Courts substantially reduced.

159. In addition thereto, as you will note, it is suggested that orders pertaining to the maintenance of the wife and/or children should form a first charge on the income of the husband in priority to any other assignment, deduction or set off.

160. Nowhere has such legislation been more effective than when pronounced by the respective Governments of the Country in their favor with regard to effecting the deduction at source of income tax, workmen's compensation board assessments, unemployment insurance commissions and the like, and it is respectfully suggested that maintenance orders for wives and children should be of equal import to the legislators of this Nation.

161. The mere registration of a certified copy of a maintenance order issued in divorce proceedings with an employer of the husband should be sufficient to establish that the employer henceforth holds any wages that would normally become payable to the husband in trust for the recipients under the maintenance order.

162. The proponents of this brief are unable to estimate the number of persons at the present time in Canada who are recipients of welfare payments and who have been deserted by husbands who are using every conceivable method to avoid living up to their responsibilities to their deserted wives and children.

163. It is respectfully suggested that if some stringent and effective legislation were enacted on the Federal level, the welfare payments in the Dominion of Canada collectively would be remarkably reduced and the burden of paying these sums imposed upon those who should be meeting same in the first instance.

SUMMATION

164. This brief does not purport to be a comprehensive consideration of all the problems that confront your Committee.

165. Broadly speaking, it agrees with the concept that marital stability is created by mature preparation for marriage, adequate sources of counsel and advice during marriage, together with a genuine desire of each spouse to remain married to the other and an ability to adjust and accept the imperfections of the other when same appear.

166. It is further based upon the premise that mature persons who marry have a natural and human desire to form happy unions with their respective spouses, each accepting on a give and take basis, the imperfections of the other.

167. It is submitted, however, that when divorce proceedings are taken by either spouse, same are not a symptom of an unhappy marriage or an unstable relationship, they are the end result of the marriage and that all attempts to rehabilitate a marriage at this latter stage are in the main useless and, therefore, divorce proceedings except in exceptional cases should be final in their effect.

168. Divorce proceedings, it is contended, are the funeral of a marriage and not a symptom of its illness. Rarely are such proceedings taken without the parties having embarked upon exhaustive programs for rehabilitation as neither, as a general rule, likes to admit that the marriage is a failure.

169. It is submitted that if a marriage is dead it is in the best interests of the Community that it be buried and that legislation should, in the main, be directed to the finalization of the arrangement and should be devoid of unrealistic and altruistic attempts to force cohabitation between two persons who have long since by reason of the conduct of one or the other concluded that same is impossible.

170. The above remarks are not to suggest that the Provinces should not be encouraged to provide, in their educational and welfare programs, expert advice and assistance for young persons to prepare them for marriage and to married persons to encompass all fields of marital matters.

171. This brief suggests that in most Provinces, educational and welfare machinery is already in existence that could and, to some extent, is, active in this field, but that because of the drastic change that would be necessary for the Federal Government Agencies to be formed on this level to enter into the matter, it is best left in the Provincial field at this time.

172. It is equally inconceivable to the subscribers to this brief that modern divorce legislation should be enforced in Courts or in legislative bodies that do not have ready access to the assistance of welfare agencies on a local level that can supply to the Court valuable and cogent evidence and opinion with regard to the important aspects of maintenance and custody of children.

173. Courts or legislative bodies such as the Exchequer Court sitting in Ottawa to hear Quebec and Newfoundland divorces or the Parliamentary Committees with regard to same, it is submitted, would tend to act in a vacuum far removed from the area where the direct and important evidence is readily available and must be taken into consideration if appropriate orders for all aspects of the dissolution of marriage are to be given consideration.

174. Accordingly, considering all the foregoing, this brief was designed and prepared and is respectfully submitted in the hope that our legislators will see that its objective is to further social justice and stability of family institutions and to bring about the relief of persons who find themselves in the dire straits of marital discord.

All of which is respectfully submitted.

Dated at Vancouver, British Columbia, this 24th day of November, A.D. 1966.

DOUGLAS AIRD HOGARTH, Esq.

Counsel on behalf of
Mothers Alone Society
Canadian Single Parents
Parents Without Partners, and
(ALPS) All Lone Parents Society

SCHEDULE "A"

MOTHERS ALONE SOCIETY

The Society was formed on the 18th of February, 1966 and was formerly called the "Society for Women Only".

Its basic formation was brought about when a number of women who found themselves divorced, separated or deserted felt that by joining together and forming this Association, a great deal of mutual assistance could be offered each to the other by sharing their common problems.

The general objectives of the group are to bring about improved welfare conditions for a deserted parent and the children of the marriage, to bring about enforcement of the Wives and Children's Maintenance Act through improved administration in the Family Court and to bring about more realistic divorce laws in the Dominion of Canada.

The group has been constantly active in endeavoring to offer constructive suggestions for an improvement in the Family Court in Vancouver and anticipates presenting a brief to the Department of Attorney-General in this regard.

At the present time there are thirty-five active members who live principally in the Lower Mainland of British Columbia.

PARENTS WITHOUT PARTNERS

This is an international non-profit, non-sectarian educational organization which is devoted to the welfare and interests of single parents and their children.

The Vancouver Chapter (No. 153) was formed in October, 1964 and the present membership is approximately sixty.

The meetings are held on the first and third Wednesday of each month¹ at the Cambie Street Y.M.C.A. in Vancouver and a social evening is held on the third Saturday of each month.

The activities of the Group include parent-child activities, coffee hours and other social events.

Eligibility for membership in Parents Without Partners is confined to "single" parents who, by reason of death, divorce find themselves alone.

Membership in any one Chapter involves membership in the other Chapters so that assistance, when out of the City, can be obtained if it is required.

ALL LONE PARENTS SOCIETY (ALPS)

This Association was formed in April, 1965. Its membership is principally derived from the City of Vancouver and there are now sixty-eight active members.

The Group is incorporated under the "Societies Act" and makes extensive efforts to provide recreation and social events for its members and their children.

The educational aspects of the Association's functions consist of meetings at which guest speakers are invited to assist them and advise on the various common problems that confront them

The objects of the Society are quite numerous, but generally it is designed to bring together single parents and their children so that they may benefit from the knowledge and assistance of persons with similar problems and thereby enrich their lives and those of their children.

All the members of these various societies have found that, by discussing the problems with which they are faced with other persons who find themselves in similar circumstances, a great deal has been accomplished to give them a mature and proper perspective of their position and guidance and assistance as to sources of relief and help.

CANADIAN SINGLE PARENTS

This Association was formed in the Spring of 1965. The Charter Members were a group of persons who were formerly associated with Parents Without Partners.

The Group now has a total membership of seventy-two men and women. Of this membership, sixteen are widowed, thirty-four are divorced and twenty-two separated from their respective spouses.

The objects of the organization are very similar to those of the other Societies, principally to be of help to fellow members by group discussions with regard to the problems of raising children in a single parent home and other similar problems.

They also plan family activities of a nature that a single parent cannot provide and carry out a social program for the adult members.

The Association has four meetings per month. Two of these meetings are business meetings, one is a family activity meeting and the other is an adult social evening.

The organization meets in Vancouver, but its membership is not restricted to people of that city.

APPENDIX "42"

Brief submitted by the majority members of a Committee appointed by the Bar of Montreal to examine into the question of divorce.

BRIEF ON DIVORCE

The following brief on divorce and the social and legal problems relating thereto, with particular reference to the Province of Quebec, is respectfully submitted to the Special Joint Committee of the Senate and House of Commons on Divorce (the "Joint Committee") on behalf of those members of the Bar of Montreal who have practical experience with divorce matters in the Province of Quebec. While this brief is submitted with the knowledge and consent of the Bar of Montreal, it is not to be construed as representing the views of the Bar of Montreal, the majority of whose members is not in favour of divorce.

In accordance with the directions contained in the "Guide for Submission of Briefs and Participation in Hearings" furnished by the Joint Committee a summary of the main conclusions and recommendations of this brief is as follows:

Conclusions: The law of divorce applicable to persons domiciled in the Province of Quebec insofar as jurisdiction, grounds, procedure and the consequences thereof are concerned is unsatisfactory.

Recommendations:

1. The Federal Parliament should enact legislation under Head 26 of Section 91 of The British North America Act

- (a) providing as grounds for divorce the following: adultery, cruelty, desertion, unsoundness of mind and conviction for certain indictable offences;
- (b) providing as ancillary and necessarily incidental to its jurisdiction over matters of marriage and divorce, for the matters of
 - (i) custody of children where that matter has not previously been settled by final Judgment of a court of the Province of Quebec; and
 - (ii) alimony for support of the wife and minor children in her custody where the wife is the successful plaintiff in divorce proceedings, save insofar as the matter of alimony for such children may have been previously specifically determined by judgment of a court of the Province of Quebec;
- (c) providing, *inter alia*, that the Exchequer Court of Canada shall have jurisdiction within the Province of Quebec for all purposes of such Act; and
- (d) providing further that the date of the dissolution of the marriage would be the date of the judgment of the Exchequer Court, subject to the right of the losing party to appeal to the Supreme Court of Canada within thirty days of the date of such judgment and the right of the successful plaintiff to desist from such judgment at any time within the same delay of thirty days.

DIVORCE IN THE PROVINCE OF QUEBEC

Introduction. It has been stated recently before the annual meeting of the Canadian Bar Association in Winnipeg that "Canada is the most backward country in the English and French speaking world in legislation relating to divorce." If by "backward" it is meant to indicate the gap between the law and

the views and wishes of a majority of the electorate, the statement may well be an accurate assessment of divorce legislation insofar as the greater portion of the English speaking populace of the country is concerned. It is not, however, accurate for the majority of residents of the Province of Quebec who, by reason of religious conviction, do not accept or condone the institution of divorce. The Civil Code of the Province of Quebec continues to satisfy, insofar as can be informally determined, the view of the majority of the people of the Province of Quebec in providing in Article 185 that: "Marriage can only be dissolved by the natural death of one of the parties; while both live, it is indissoluble."

As the law applicable to the Province of Quebec includes federal statutes enacted within the jurisdictional confines of Section 91 of the British North America Act, divorces arising through legislative action of the Federal Parliament, and latterly by the Senate alone, are recognized as valid. Indeed while the institution of divorce may not be recognized or contemplated by the Civil Code, divorce leads to such civil law consequences as the dissolution of community of property which may have existed between the consorts as well as the termination of the mutual obligations of the husband and wife contracted by the mere fact of their marriage. Such obligations include the support due the wife by the husband during marriage.

Significant is the increasingly apparent disposition on the part of the chief religious discipline of the Province to recognize the rights of persons who do not subscribe to the religious views of the majority to avail themselves of recourses open to residents of other jurisdictions including, it is understood, the recourse to divorce.

Basis for Conclusion. The single conclusion set forth in the preface to this brief was that the law of divorce, in its varied aspects, as applied to persons domiciled in the Province of Quebec, is entirely unsatisfactory. The premises which in our view lead to such a conclusion are as follows:

(a) *Procedure:* While the current system of having the Senate act alone in providing legislation by resolution represents a distinct improvement over the pre-existing system, it remains unsuitable for the following reasons:

- (i) *It should be a judicial and not a legislative process.* Although tempered by the role of a Judge of the Exchequer Court acting as a Commissioner, the current system remains in essence, a legislative process. The Senate Divorce Committee for example, is by no means obliged to accept the recommendation of the Commissioner, nor for that matter is the Senate obliged to follow and accept the recommendations of the Senate Divorce Committee. Authority to question the Commissioner and even to hear further evidence exists. In circumstances of controversial evidence, it is still conceivable that persons would be expected to render judgment on evidence and points of law who have no experience or specialized education for such tasks.
- (ii) *The procedure is inefficient.* Under the current system, proceedings upon filing are carefully studied by a clerical staff which brings to the prompt attention of offending attorneys, any deficiencies in the documentation or procedure. The Commissioner on hearing the evidence, which may or may not be transcribed by the court stenographer present, then makes a written report in the form of a recommendation to the Senate Divorce Committee. The latter reports and makes recommendations in due course to the Senate and a resolution may then be adopted dissolving the marriage. A period for appeal then commences and while, to the best of our knowledge, no appeals have as yet been taken, the procedure provided is too cumbersome to contemplate, involving a petition, draft bill and full parliamentary treatment by both Houses and Royal Assent.

- (iii) *The procedure is too costly.* Several years ago, the Senate Divorce Committee adopted the practice of asking Petitioners the total costs of their proceedings. We are not aware of the consensus obtained but feel that costs to the Petitioners questioned may have been higher than acknowledged, it being highly unlikely that a final account would have been received as of the time of hearing. We would venture to say that the average cost of divorce proceedings is approximately \$1,500 today. Mr. E. Russell Hopkins, Law Clerk and Parliamentary Counsel to the Senate, in his excellent address to the Joint Committee in its first session cited an amusing yet tragic tale of a hawker convicted of bigamy in circumstances where it was evident that he was too poor to be able to afford a divorce. The judgment concluded by suggesting wryly that England was not a country in which there was one law for the rich and one for the poor. We fear that this grim tale might be told with as telling sociological significance a century later insofar as divorce for persons domiciled in the Province of Quebec is concerned.

The Parliamentary divorce system and latterly the Senate resolution system is, however, by no means completely to blame for the high costs of divorce. The factor of necessarily travelling to Ottawa for witnesses and counsel certainly increases the costs. The change to a system involving hearings within the Province of Quebec might reduce costs by approximately \$400. It is also ironic to consider that while service of a subpoena, accompanied by payment of expenses for travel may in theory oblige the recipient to attend a hearing, he or she need not answer any questions, according to the standing evidence rule, if the answers relate to any adultery which may have been committed by such witness. While never morally condoned, what is the basis for regarding admissions of adultery as quasi incrimination? We are also of the view that the subpoena provisions are unrealistic in that a proper penalty system for persons who fail to respond to subpoenas does not exist.

The minor expense of notices in the Official Gazette of Canada might usefully be eliminated, the justification for such requirement being somewhat obtruse at this juncture, more especially in the view of the fact that the requirement of notices in local newspapers was dispensed with several years ago. A substantial reduction could also be made to the currently exorbitant filing fee. We see no justification for a fee of \$210 being required and feel it could be reduced without great economic significance to the order of \$25.00. Another major factor contributing to high costs is the necessity of negotiating, drafting and implementing as many as three agreements in many instances to secure the wife's position, the explanation for this situation being set forth under the heading "Particular Problems of Quebec Petitioners." Before leaving the subject of costs, we would like to make the observation that, in general, the fees charged by Quebec practitioners are not out of line with those generally charged by attorneys in Ontario for example. The fees in most divorces run from about \$600 to \$800. When it is considered that a major part of the attorney's time is spent negotiating and drafting agreements by reason of civil law complexities and not on the drafting of the proceedings or pleading of the case itself the fees are not, as far as we can determine, out of line by any means with fees charged elsewhere.

- (iv) *The appeal system is unrealistic.* If the costs of divorce proceedings for the petitioner are accepted as being too high, consider the plight of the respondent who feels that the conclusion has been erroneous,

the evidence inconclusive and who wishes to appeal from the resolution of the Senate. A contested divorce proceeding is extremely costly in itself but the machinery of appeal would surely deter all but the very wealthy. The fact that an appeal might be taken suggests that such a case, for reasons of law and/or evidence, would merit close scrutiny, preferably by persons with some legal training. It is perhaps not presumptuous to suggest that what with rigorous parliamentary and extra parliamentary duties it might prove very difficult to find suitable members of both Houses to establish the committee which would be required to consider the evidence on an appeal.

- (v) *General criticism of procedure.* As a closing observation on the subject of procedure we should like to make a general criticism of the role of and administration or procedure by the Senate Divorce Committee and the various officials concerned.

The trend in most jurisdictions of the world is away from formalism. In this regard we note the language of Article 2 of the new Code of Civil Procedure of the Province of Quebec which provides

"2. The rules of procedure in this Code are intended to render effective the substantive law and to ensure that it is carried out; and failing a provision to the contrary, failure to observe the rules which are not of public order can only affect a proceeding if the defect has not been remedied when it was possible to do so. The provisions of this Code must be interpreted the one by the other, and, so far as possible, in such a way as to facilitate rather than to delay or to end prematurely the normal advancement of cases."

In our view the exact reverse has been the practice of officials in charge of supervision of procedural matters in parliamentary divorce and not infrequently to the prejudice of clients. We do not wish to be more specific in this regard but suggest that consideration be given to a relaxation of the present formalism in the rules and application of procedure.

- (b) *The current grounds are inadequate.* It appears to be a widely held view that the exclusive ground of adultery, having its origin in biblical injunction, is entirely unsatisfactory being, it has been argued, but a very minor cause of marriage failures. If we consider the currently well publicized concept of "the marriage breakdown" as warranting consideration, it would appear that adultery is in fact a minor contributor.

Under the current system it is open to the Senate to grant a divorce for any ground that it may see fit. The prospect of a divorce being granted for any ground other than adultery is, however, extremely remote, when one considers not only precedent but the fact that the Act under which the Senate is currently authorized to dissolve or annul marriages (1963 12 Eliz. II) provides that the officer designated by the Speaker of the Senate (i.e. the Commissioner) "shall not recommend that a marriage be dissolved or annulled except on a ground on which a marriage could be dissolved or annulled as the case may be, under the laws of England as they existed on the 15th day of July, 1870, or under the Marriage and Divorce Act, Chapter 176 of the Revised Statutes of Canada, 1952." The scope for recommendation under the latter restrictions would extend only to adultery of husband or wife (the so called "double standard" having been removed by the Marriage and Divorce Act of 1952) insofar as divorce is concerned. It would require great fortitude and a fine disregard for costs to take divorce proceedings under the current system on any ground other than adultery.

Our concept of the meaning and application of the recommended grounds is as follows:

1. *Adultery*: No change is recommended in the current law respecting this ground, save and except that the provisions of Section 5 of the Marriage and Divorce Act of 1952 should apply to the petition of the husband as well as to that of the wife. That section as it presently stands, and in the absence of such precedent as would require the application of similar provisions to petitions of the husband, quite properly provides that the court "is not bound to pronounce a decree declaring such marriage to be dissolved where the wife may have been guilty of adultery, of unreasonable delay in presenting the petition, cruelty towards the husband, having deserted or wilfully separated herself from the husband before the adultery without reasonable excuse, or of such wilful neglect or misconduct as has conduced to the adultery."

2. *Cruelty*: We have perused with great interest the remarks of E. Russell Hopkins, Esq., concerning the interpretation by the courts of England of the word "cruelty" as a ground for divorce. The jurisprudence reviewed by Mr. Hopkins seems to indicate that the common denominator for all instances in which cruelty has been recognized as a ground for divorce in England has been actual or reasonable apprehension of possible damage to the health of the petitioner. He stated, however, that "legal cruelty" had been broadly defined in England "as conduct of such character as to have caused danger to life, limb or health (bodily or mental) or as to give rise to reasonable apprehension of such danger."

We wish to express concern as to the apparent scope recognized for cruelty or "mental cruelty" as a ground for divorce in certain of the states of the United States. With the greatest respect of English jurisprudence and our possible misinterpretation of the evidence of Mr. Hopkins, it is our impression that under English law a divorce could be granted in circumstances of mere reasonable apprehension of mental damage. We can conceive of actual mental damage resulting from a form of actual cruelty which could justify a divorce but wish to make clear an objection to extending the ground of cruelty to any circumstance in which mere apprehension of mental damage would be sufficient.

3. *Unsoundness of Mind*: Here we would subscribe to the concept recognized by the courts in England subject to the proviso suggested by Mr. Justice Allison Walsh in his evidence before the Joint Committee to the effect that should the Petition be taken by the husband, adequate financial provision be made for the continued treatment and welfare of the insane spouse. In essence this ground may be relied upon where either spouse is incurably of unsound mind and has been under care and treatment during a period of at least five years immediately preceding the presentation of the petition.

4. *Desertion*: Once again we would refer with approval to the review presented by Mr. Hopkins of the jurisprudence of the English courts concerning the meaning of the word "desertion" as a ground for divorce. The essential requirements would be the fact of separation and a forsaking. The latter element was expressed as being not so much a withdrawal from a place but from a state of things. There must be an evident will to desert in addition to the physical fact of separation.

The period of separation resulting from such desertion should, in our view, be of not less than three years duration immediately preceding the commencement of proceedings leading to a divorce.

5. *Conviction for certain indictable offences*: In Mr. Hopkins' review of English jurisprudence, the subject of conviction for offences resulting in one of the spouses being sent to prison was raised in the context of "involuntary

desertion." It was stated that under current English law said circumstances would not lead to a finding of desertion. In our view conviction to the following indictable offences should constitute grounds for divorce: sodomy, bestiality, rape, bigamy. In addition, we are of the view that any conviction to imprisonment of twenty years or more or as a "habitual criminal" should constitute grounds for divorce.

Jurisdiction: The foregoing paragraphs purported to provide cursory elucidation for Recommendation 1(a) of this brief. Items 1(b) and (c) dealt with issues of jurisdiction. Our views in this latter regard are as follows.

Ideally, one court, a court of the Province of Quebec, would not only have jurisdiction to decide whether or not satisfactory evidence has been established warranting the granting of a divorce but would also have, as vitally ancillary thereto, jurisdiction over matters of custody, alimony and settlement of property rights as well. Public policy of the Province of Quebec being opposed to divorce, we cannot foresee legislation emanating from the provincial legislature in the immediate future covering such vital matters. It is our view that in the absence of such provincial legislation the Parliament of Canada should and could enact legislation ancillary to these subjects in order to protect the rights and interests of those who are affected by a divorce granted with respect to persons domiciled in the Province of Quebec.

The Exchequer Court of Canada should be given exclusive jurisdiction in respect of all matters pertaining to divorce in this province and this should be accomplished whether or not Recommendation 1(b) is followed. In our understanding, it is now the view in certain ecclesiastical, political and legal circles of this Province that as valid divorces may be granted under the laws of Canada to persons domiciled in the Province of Quebec, it would be better to have the courts of this Province charged with determining evidence. While public policy might not extend, at this date at least, to admit of amendments or additions to the Civil Code to recognize divorce and provide for its consequences, it might be appropriate at some future date to authorize, by delegation of federal authority, a Quebec court to have concurrent jurisdiction with the Exchequer Court of Canada to hear and determine applications for divorce. The social, political and legal ramifications of this question have not been researched however and thus no specific recommendation can now be made in this regard.

Particular Problems of Quebec Petitioners: Divorce practice in the Province of Quebec presents certain problems which can only be overcome by ancillary legislation action of the Parliament of Canada.

The chief problem is how to validly provide for and secure a property settlement and payment of alimony subsequent to the divorce when under the law of the Province of Quebec the consorts are by Article 1265 of the Civil Code precluded from benefitting each other during marriage except under the terms of a marriage contract and, the husband's obligation of supporting the wife terminates upon the dissolution of the marriage.

In essence, no agreement entered into between the spouses relating to alimony or property settlement prior to the divorce becoming final can be relied upon as being legally binding although there are theories as to such justifiable considerations for such an agreement as "fault" which are as yet untested by the courts. There is jurisprudence sanctioning an advance agreement as to the contents of the respective halves of the community of property which would be dissolved upon divorce but this is of limited and particular application. Practical solutions to this problem involve varied ways and means of assuring that the husband will in fact execute a similar agreement after divorce, in notarial form, usually in order to be completely safe by reason of the possible gift aspect. Such procedure is fraught with risk even for the knowledgeable practitioner and pity

the poor female who, with an inexperienced practitioner at the helm, proceeds to a divorce only to find too late that there is no means by which she can oblige her divorced spouse to provide for her support. We have all heard of such cases.

It is certainly in the interests of innocent children, the consorts and society at large to ensure an equitable property settlement and assurance of post-divorce support. If the parties are themselves desirous of accomplishing these ends, should not the law serve such objectives. As long as the court is satisfied that the agreement is not really an ill-conceived inducement to one of the parties to take divorce proceedings constituting thereby a breach of public order, there should be no objection. There is certainly no objection on the grounds of public policy to an agreement being entered into after the divorce.

The solution to these foregoing problems might ordinarily lie with the legislature of the Province of Quebec, relating as it does to the field of property and civil rights but if the federal law of divorce is to be updated, it seems logical and equitable that these special problems be dealt with in virtue of the ancillary powers of the Parliament of Canada.

It is appreciated that the constitutional law aspects of enacting valid federal legislation dealing with the foregoing matters, not to mention inhibiting political considerations which we must realistically note, render the likelihood of prompt action unlikely. It is with the foregoing considerations in mind that we make Recommendation 1(d) providing for an appeal period of thirty days, the successful plaintiff being able right up to the last day of the period for appeal to desist from the judgment rendered. In this way a notarial agreement respecting property settlement and alimony matters could be concluded at a date which would be, in virtue of the effective date of the dissolution of marriage, after the dissolution of marriage. We believe that in this fashion, the greatest hazard for petitioners domiciled in Quebec would be resolved.

As a further recommendation, applicable while Recommendation 1(b) is not enacted, we would suggest that a great deal of hardship could be averted if, as part of the procedure in hearing current divorce applications, the Commissioner would assure himself that where minor children are involved, there is either a final judgement establishing custody and visiting rights or that the parties have at least entered into a written agreement respecting this matter. Many wives now proceed with petitions without such matters having been settled formally, proceeding on the belief that the husband has accepted the status quo in this regard and that no difficulties will likely ensue. In the vast majority of cases there is no difficulty but we are aware of a case requiring the use of habeas corpus which arose from a post-divorce dispute respecting custody which went to the Supreme Court of Canada for final disposition. The law of the Province of Quebec is to the effect that once a divorce has been granted, both parties in effect have legal custody and therefore neither can be said to be "detaining" a child illegally. Thus all a husband, or for that matter the wife, need to do in such circumstances is remove a child without authorization from the factual custody of the other and there is no recourse save a direct action in custody which might take a considerable period of time before final disposition. As the Civil Code does not contemplate divorce, so the new Code of Procedure does not provide any machinery for an expeditious disposition of a post-divorce custody dispute. The child rarely benefits from such parental "tugs of war."

CONCLUSION

The "disintegrating marriage" is a very real if lamentable feature of the increasingly complex sociological relationships of this century. For better or for worse, divorce is provided for by the laws of the land. From the foregoing we trust it is evident that the law of divorce for the Province of Quebec requires

extensive and immediate revision. The casualties of divorce, the consorts and the children, suffer enough from the very circumstances which lead to applications for divorce and it would seem that the role of the law should be to provide a recourse where the bonds of matrimony have become insufferable, in the context of specific grounds, plus protection for the rights and well being, insofar as is possible, of the innocent. It should be guided by a concept of responsibility under which the guilty party, as it were, will not unwittingly be rewarded for his transgressions by termination of certain of the major obligations arising from marriage.

We would be pleased to provide such elucidation with respect to this brief as the Joint Committee may require.

Montreal, January 19, 1967.

APPENDIX "43"

Minority report submitted by Bernard M. Deschênes, Q.C.,
member of a Committee appointed by the Bar of Montreal
to examine into the question of divorce.

BRIEF ON DIVORCE

This brief on divorce with its legal and social implications, more particularly with reference to the province of Quebec, is respectfully submitted to the Special Joint Committee of the Senate and House of Commons with the cognizance and consent of the Montreal bar. The proposals which are submitted hereafter cannot, however, be interpreted as representative of the opinions of the Montreal bar.

Bernard M. Deschênes, Q.C.

For the great majority of the citizens of the province of Quebec, the family is the sole valid basis of society and anything which may threaten the security of this social unit is essentially bad. That is why marriage is there considered indissoluble and divorce "*a vinculo matrimonii*" a destructive system.

Our law, however, recognizes the fact that unfortunately many couples are unable, for numerous reasons, to continue living together. That is why the system of legal separation is worked out in such detail. This system makes provisions for all the consequences of separation, especially the decision of the judge as to the custody of the children, rights to visit them and take them out, alimony for the spouse and children, and also the decision on matter pertaining to the separation by contract or even to judgment on matters of contractual obligations. It is the real divorce "*a mensa et thoro*".

However, the religious and social principles of a large proportion of our population urge us not to exceed this limit and thus allow the dissolution of the matrimonial bond. Although the consequences of the separation are usually harmful to the married couple, the children and society, we are far from convinced that remarriage is a worthwhile solution to this state of affairs. On the contrary, in most cases, the unfortunate results of the separation will be so much the more aggravated. The economic problems will be even more numerous! The children will be even more disturbed by the arrival of a third or even a fourth unfamiliar person in the family circle. All hope of reconciliation, slight as it may be in many cases, will disappear!

However, divorce "*a vinculo matrimonii*" does in fact exist for the people of Quebec. That is a hard fact. On the other hand, those who are not prepared to permit the dissolution of the matrimonial bond in their own cases should allow this right to those who do not share our religious and social convictions just as they are preparing to allow it in the case of purely civil marriage which will shortly be introduced into our legislation.

When we declare that divorce is an evil in itself, we are stating that it is an existing evil and one that we must confront in an effort to restrict it as much as possible. It is in this spirit that we propose the following recommendations:

1. The grounds at present recognized by the Canadian Senate should not be extended. We acknowledge that adultery is a serious offense which one of the partners may commit against the other. However, we are not prepared to accept

the objection which is often raised in order to justify the extension of the grounds for divorce, namely, that the proof of adultery is often faked or fabricated for the purpose of obtaining a divorce, and we refer you to the evidence given by the Honourable Judge A. M. Walsh on page 31 of your discussions where he arrives at the conclusion that "in only 5 or 10 % of the total number of cases *may* the proof be faked".

2. In the province of Quebec, jurisdiction in the hearing of divorce cases should be delegated to the Superior Court. This is the tribunal which already normally deals with all proceedings of a matrimonial nature. The judges on its bench are familiar with the social background of the parties and represent the principles which motivate the population as a whole. They are certainly more fitted to pass judgment on this delicate matter than a judge from another province sitting on the bench of the Exchequer Court would be.

It is true that the Honourable Judge Walsh who at present hears a large proportion of the cases originating in the province of Quebec is a native of that province, and we should give him tribute for carrying out his duties with insight and understanding.

But if the jurisdiction for hearing the cases originating in the province of Quebec was entirely entrusted to the Exchequer Court, there would be no guarantee that only the judges of this court who are aware of our particular problems and of our matrimonial law in general would be called upon to pass judgement on those cases.

On the other hand, the Superior Court would have the immense advantage of being able to deal at the same time with the consequences of the divorce as it now does in cases of legal separation. The judge would then be called upon to decide on the family problem as a whole and he would certainly be in a better position to decide on the divorce himself if he was also aware of all the side-issues and all the consequences.

Furthermore, in our desire to find the best possible solution to this problem, we would add that if ever a real family court were created it would be advisable to place the jurisdiction of divorce cases in its hands too.

The opinion has often been expressed that the Quebec legislators would never accept such a delegation of authority to the Superior Court. We submit that to date no serious attempt has been made in this direction and that neither the civil nor religious authorities would shy away from the idea of studying the problem and accepting the responsibilities it involves.

3. As a corollary to this delegation of authority to the Superior Court, it would be necessary to introduce into the Civil Code the right to alimony in the case of divorce as in that of legal separation, but only until remarriage occurs. In fact, this right of one partner relation to the other does not apply in the case of a divorce pronounced by the Senate. However, our tribunals maintain the right of an allowance for the children.

4. The Federal Government should not legislate on divorce except in matters concerning the grounds for divorce. We are familiar with the opinion that the provincial legislature alone cannot make valid amendments to the Civil Code in the matter of marriage, except as regards the ceremony, but we are unable to endorse it. In any case it would certainly not be appropriate and it is more than doubtful whether such a law would be valid if the federal authority legislated on matters ancillary to the divorce such as the custody of the children, the alimony and the settling of the rights of ownership. It would definitely be more logical for the provisions of the Civil Code relating to legal separation to be extended to cover divorce cases.

APPENDIX "44"

SUBMISSION
to
THE SPECIAL JOINT COMMITTEE
of the
SENATE AND HOUSE OF COMMONS
on
DIVORCE
by
THE MANITOBA BAR ASSOCIATION

24th. January A.D. 1967

CONTENT

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 - (A) Prologue
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 - (D) Grounds for Divorce

I PREFACE

The Manitoba Bar Association at the invitation of the Chairman of the Joint Committee struck off a special committee to prepare a brief.

The members of the committee were:

Mr. Harold Kemp Irving, Q.C., Chairman
Mr. Joseph O'Sullivan, B.A. LLB.
Mr. Joseph J. Wilder, B.A. LLB.
Mr. Rudolph Anderson, B.A. LLB.
Mr. Stephen J. Skelly, LLB. (Hons.)

The Brief is presented as an unanimous report with an addendum by each member who desired to do so, setting forth his own definition of Grounds for Marriage Breakdown.

As is the case with most committee work this Brief though presented as an unanimous report was the result of some compromise of views on the part of each of the members. Each member had very strong personal views but where a conflict of ideas arose, a way was sought to obtain an agreement. We were not always successful. This Brief sets forth those areas where it succeeded.

III SUMMARY OF RECOMMENDATIONS

A. Prologue

B. That bona fide residence of the Petitioner be sufficient to grant the court jurisdiction to hear a petition for dissolution of marriage.

C. That a Federal Marriage Act be proclaimed wherein all civil ceremony marriages must be performed by a civil ceremony then the marriage may have a religious ceremony in a church of their choice.

D. That a dissolution of marriage be granted on evidence of a marriage breakdown.

IV SUGGESTED REFORMS

A. Prologue

As far back as 1946 as evidenced by the Minutes of the annual meeting of that year the Canadian Bar Association on a motion by Judge Fuller and seconded by Mr. Coyne adopted the following Resolution:

That it is advisable to amend the Dominion Divorce Laws to give the courts in addition to such grounds as already existed for granting dissolution, the following grounds:

- (a) Desertion without cause for a period of at least three years;
- (b) Gross cruelty;
- (c) Incurable unsoundness of mind existing for at least five years;
- (d) Upon legal presumption of death

and that provision be made that the legislation should be effective only in such provinces as may, by legislation action, adopt the same.

That was passed in 1946 and we are now entering the year 1967, and we still do not have any changes in our Divorce Laws. The Law on Divorce which we now have is based on the Matrimonial Causes Act of England passed in 1857 with the amendments as they stood at July 15, 1870.

Meanwhile, in England, A. P. Herbert, was able to introduce a Bill which amended the grounds for divorce incorporating in 1937 similar grounds to those set forth in the Canadian Bar resolution of 1946 and in England there have been amendments since 1937 as required which is the usual course of most living legislation.

The act of 1857 though dead in England still rules here.

B. Jurisdiction

It is common ground that the concept of domicile as applied to Canada with each of the ten provinces being considered as foreign country, one to the other is a cumbersome concept. The concept of domicile developed in England where nationality and jurisdiction for divorce purposes are one, becomes divisive in Canada and distorts the original concept of domicile thus working an unnecessary hardship upon Canadians. It is equally true, that Canadian domicile as such, is a concept which cannot be administered as readily as English domicile and there are many difficulties inherent in a Canadian domicile, and it would tend to detract from those Provincial rights which have now become firmly entrenched in the Canadian Constitution. It is therefore submitted that residence be substituted for domicile in order to give jurisdiction to a court. It is also submitted that the simplest method of doing this, is to amend the present Divorce Jurisdiction Act, by widening the meaning of residence and by this simple method allowing those Provinces to which it is applicable to have the right to hear matters of divorce where bona fide residence is established. This would also further the cause of equal rights for women.

C. Marriage Act

It is further submitted that there is a present difficulty in Canada dealing with divorce grounds because the marriage itself is not a purely civil matter. It is a mixture of religious and civil matters. This is so because in the first instance, although the State grants the Licence to marry it recognizes marriage ceremonies performed by different religious bodies. However, the state only recognizes a divorce granted by it. The state in granting the divorce becomes a party to a breach of faith where a party marries under certain church vows and then allows the State to dissolve the marriage on grounds contrary to the marriage ceremony. This difficulty could be avoided it is submitted, if the marriage ceremony in Canada be changed by a Federal Marriage Act so that all marriages, in order to achieve validity under the State Laws, must comply with the State regulations as to marriage, and every marriage would need go through a civil ceremony before this marriage would be recognized by the State, and once this marriage took place, then each couple could, according to their belief, enter into a religious ceremony of their own choosing. The state then would in its' dissolution of marriage only deal with that ceremony over which they have complete jurisdiction, and they would dissolve the State marriage, and not be in the position of interfering with religious beliefs.

D. Grounds for Divorce

It is also submitted that the grounds for divorce be widened. It is the submission of the Committee that adultery and cruelty and desertion are only symptoms of difficulties in a marriage and that a healthy marriage could survive these symptoms and more and therefore need not in themselves be grounds for dissolution. But where there is a complete breakdown of a marriage, even if those symptoms do not appear, dissolution should be allowed. For it is agreed that a marriage relationship which fosters hate and immorality, which in turn breeds hate and immorality, in the children or others in the family, affects the community as a whole. This is not to say that allowing the dissolution of a marriage where it has broken down will be a panacea to the ills of the community, but it does recognize that this is an unhealthy situation which should be dissolved as it does not promote the health and welfare of the community as a whole.

The marriage breakdown itself is a concept that is very difficult to define. But a definition must be arrived at in order to allow the courts to adjudicate upon the matter. The definition we have adopted is that put forward by Douglas F. Fitch as set forth in the Canadian Bar Journal Volume 9 No. 2 April 1966 issue Page 92 and is as follows: Permanent breakdown of marriage shall be proven by evidence that either:

- (a) The Petitioner and Defendant have separated and thereafter have lived separate and apart for a continuous period, except for a period of co-habitation of not more than two months that reconciliation as a prime purpose, of not less than three years immediately preceding the date of the granting of the decree and there are no reasonable grounds for believing that there will be reconciliation or
- (b)
 - 1. The Petitioner and the Defendant have separated and thereafter having lived separately and apart for a continuous period of not less than one year immediately preceding the date of the granting of the decree and there are no reasonable grounds for believing that there will be a reconciliation, and
 - 2. The Defendant has been guilty of adultery or has during the period of not less than one year habitually been guilty of extreme cruelty.

All of which is respectfully submitted by the Manitoba Bar Association.

Mr. Fitch's definition above referred to was agreed upon by the Committee as a whole, but it did not reflect the opinions of the individual members accurately and it was decided that each member would be allowed to add to the definition and their individual additions are appended hereto.

ADDENDUM OF R. ANDERSON

I would recommend that a marriage breakdown evidenced by a separation of one year, there being no reasonable grounds for believing that there will be a reconciliation, would constitute a marriage breakdown and the Court having jurisdiction could grant a dissolution of the marriage.

ADDENDUM OF S. J. SKELLY

I sincerely believe that marriage breakdown is the ultimate basis for relief in divorce actions. I do not think it is possible to give a precise definition of marriage breakdown. All we can say is that a marriage has broken down when it is no longer possible for the parties to live together as husband and wife and when the marriage is no longer any benefit to society and to the parties to that union (including the children).

Consequently I do not consider that the grounds for relief suggested in the brief constitute a definition of marriage breakdown, they are tests for marriage breakdown. The suggestion has the merit that it does not rely solely on the matrimonial offence and therefore brings relief to a larger number of people. I do, however, feel that given the normal interpretation of "separated" i.e. by consent, there is no provision to cover the situation where there has been desertion. I would suggest therefore, that either desertion for 3 years prior to the petition be added as a ground, or the separation ground be expanded to cover this.

(I would respectfully refer you to the brief which I have personally submitted to your committee where I have proposed a wider breakdown ground, paras. 18-28. There is also a discussion of the disadvantage of combining marriage breakdown and offence grounds, paras. 36-40, and a discussion of marriage breakdown, *per se*, paras. 43-56)

OFFICIAL REPORT OF MINUTES
OF
PROCEEDINGS AND EVIDENCE

This edition contains the English deliberations and/or a translation into English of the French.

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Translated by the General Bureau for Translation, Secretary of State.

LÉON-J. RAYMOND,
The Clerk of the House.



First Session—Twenty-seventh Parliament 1966-67

1966-67

PROCEEDINGS OF
THE SPECIAL JOINT COMMITTEE OF THE SENATE
AND HOUSE OF COMMONS ON

DIVORCE

No. 17

TUESDAY, FEBRUARY 21, 1967

Joint Chairmen

The Honourable A. W. Roebuck, Q.C.
and

A. J. P. Cameron, Q.C., M.P.

WITNESSES:

- (1) *The Unitarian Congregation of Don Heights, Scarborough, Ont.*: Reverend Kenneth Helms, F. Stewart Fisher, Barrister at law.
- (2) Professor Julien D. Payne, Faculty of Law, University of Western Ontario.

APPENDICES:

- 45.—Resolutions passed at the 4th Annual Meeting of the Canadian Unitarian Council in Winnipeg on May 8, 1965.
- 46.—Brief by Professor Julien D. Payne.
- 47.—Article by Christopher Lasch entitled *Divorce and the Family in America*.
- 48.—Article by Douglas F. Fitch entitled *As grounds for divorce let's abolish matrimonial offences*.
- 49.—Article by Donald J. Cantor entitled *The right of divorce*.
- 50.—Article by B. D. Inglis entitled *Divorce reform in New Zealand*.
- 51.—Article by R. T. Oerton and A. R. Green entitled *Marriage breakdown*.
- 52.—Article by G. R. B. Whitehead entitled *Divorce reform in Canada*.
- 53.—Article by Neville L. Brown entitled *Cruelty without culpability or Divorce without fault*.
- 54.—Article by David R. Mace entitled *Marriage breakdown or Matrimonial Offense: A clinical or Legal approach to divorce*.
- 55.—Article by Patricia M. Webb entitled *Breakdown versus fault—recent changes in United Kingdom and New Zealand divorce law*.
- 56.—Article by William Latey, Q.C. entitled *Divorce Law in Australia—federal uniformity*.
- 57.—Article by W. Kent Power entitled *Marriage and Divorce—United Kingdom—Royal Commission on Marriage and Divorce—Some points of interest for Canada*.
- 58.—Article by Zelman Cowen and D. Mendes Da Costa entitled *Matrimonial causes jurisdiction: The first Year*.
- 59.—Article entitled *Divorce—Australian statute establishes uniform federal law for marital actions—Matrimonial Causes Act 1959, Act No. 104 of 1959 (Austl.)*.

ROGER DUHAMEL, F.R.S.C.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1967

MEMBERS OF THE
SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS
ON DIVORCE

FOR THE SENATE

A. J. P. Cameron, Q.C. (*High Park*), *Joint Chairman*

The Honourable Senators

Aseltine	Connolly (<i>Halifax North</i>)	Flynn
Baird	Croll	Gershaw
Belisle	Denis	Haig
Burchill	Fergusson	Roebuck—(12).

FOR THE HOUSE OF COMMONS

A. J. P. Cameron, Q.C. (*High Park*), *Joint Chairman*

Members of the House of Commons

Aiken	Forest	McQuaid
Baldwin	Goyer	Otto
Brewin	Honey	Peters
Cameron (<i>High Park</i>)	Laflamme	Ryan
Cantin	Langlois (<i>Mégantic</i>)	Stanbury
Choquette	MacEwan	Trudeau
Chrétien	Mandziuk	Wahn
Fairweather	McCleave	Woolliams—(24).

(Quorum 7)

ORDERS OF REFERENCE

Extracts from the Votes and Proceedings of the House of Commons: March 15, 1966:

"On motion of Mr. McIlraith, seconded by Mr. Hellyer, it was resolved—that a Special Joint Committee of the Senate and the House of Commons be appointed to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either House;

That 24 Members of the House of Commons, to be designated by the House at a later date, be members of the Special Joint Committee, and that Standing Order 67(1) of the House of Commons be suspended in relation thereto;

That the Committee have power to engage the services of such technical, clerical and other personnel as may be necessary for the purpose of the inquiry;

That the Committee have the power to send for persons, papers and records, to examine witnesses, to report from time to time, and to print such papers and evidence from day to day as may be ordered by the Committee, and that Standing Order 66 be suspended in relation thereto; and

That a Message be sent to the Senate requesting Their Honours to unite with this House for the above purpose, and to select, if the Senate deems it so advisable, some of its Members to act on the proposed Special Joint Committee."

"By unanimous consent, on motion of Mr. McIlraith, seconded by Mr. Hellyer, it was ordered—That the order of the House of Monday, February 21, 1966 referring the subject-matter of the following bills to the Standing Committee on Justice and Legal Affairs, namely:—

Bill C-16, an Act to provide in Canada for the Dissolution of Marriage (Additional Grounds for Divorce).

Bill C-19, An Act to provide in Canada for the Dissolution and the Annulment of Marriage.

Bill C-41, An Act to amend the British North America Acts, 1867 to 1965, (Provincial Marriage and Divorce Laws).

Bill C-44, An Act to provide in Canada for the Dissolution of Marriage.

Bill C-55, An Act to provide in Canada for the Dissolution of Marriage.

Bill C-58, An Act respecting Marriage and Divorce.

Bill C-79, An Act to amend the Dissolution and Annulment of Marriages Act (Additional Grounds for Divorce).

be discharged, and that the subject-matter of the same bills be referred to the Joint Committee of the Senate and the House of Commons on Divorce."

March 16, 1966:

"By unanimous consent, on motion of Mr. Stewart, seconded by Mr. Byrne, it was ordered—That the subject-matter of Bill C-133, An Act to extend the grounds upon which courts now have jurisdiction to grant divorces a *vinculo matrimonii* may grant such relief, be referred to the Special Joint Committee on Divorce."

"By unanimous consent, on motion of Mr. Stewart, seconded by Mr. Byrne, it was ordered—That the subject-matter of Notice of Motion No. 11 be referred to the Special Joint Committee on Divorce."

March 22, 1966:

"On motion of Mr. Pilon, seconded by Mr. McNulty, it was ordered—That a Message be sent to the Senate to acquaint Their Honours that this House will unite with them in the formation of a Joint Committee of both Houses to inquire into and report upon divorce in Canada, and that the Members to serve on the said Committee, on the part of this House, will be as follows: Messrs. Aiken, Baldwin, Brewin, Cameron (*High Park*), Cantin, Choquette, Chrétien, Fairweather, Forest, Goyer, Honey, Laflamme, Langlois (*Mégantic*), MacEwan, Mandziuk, McCleave, McQuaid, Otto, Peters, Ryan, Stanbury, Trudeau, Wahn and Woolliams."

LÉON-J. RAYMOND,
Clerk of the House of Commons.

Extracts from the Minutes of the Proceedings of the Senate:

March 23, 1966:

"Pursuant to the Order of the Day, the Senate proceeded to the consideration of the Message from the House of Commons requesting the appointment of a Special Joint Committee of the Senate House of Commons on Divorce.

The Honourable Senator Connolly, P.C., moved, seconded by the Honourable Senator Roebuck:

That the Senate do unite with the House of Commons in the appointment of A Special Joint Committee of both Houses of Parliament to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either House;

That twelve Members of the Senate, to be designated at a later date, act on behalf of the Senate as members of the said Special Joint Committee;

That the Committee have power to engage the services of such technical, clerical and other personnel as may be necessary for the purpose of the inquiry;

That the Committee have the power to send for persons, papers and records, to examine witnesses, to report from time to time, and to print such papers and evidence from day to day as may be ordered by the Committee, and to sit during sittings and adjournments of the Senate; and

That a Message be sent to the House of Commons to inform that House accordingly.

After debate, and—

The question being put on the motion, it was—
Resolved in the affirmative."

March 29, 1966:

"With leave of the Senate,

The Honourable Senator Beaubien (*Provencher*) moved, seconded by the Honourable Senator Inman:

That the following Senators be appointed to act on behalf of the Senate on the Special Joint Committee of the Senate and House of Commons to inquire into and report upon divorce in Canada and the social and legal problems relating

thereto, namely, the Honourable Senators Aseltine, Baird, Belisle, Bourget, Burchill, Connolly (*Halifax North*), Croll, Fergusson, Flynn, Gershaw, Haig and Roebuck; and

That a message be sent to the House of Commons to inform that House accordingly.

The question being put on the motion, it was—
Resolved in the affirmative.”

May 10, 1966:

“Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Roebuck, seconded by the Honourable Senator Croll, for the second reading of the Bill S-19 intituled; “An Act to extend the grounds upon which courts now having jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief”.

The question being put on the motion—

In amendment, the Honourable Senator Connolly, P.C., moved, seconded by the Honourable Senator Hugessen, that the Bill be not now read the second time, but that the subject-matter be referred to the Special Joint Committee on Divorce.

After debate, and—

The question being put on the motion, it was—
Resolved in the affirmative.”

J. F. MACNEILL,
Clerk of the Senate.

MINUTES OF PROCEEDINGS

TUESDAY, February 21, 1967.

Pursuant to adjournment and notice, the Special Joint Committee of the Senate and House of Commons on Divorce met this day at 3:30 p.m.

Present: For the Senate: The Honourable Senators Roebuck (*Joint Chairman*), Aseltine, Belisle, Fergusson and Gershaw—5

For the House of Commons: Messrs. Cameron (*High Park*) (*Joint Chairman*), Aiken and McCleave—3

In attendance: Peter J. King, Ph. D., Special Assistant.

The following witnesses were heard:

- (1) The Unitarian Congregation of Don Heights, Scarborough, Ontario: Reverend Kenneth Helms F. Stewart Fisher, Barrister at law.
- (2) Professor Julien D. Payne, Faculty of Law, University of Western Ontario.

The following briefs and articles are printed as Appendices:

45. Resolutions passed at the 4th Annual Meeting of the Canadian Unitarian Council in Winnipeg on May 8, 1965.
46. Brief by Professor Julien D. Payne.
47. Article by Christopher Lasch entitled *Divorce and the Family in America*.
48. Article by Douglas F. Fitch entitled *As grounds for divorce let's abolish matrimonial offences*.
49. Article by Donald J. Cantor entitled *The right of divorce*.
50. Article by B.D. Inglis entitled *Divorce reform in New Zealand*.
51. Article by R.T. Oerton and A.R. Green entitled *Marriage breakdown*.
52. Article by G.R.B. Whitehead entitled *Divorce reform in Canada*.
53. Article by Neville L. Brown entitled *Cruelty without culpability or Divorce without fault*.
54. Article by David R. Mace entitled *Marriage breakdown or Matrimonial Offense: A clinical or Legal approach to divorce*.
55. Article by Patricia M. Webb entitled *Breakdown versus fault—recent changes in United Kingdom and New Zealand divorce law*.
56. Article by William Latey, Q.C., entitled *Divorce law in Australia—Federal Uniformity*.
57. Article by W. Kent Power Entitled *Marriage and Divorce-United Kingdom-Royal Commission on Marriage and Divorce-Some points of interest for Canada*.
58. Article by Zelman Cowen and D. Mendes Da Costa entitled *Matrimonial causes Jurisdiction: The first year*.

59. Article entitled *Divorce—Australian statute establishes uniform federal law for marital actions—Matrimonial Causes Act 1959, Act. No. 104 of 1959 (Austl.)*.

At 5.40 p.m. the Committee adjourned until Thursday next, February 23, 1967 at 3:30 p.m.

Attest.

Patrick J. Savoie,
Clerk of the Committee.

THE SENATE

SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS ON DIVORCE

EVIDENCE

OTTAWA, Tuesday, February 21, 1967.

The Special Joint Committee of the Senate and House of Commons on Divorce met this day at 3.30 p.m.

Senator ARTHUR A. ROEBUCK and Mr. A. J. P. CAMERON (*High Park*), co-chairmen.

Co-Chairman Mr. CAMERON: Honourable senators and members of the House of Commons, we have a quorum. Our first brief today will be from the Unitarian Congregation of Don Heights.

It will be presented by the Reverend Kenneth N. Helms, who was born in Peoria, Illinois, 31 years ago. He was educated at Illinois Wesleyan University; graduated from Bradley University in 1958 as Bachelor of Science in Sociology; and graduated in 1962 from Meadville Theological Seminary, University of Chicago.

He is President and Chairman of the Human Relations Council, Muncie, Indiana; he is a member of the American Civil Liberties Union; he is religious adviser to Unitarian university students at Ball State University, Muncie, Indiana, and he is minister of the Unitarian congregation of Don Heights, Scarborough, Ontario.

He is accompanied by Mr. Franklin Stewart Fisher, who was born in Toronto 33 years ago. In 1954 he graduated from the University of Toronto. He studied at Osgoode Hall; and he was called to the Bar in 1958. He is an elected trustee of the County of York Law Association, and Chairman of the County of York Legal Aid Program. He has been Director of the United Nations Couchiching Conference for secondary school students since 1962. He is partner in the firm of Ludwig, Fisher and Holness, and practises in the city of Toronto.

Co-Chairman Senator ROEBUCK: Mr. Co-Chairman, before we start the more serious proceedings, I have a letter from Mr. R. B. Guss, whom members will remember, who addressed us at the last meeting, with Mr. Palmer.

His concluding sentence is:

Will you please express to Senator Fergusson and the other senators our sincere thanks for the courteous attention.

Co-Chairman Mr. CAMERON: The Reverend Kenneth Helms will present the brief now.

Reverend Kenneth N. Helms, Minister of the Unitarian Congregation of Don Heights, Scarborough, Ontario: Honourable co-chairmen and members of the committee, before reading the brief, may I say something as to the background? Mr. Stewart Fisher, a member of my congregation, was the recipient of the proceedings of the work of this committee. He and I became interested in the

topic of divorce reform. We brought this to the attention of the members of the congregation. A small committee was established to study the proceedings and present a report to the congregation. At that time we received unanimous support for the brief now being presented.

Appended to the brief you will find the 1965 Unitarian Council's proposals on divorce reform, which were presented at the fourth annual meeting of the C.U.C. It is comparable in background, and I received permission of the Chairman of the C.U.C., which represents all Canadian Unitarian congregations, to append it to our brief, because of the similarity and the parallel in the interest expressed.

Unitarianism

While identified with the great evolution and reform that has taken place in all Christian churches since the Protestant Reformation, Unitarianism has carried the idea of the supremacy of the individual conscience to a logical conclusion, namely: by creating a religious movement that permits the individual to come to his own conclusions which are meaningful to him concerning the validity of God and the nature of man, without the assistance of dogma, creed or outside authority.

The result has caused Unitarians to evolve outside of Christianity in the direction of a more humanistic, scientific and democratic approach to religion.

Theologically, Unitarianism, as a term, is as ancient in its claims as monotheism itself, and its historical premise of the Unity of God was a decisive issue in the earliest doctrinal controversies within the Christian church.

Denominationally, Unitarianism came to prominence in the wake of the successive waves of humanism, rationalism, and reform that swept Europe in the 16th Century and has been a recognized denomination and received religion since the middle of that century.

Recently, Unitarianism has devoted its primary religious activities to the ethical and moral implications of the Naturalism, Humanism and Rationalism that have informed its spirit and that underly its present reliance upon the scientific method, as that method best suited to human inquiry, and democracy as the finest embodiment of those principles best suited to human institutions.

Co-Chairman Senator ROEBUCK: Would you mind giving us some information as to the numbers of either churches or congregations in Canada?

Rev. HELMS: Yes. The number of constituent members of Unitarianism in Canada at this point is 15,000. That is across Canada. It is not, as you can tell, a particularly large denomination.

Co-Chairman Senator ROEBUCK: How many churches would that be?

Rev. HELMS: I am sorry, but I am not sure.

Co-Chairman Senator ROEBUCK: Thank you.

Rev. HELMS: I would like now simply to summarize, or give you the summary as indicated on page 2 of this Unitarian Brief, and then I will turn the remaining portion of the brief over to Mr. Fisher.

This is the summary of the brief:

1. Support of marriage breakdown principal as opposed to matrimonial offences and grounds principal.
2. Test of marriage breakdown is not judicial enquiry but the judgment of the husband and wife as evidenced by consent or separation.
3. The question of divorce should be determined not by the attempt to preserve the institution of marriage at all costs but is to be deter-

mined in the light of the civil rights and liberties of husband, wife and family.

Co-Chairman Senator ROEBUCK: Thank you. Mr. Fisher?

Mr. Franklin Stewart Fisher: Thank you, Mr. Chairman. I would like to proceed now with the operative part of the brief. I might say that we did, after a great amount of documentation, attempt to confine this brief to the essential points in order to make it a real brief. I might say that it was also our intention not to come before this group, if we did not feel we had anything original to contribute. But after reading the briefs that were submitted to you we feel that the significant point of what we are trying to say to the committee is that we have found the briefs to accentuate the idea of the preservation of marriage at all costs. And this is a simple statement, I think, of the differences we have found. Our concern is with the individual liberties of the husband, wife and family. That has been our paramount consideration and, hence, the reason for our brief.

I would like to read from the brief, starting at page 3.

We, the Divorce Reform Committee of The Unitarian Congregation of Don Heights, owing no absolute allegiance to any authoritative body, creed or dogma and governed as free men and women by the dictates of our own conscience, our reason and the accumulated wisdom of our race, deplore the fact that man is in many cases imprisoned by the institutions that he has created and thinks in terms of reform within these existing institutions rather than questioning the validity of the institutions themselves.

I might add that I recently gave a talk on marriage, which I entitled "Of Human Bondage." The significance of that statement is the fact that as human beings we have institutions, and such still exist, which we created that are of human bondage and often, while we think in terms of reforming a particular institution, it seems to me that we must examine the very essence of the institution itself.

This is what we are requesting in the brief:

Realizing that the present divorce laws and nearly all of the submissions to the committee have as their paramount theme the preservations of marriage and the family, and as a result have been, in many cases, callously indifferent to the civil rights and liberties and the welfare, growth and happiness of the individuals within the marriage and family;

Acknowledging that where hate and fear have replaced love in a family relationship that it is in the best interest of the spouse, the children and therefore society to end the relationship—and this has been emphasized by many of the briefs submitted;

Aware that the present archaic laws relating to divorce do not reflect the change in the economic structure of the family and the changing religious and sexual attitudes of Canadians and are an interference by the State that is oppressive and seriously prejudices the happiness and well-being of men, women and children throughout Canada;

Realizing that the separation of Church and State is historically to be preferred and that the individual in a pluralistic and free society, whether part of a majority or a minority, must be free to follow the dictates of his own conscience with respect to legislating divorce laws and making use of them—and, interestingly enough, historically we have felt that marriage has been a religious institution which, in a pluralistic society, as most of your briefs have indicated, is an anachronism and something which should not continue. In unitarianism we

have found, by freeing individuals to follow the dictates of their own consciences, you can evolve into a sort of freedom situation, and we say that the same thing is true of marriage. If you allow individuals to create their own relationship, you will get the type of freedom in relationship which we are trying to get;

Recognizing that state interference in divorce is justified if it attempts to insure that none of the individuals in the family become wards of the state;

Therefore: We are proposing that, in legislating with respect to marriage and divorce, the paramount considerations must be:

1. The civil rights and liberties of the individual members of the family rather than the tendency to preserve the institution of marriage at all costs.

2. The enforcement of the obligations and responsibilities of spouses in order to prevent members of the family from becoming wards of the state.

Therefore, with respect to dissolution of marriage we are resolved that:

1. Subject to the question of support as hereinafter set out, marriage shall be dissolved upon the consent of both parties.

I have yet to find an answer to the proposition that, if two adult human beings wish to dissolve their union, the state has any interest to maintain it. I am referring, of course, to a couple without children. Children obviously complicate matters.

It is an unnatural interference with the civil rights of individuals for the state to attempt to preserve a marriage that, on the voluntary admission of both parties, has broken down.

Of course, that is the principle of marriage breakdown that we are supporting.

2. Upon proof by either the husband or the wife that the spouses have been living separate for a total period of two years.

Very briefly, we found our real problems in coming to a decision in this area, and, if we are consistent, we consider this problem in the light of civil rights of the husband and the wife and we say this: If one partner of the marriage says he does not want to preserve the marriage and the other party says that she does, the feeling is that the—let us say it is the husband who does not want to preserve the marriage—the feeling is that it is his civil right not to want to preserve it. However, if the wife wishes to preserve the marriage, her civil rights have to be respected as well.

We felt that a two-year period was sufficient to allow the spouse who wished to preserve the marriage to attempt to keep the marriage going, by counselling or whatever means, was desired. However, if this is not possible, you do not have a marriage if you have one person who still refuses to go on with the marriage, and, therefore, you must dissolve the marriage. This seemed a fair type of compromise.

The next heading is "Support".

Support

3. Upon application to the court for dissolution, the court shall order the equal division of all property acquired during marriage by either spouse.

This is on the basis of a partnership relation. Any assets acquired in a partnership are, on dissolution, split in two, and I might say that the Ontario Government in its Law Reform Commission is attempting to do exactly this.

4. No dissolution of the marriage shall be granted unless and until the court is satisfied that arrangements, for the care and upbringing of every child of the marriage and of the family who is under the age of sixteen years, have been

made and are satisfactory or are the best that can be devised under the circumstances.

5. With respect to the support of the wife, the following factors should be taken into consideration:

- (a) Whether she has the custody of the children.
- (b) The wife's assets, income and ability to support herself.
- (c) Payments by the husband during a period of rehabilitation of the wife.

Very simply, our feeling was that it is not in the interests of husband or wife to have the situation that now exists, where a husband will have to pay for an indefinite period or for all of his life for the support of the wife. We picked on the term "rehabilitation," because in fact that is the type of payment which a husband should be responsible for to attempt to rehabilitate the wife to take a useful place in society.

6. It is in the interest of the state to enforce the collection of support on behalf of members of the family. This is, in fact, one of the more serious things not being done today. In the City of Toronto there is something like \$10 million paid out for the support of deserted wives and children and something like \$56,000 being collected from the husbands who have the obligation to support them, and it is obvious we are not doing this as a society. I as a taxpayer have an objection to this. If I have to pay for somebody else's children who have become wards of the state I object to it.

Counselling

7. Skilled counselling services shall be made available for persons prior to marriage to include responsibilities of marriage, budgeting, sex, child care and family planning.

I might say this is one of the most important aspects of our brief. It is something which is entirely neglected, this type of counselling before marriage, which is so necessary.

8. Counselling should be available at every stage of the marriage.

I might add that there should not be compulsory counselling, which some have suggested, but the type which is available for those husbands and wives who wish it.

Again, as I say, and as Rev. Helms said, we have added as an appendix a resolution passed by the Unitarian Council that is similar to ours, but in fact we did not use it when we drew up our brief. We did not have any recourse to that. I think it goes to show that Unitarians seem to think alike in this area of divorce reform.

That is the conclusion of the brief. The thing we are attempting to show as being significant about our brief is that we must consider in any talk of marriage and divorce the civil rights of the husband, wife and children. That is the most important aspect of marriage.

Co-Chairman Mr. CAMERON: Thank you for your very interesting and informative presentation. It is our usual practice to have the members of the committee ask questions, if they are so inclined, and we trust that you will follow this pattern and try to supply the answers to the questions that are asked.

Senator BELISLE: With reference to page 5, paragraph 5 under (c), could I ask the honourable gentleman how long does he feel that a payment should be made towards the rehabilitation of the wife?

Mr. FISHER: This should vary in each instance. I think in the type of divorce which I see where the husband and wife sit down and work out the situation, the

husband would pay towards the tuition of the wife at a university or at a teachers' college for a year so as to allow her to take on high school teaching. In most instances we are not in a position to have the wife stay home and look after the children. That is not possible in our society. Most husbands do not make that kind of money. So we try to work it out that the wife becomes a self-supporting member of society so that she can take her own place in society.

Rev. Mr. HELMS: I might say that the 1965 resolution of the C.U.C. makes mention of the concept of domestic courts, which I think is what we are assuming in our presentation, but we felt it was not in keeping with the brief for us to enter into procedural arrangements or the arrangements envisioned by a court to carry out the proposal. But it does raise the concept of the domestic court where it would have to be considered from the point of view of making the spouse a self-supporting member of society.

Senator FERGUSON: Referring to page 5, also, Mr. Chairman, in paragraph 3 there is a provision for an equal division of all property acquired during the marriage at the time of the application for dissolution. Would this mean that all property that either the husband or the wife had acquired should be divided? What would be the situation if one of them had inherited a large fortune? Should that be divided equally at the time of this dissolution?

Mr. FISHER: This is a difficult question. I think our feeling was that it was really what was acquired through the joint labours of the husband and wife rather than any windfall that might accrue to either one of them. This does not mean that the inheritance would not be made use of, because it certainly would be used for the support of the children. But really what we had in mind was whatever accrued to the partnership as the result of the toil of the two partners working together. I think we had more in mind the fact that the wife normally works in the home and certainly is not earning any salary, but she is certainly entitled to half of what the husband is earning.

Senator FERGUSON: I quite agree, but I wanted clarification.

Mr. AIKEN: I have a question based on the same section on page 5. Would it be fair to say in respect of items 3, 5 and 6 that they are very general in nature and that they would be very difficult to work out in practice as part of divorce proceedings?

Mr. FISHER: Well, in fact as I understand it, 3, 5 and 6 come within the domain of the provincial government and they certainly do so in Ontario at the present time. There they have got out a very large volume of recommendations in this area, and in fact whether this committee intends to deal with anything more than the dissolution of marriage, I don't know. But I agree that the provinces are charged with the question of property, and I would think that this is more in their domain at the present time under the jurisdiction of the British North America Act.

Mr. AIKEN: Section 4 seems to be reasonable and it seems that this committee could deal with this as part of the divorce legislation. I also had a question on item 3, but I don't know how this could be carried out in practice—that the court could order equal division of property acquired during the marriage. It would be difficult to decide what had been acquired during the marriage as opposed to that which had been acquired before the marriage. Anybody who has had dealings with succession duties knows how difficult it is to try to show what had been acquired by the husband and by the wife individually. I quite agree with the comment that in practice this might prove to be extremely difficult. Likewise in paragraph 6 where you deal with enforcing the collection of support on behalf of the family. Could this be done other than in the provincial domain?

Mr. FISHER: We had a suggestion to show how this could be done. For example, there is no reason why somebody should not have a red social security card which would be presented on taking up employment, and this would mean an automatic deduction by the employer for the support of the children. You might say that this is an interference with the person's liberty, but I also consider it an interference if I have to pay for somebody else's children. I know I am paying today for a great number of children which the state is having to support.

Mr. AIKEN: Could this be done on a national basis?

Mr. FISHER: Yes. It has been my experience that a husband on having a judgment rendered against him does not mind, as a rule, supporting the children, but he objects to supporting his wife and he leaves for another jurisdiction in perhaps Alberta or Saskatchewan, and in my experience such judgments have been almost impossible to collect.

Mr. AIKEN: I can see the desirability of having some agreement on methods of collection. I know the Province of Ontario is moving towards assignment of these judgments by the deserted wife in a manner in which the province can enforce collection, but I find it difficult to think that we could do anything with it under federal legislation.

Mr. FISHER: I was trying to press upon the Provincial Law Reform Committee that they should make a presentation to this group. It seems to me they were talking about it. I don't know whether they have made a presentation or not, but they were thinking of making a presentation along these lines.

Mr. AIKEN: Again in the field of counselling, it would give rise to one of these joint jurisdictional problems that really, I feel, belong to the province except at the point where divorce becomes a possibility.

Mr. FISHER: We discussed this but found it was difficult to separate them. They all seem to go together. This applies particularly when you consider the individual liberties of the partners to the marriage.

Mr. AIKEN: Thank you for pointing out to me what the difficulties are here. I would appreciate it if there were some way of handling these suggestions, particularly the portions with regard to support. I have had experience in the family court and I agree entirely that there is not one in 20 of these orders that are actually collected if the husband does not want to pay. He just takes off and very freely takes employment somewhere else, even within the province, or outside the province, if they bother him too much.

Mr. McCLEAVE: I wonder with regard to this property division if any thought had been given to a division of the debts upon dissolution of the marriage.

Mr. FISHER: I think the same thing applies.

Mr. McCLEAVE: That they divide them equally?

Mr. FISHER: Well, it would seem to me if you are dividing the assets you would have to use them to get rid of liabilities.

Mr. McCLEAVE: However, my main area of questioning is the conciliation field, so I do not let down the third-year law students at Dalhousie University who are preparing a brief feverishly for us, Mr. Chairman, and hope to have it here before the conclusion of our hearings.

It seems to me you do not make enough allowance for the fact that one party may be less willing to break up a marriage than the other, and the less willing one being able to persuade the more willing one to enter into the conciliation process.

Mr. FISHER: We have felt, again, the problem of there being any need for the marriage at all if one party is not interested. In other words, marriage, it seems to us, is the continuing consent of both parties to live together under that arrangement. If one party decides that he is not going to exist in that relationship, it just does not really matter what the other person thinks, as long as they are given the opportunity and their rights are well enough protected to give them sufficient time to persuade the errant spouse to come back to the family.

Mr. McCLEAVE: I think the experience in the California and Los Angeles conciliation courts is that if you can possibly get both sides to agree to go to the counselling or conciliation table, the chances of saving the marriage are as high as 47 per cent. Once you go beyond that stage and writs and petitions are issued, the chances drop very rapidly.

Mr. FISHER: Our suggestion is that in the two-year period there would be a chance for it to be made available.

Mr. McCLEAVE: If one party refused, this method would not really be effective.

Mr. FISHER: If you had some arrangement whereby if these parties took counselling they could speed up the two-year period, that is the only way perhaps you could get a reluctant spouse to go to counselling. Our belief is that you cannot coerce people to go to counselling.

Mr. McCLEAVE: May I ask you if you, in your own ministry, have felt you have been able to avert the breakup of marriages by counselling yourself?

Rev. Mr. HELMS: I think it is possibly true that counselling, to an extent, would avert these breakups. It very much depends on the severity of the problem that is brought to a counselling situation. If it has been going on for a long time and is highly aggravated, then the possibilities are less if a great deal of animosity has been created. If they find themselves faced with particular problems and are in ruts, and it is possible to get them out of the ruts and that their thinking be realigned in a more open way, and through this kind of opening in counselling they themselves realize the possibilities of marriage—not really through any real, positive action by a minister or a counsellor, but just getting them out of the rutted ways of looking at it, you try to get them to open up communications so it does not terminate in a divorce. But I have not found any way of assuring, nor am I interested in assuring the continuation of an old marriage through persuasion. I think one of the most sobering effects to people thinking about divorce is a good, honest talk with a lawyer. It costs too much and the stakes are too high. They have to divide their debts and face accusations of adultery, and they say, "Well, maybe we will think about it twice." However, I am not saying this is really a healthy situation.

Mr. McCLEAVE: I hoped we would have one group of witnesses before us who would never mention the word "adultery," but you have just destroyed my hope.

Rev. Mr. HELMS: That is the law as it stands, and I would much prefer to see it changed.

Senator ASELTINE: Does not paragraph 3 raise a constitutional question? Under the B.N.A. Act property and civil rights are both under the jurisdiction of the provinces.

Co-Chairman Mr. CAMERON: Mr. Aiken was discussing that with the witness.

Senator ASELTINE: I wondered if you considered that when you made this recommendation.

Mr. FISHER: Yes, we have, but feeling it was all so much part and parcel, we had to cover the whole spectrum of marriage. That included property. I agree it is a provincial matter, but we understand the province is making this particular recommendation.

Senator GERSHAW: With regard to your paragraph at the bottom of page 4, do you not think it would make divorce altogether too easy? It just says if both consent to it, and then you speak of civil rights. Is it not primarily the duty to make the marriage a success? Might it not just be a temporary disagreement that would resolve itself and the marriage could go on? It seems to me it is making divorce a little too easy.

Mr. FISHER: The feeling now is you have at the present divorce by consent. That is, in fact, what we operate under now. The only trouble is that consent involves some discussion of adultery between the husband and wife. It does exist at the present time.

As far as making divorce too easy, I would answer that by saying that divorce statistics on the rise are not necessarily a bad thing. I would think, on the contrary, they may very well mean that two people who are in human bondage are working at a marriage, and they are allowed to be free to attempt to establish a decent relationship. Divorce statistics show the second marriage has a far better chance of success than the first because the first was usually contracted by very young people for the strangest reasons. People who marry for the second time do it soberly and with a great deal of thought. In fact, the third point we are making is that it is not up to the state to interfere and decide whether marriages are being gotten out of easily or not. It is a matter for the individuals themselves to decide, whether their relationship is going to continue or whether it should end. The state really has no right to interfere. In other words, we are not suggesting the Government has a right in this matter. We say they do not have a right in this matter of interference with two adult individuals, where there are no children, to say they should stay married if both do not want to. I have yet to hear any reason why these two human beings should stay together.

Senator BELISLE: I think I heard a while ago one of the witnesses expressing a concern for what is real religious bondage. I wonder if the honourable gentleman would say what he is referring to on page 5 when he mentions "counselling." Is he referring to religious or legal counselling? Are you referring to counselling by the courts or counselling by the churches?

Rev. Mr. HELMS: The expression "human bondage" has been added to the text.

Senator BELISLE: I think Mr. Fisher used the word "bondage".

Rev. Mr. HELMS: Whether or not this counselling had to be worked out directly from the religious standpoint?

Senator BELISLE: Yes.

Rev. Mr. HELMS: I would have to say the words "human bondage" are not my own in this instance. Again, what I think both you and I and the congregation felt was that we were dealing with this matter more directly from the point of view of the continuation of the marriage by the partners, and we were not getting into court arrangements. What I intended was counselling services and the use of those services in the marriage early on. We have family counselling service agencies available to the community today. I am less interested, quite frankly, in whether that counselling comes from a qualified minister, if he is engaging himself in consultations on marriage and marital problems, or from a secondary agency. The important thing is that the man be qualified, and that the people who receive this kind of counselling be able to receive it, and have it

provided. So, I cannot choose between religious counselling and secular counselling. The responsibility for and the availability of the counselling are the important things. I cannot distinguish between them.

Senator BELISLE: In other words, you feel that counselling by the Department of National Welfare, for example, would be the equivalent of counselling by a recognized minister?

Rev. Mr. HELMS: Frequently, sir, it is superior because those people are better qualified—although, not necessarily. But, if there are qualified people in these secular arrangements so-called, then the advice given by those people, because of their very educational qualifications, is superior to the advice given by a minister.

Mr. FISHER: I think that the individual should have a choice as to whether he goes to the minister of his own church, or to somebody quite apart from the Church.

Senator BELISLE: Do you not think that a counsellor from the Department of National Welfare would have only a degree in social welfare, while a minister would have much more than that.

Rev. Mr. HELMS: Yes, he has a B.D., or what is generally known as the degree of Bachelor of Divinity, and I am not sure what that qualifies him for. Again, I think the important point is one of qualification, and I say that in the instance where a minister is qualified for marital counselling, or any other kind of counselling, it is important in the ministerial discussion or counselling session that increasing emphasis be placed on the fact that if the minister finds himself in the area of psychiatric counselling or marital counselling that is beyond his capacity, then he should refer the matter. He should not deal with anything that is beyond his capacity. Therefore, the concept in any counselling should be one of qualification. If the matter requires referral to a secular agency then it is important that that should be done. I think it is important for the minister himself.

Senator BELISLE: Then my last question is: Who should pay for it?

Rev. Mr. HELMS: Who should pay for what?

Senator BELISLE: The counselling?

Rev. Mr. HELMS: As it stands right now, in the instance of most ministers, there is no pay, so the state may be assured that ministers do not get paid for this kind of counselling. When it comes to secular agencies, like the Family Counselling Service and many others, I suppose they are already provided for. Any extension of their funds would have to come from taxes or other sources of revenue. It might be interpreted as a broadening of some agencies, particularly those concerned with marriage and divorce, particularly in those matters where referral from family counselling is necessary. We are short in the area of qualified psychiatrists who are able to get into the backgrounds of people who are in marital trouble. There ought to be supplementary provisions to cover this area of marriage, and the money for that will have to come from taxes. Tax money is being allocated to other less important matters. At the present we have no proper procedure for the alleviation of the distress of people with marital problems, or of dealing with it intelligently.

Co-Chairman Mr. CAMERON: Are there any other questions? If not, I will ask Senator Roebuck to say something at this time.

Co-Chairman Senator ROEBUCK: I should like to say something at the conclusion of this most interesting presentation. Mr. Fisher, I think you were entirely right when you decided to come and not repeat what somebody else has

been saying, but to give a real presentation of your own thoughts. You have given us a very great deal to think about.

When you appeal to us on your basic principle of freedom you ring a bell, of course, in both the House of Commons and the Senate. We take no second position to anybody in our love for freedom, or feeling that too much freedom usually has to be cured by more freedom, but we always append to that the thought that freedom must be limited by the equal freedom of all others. If we could bring greater freedom to the marriage relationship, and to all those people who are engaged in it, we would do a great service for the people of Canada.

The details are another matter. You will agree with me, I think, that we as a committee have a very difficult problem on our hands. But, as I have said before, you have really given us something to think about. On behalf of the committee I thank you for coming here. We appreciate this demonstration of your public spirit in coming here and giving us of your time and your thoughts, and those of your congregation.

Co-Chairman Mr. CAMERON: I should like to introduce to the committee Professor Julien David Payne, who was born in Nottingham, England, on February 4, 1934. Professor Payne is married and has two children.

He attended the Faculty of Law of King's College, University of London, England, as an undergraduate from 1952 to 1955. He was awarded a research scholarship, and undertook graduate studies at the same college from 1955 to 1956.

From 1956 to 1960 he served as a lecturer at Queen's College, Belfast, Northern Ireland. From 1960 to 1963 he served as Assistant Professor at the University of Saskatchewan. In 1963 he was appointed a member of the Faculty of Law of the University of Western Ontario, where he presently holds the position of Associate Professor. In 1965 he was appointed as Research Associate to the Ontario Family Research Project, and he is still serving in that capacity.

He was called to the Bar, and enrolled as a solicitor of the Province of Ontario, in 1965. I might add that he is also the editor of the second edition of *Power on Divorce*.

Professor Julien David Payne, Faculty of Law, University of Western Ontario: Mr. Chairman, I think that having regard to the fact that time is of the essence, it would be easier on the committee and myself—

Co-Chairman Mr. CAMERON: Just a minute. I forgot to state—and I was instructed to do so—that Professor Payne would appreciate it if members of the committee would ask questions as he goes along, if questions arise in their minds, rather than waiting until the end. Professor Payne will be glad to answer questions at the end of his presentation, but if during the course of it questions arise in the minds of the members of the committee then I would ask them not to hesitate to ask them of the Professor.

Professor PAYNE: First, I should like to say that I am here in a personal capacity. I do not represent any organization or association.

Mr. McCLEAVE: Perhaps by the time you are through you will be able to write a third edition of *Power on Divorce*, and include in it a lot of new grounds.

Professor PAYNE: I should perhaps state that if I did rewrite *Power on Divorce* I would not be motivated by the financial consideration. The financial consideration alone would be sufficient reason to recommend no change in the Canadian divorce laws.

Perhaps I could be allowed to raise these thoughts, and explain my reasons in answer to questions from the committee. If that is agreeable perhaps we can proceed more quickly than we otherwise would.

The first matter to which I direct my attention in this report is grounds for divorce, and I think the wisest procedure is to take each in turn. I would suggest, therefore, that you refer to page 29. By way of generalization let me say that the first 28 pages of this report or brief discuss general considerations which constitute the premise upon which I propose certain recommendations for change.

The first recommendation is that adultery be retained as an independent ground for divorce. Unless any questions are directed to me I think it unwise to devote too much attention to the reasons for individual recommendations. Therefore, in the absence of questions I will proceed to the second ground for divorce, which is rape, sodomy, or bestiality.

These grounds are presently recognized in Canada in several jurisdictions, but they are available only in the case of a wife's petition. I would suggest that they be made available at the instance of either the husband or the wife—that is to say, that either spouse should be entitled to petition for divorce on proof of rape, sodomy or bestiality committed by his or her partner.

To the issue of cruelty as a ground for divorce I will devote more attention because it does raise some very substantial questions. At the present time the concept of cruelty in matrimonial cases in Canada generally conforms to the definition adopted by the House of Lords in England in the case of *Russell v. Russell* [1897] A.C. 395. In that case it was said that in order to establish matrimonial cruelty in England for purposes of divorce, also for judicial separation and ancillary remedies such as alimony and maintenance, it was essential to establish injury to health or reasonable apprehension thereof.

In the first part of my brief I suggest that this definition be extended to include intolerable and insulting conduct, and that in all cases where cruelty is alleged in a petition for divorce the court should be satisfied that the party seeking matrimonial relief cannot be expected to live with the other spouse after he or she has been guilty of the intolerable, insulting or injurious conduct alleged in the petition.

In suggesting this extended definition of cruelty, I would make reference to the legislation which presently exists in the provinces of Alberta and Saskatchewan, where, for purposes of judicial separation and alimony, cruelty is defined by statute in a manner not dissimilar to the manner that I recommend.

In Alberta and Saskatchewan, cruelty is defined to include injury to health and reasonable apprehension thereof, and also insulting or intolerable conduct, being of such a nature that renders marital consortium impossible.

I am not actually quoting from the statute, I am paraphrasing its contents, and it is referred to in page 33 of the brief.

The second issue concerning the definition of cruelty is that of intention, and here I favour adopting the attitude which was favoured by the English House of Lords in the case of *Gollins and Gollins* [1963] 3 W.L.R. 176, which has been brought to the attention of this committee on previous occasions. In that case the House of Lords emphasized that in cruelty the primary concern of the court should be directed to the consequences of the conduct complained of rather than the culpable intent of the respondent. I would suggest that any definition of cruelty should conform to this principle established by the House of Lords.

Co-Chairman Senator ROEBUCK: In that case the husband would not go to work, and the wife supported him for a considerable length of time until at last her health failed her. Is that not so?

Professor PAYNE: I think the principle defined is clearly that the culpable intent of the party is not all important, that the all important consideration is the effect of the conduct complained of on the petitioner—is it intolerable, does it render marital consortium impossible? If so, then the courts are inclined to find

cruelty, notwithstanding the absence of wilful or malicious misconduct, or indeed intentional misconduct.

Perhaps I might add that the decision in *Williams v. Williams* [1963] 3 W.L.R. 215 applies the same principle as *Gollins v. Gollins* in holding that insanity may constitute no defence to a charge of cruelty. I think this is reasonably clear. Cruelty as a ground for divorce exists not to punish the offending spouse but to afford protection to the innocent spouse.

Mr. McCLEAVE: Why argue there should be a statutory definition, when it seems to me that the *Gollins* case and the *Williams* case and other recent cases, at least in the English jurisdiction, form a pretty broad ground within which one could work?

Professor PAYNE: I felt in presenting the brief it was important to propound ideas rather than to draft any form of legislation. Certainly it may be rather difficult, and perhaps impossible, to incorporate the effect of *Williams v. Williams* in a statutory declaration. On the other hand, I believe that if one wishes to adopt the proposal I have submitted in defining cruelty in a manner extending beyond the definition of *Russell v. Russell*, then statutory legislation is vital. The courts could not expand the definition in *Russell v. Russell* without statutory authority so to do, and on this particular issue I think a statute would be required and it would have to indicate whether cruelty went beyond injury to physical or mental health.

Mr. McCLEAVE: Then you say that *Russell v. Russell* has been frozen as a statutory definition?

Professor PAYNE: In Canadian law I think the position is that the *Russell* formula is applied in all cases where matrimonial cruelty becomes an issue. The only exceptions known to me are in the provinces of Alberta and Saskatchewan where the statutory definition goes beyond *Russell v. Russell* to include not only injury to health, but also intolerable and insulting conduct, being of such a nature as renders continuance or maintenance of marital consortium impossible.

Co-Chairman Senator ROEBUCK: Is it not in the *Williams* case that the judge said that cruelty is not possible of definement, but it was possible to recognize it when one sees it?

Professor PAYNE: I think that is true. It is difficult to define cruelty, but I think the example in Alberta and Saskatchewan clearly indicates that some aspects of this particular concept can be set out in statutory form.

Co-Chairman Senator ROEBUCK: I suppose not to exclude other ideas of cruelty?

Professor PAYNE: That is the case. It would not be a comprehensive definition; it would build on the common law of Canada and of England, and it would qualify that common law if my proposal were acceptable by expanding the common law definition of cruelty as set out in *Russell and Russell*, where cruelty is confined to cases involving injury to physical or mental health.

Co-Chairman Senator ROEBUCK: Why do you think *Russell and Russell* is binding on us in Canada?

Professor PAYNE: I think the Canadian courts have clearly indicated they intend to follow and have indeed followed *Russell and Russell* without question.

Mr. McCLEAVE: In Nova Scotia there are judges at least who tend to follow the expansion in this field in the English cases. I suppose it is just because the cases have not gone on to appeal and been reported?

Professor PAYNE: The expansion in the English cases has been through the concept of intention in the context of cruelty.

Mr. McCLEAVE: But particularly in *Gollins*?

Professor PAYNE: Yes, certainly. But intention to injure is not required, and this is quite consistent with *Russell and Russell*. *Russell and Russell* does not speak of the intention element in the concept of matrimonial cruelty; it looks to whether the conduct complained of causes injury to health. These are two independent issues, and it may be that neither, or one or both, of my recommendations concerning these independent issues may be acceptable to this committee.

Mr. McCLEAVE: What is the definition of cruelty in England?

Professor PAYNE: In the English act cruelty is not specifically defined; the statute impliedly affirms the principle set out in *Russell and Russell* which requires injury to health or reasonable apprehension thereof.

Mr. McCLEAVE: It says cruelty does it not?

Professor PAYNE: It says cruelty.

Senator ASELTINE: I think in the bill you brought in in 1938 here in Canada it was defined as being according to the law of England at a certain time.

Co-Chairman Senator ROEBUCK: We defined it at that certain time.

Senator ASELTINE: I have not the bill here; I should have brought it with me.

Co-Chairman Senator ROEBUCK: If we defined it as you did in your bill it would include the *Gollins* and the *Williams* cases.

Senator ASELTINE: I am certain it would.

Mr. AIKEN: In view of the fact that we do not now have cruelty defined in divorce, obviously we are going to have to legislate if we are to include it. Would you suggest that the legislation be broad in terms and use the word cruelty, or go much further than that?

Professor PAYNE: My position would be that it is essential that the legislation go beyond the common law if you are of the opinion that injury to health should not be the sole criterion. I am of the opinion that injury to health or reasonable apprehension thereof should not be the only case in which cruelty can be established, it should be capable of being established in cases where the court finds as a fact that the conduct of the respondent is so intolerable that the petitioner cannot be expected to continue or resume matrimonial cohabitation.

Co-Chairman Senator ROEBUCK: Is not that the law of England now?

Professor PAYNE: No. The law of England is more restricted. The law of England today requires proof of injury to health, bodily or mental, in order to establish matrimonial cruelty. I suggest that we expand this definition to include cases which do not involve injury to health, but do involve conduct which renders matrimonial consortium impossible.

Mr. AIKEN: We have had evidence from a psychiatrist in connection with mental cases, which goes very much along the lines we are discussing now. In other words, it is not the intemperance of the partner involved at all in mental cases: it is the actual conduct and the result of that conduct that is essential.

In such cases they recommend that insanity not be used as a ground but that it be some other, such as either cruelty or desertion in the case of being confined in a mental institution.

Professor PAYNE: Perhaps it would be appropriate if I spoke to this at a later time, when I speak to my specific recommendation on insanity as a ground for divorce.

I come now to page 34, the introduction of desertion as a ground for divorce. I have indicated the nature of the definition which I favour, in paragraph 79, on page 35.

I think it is very important that the offence of desertion should be so defined that the spouses are not deterred from resuming cohabitation in an attempt to secure an enduring reconciliation.

I accordingly recommend that desertion as a ground for divorce in Canada should be constituted by an unjustified withdrawal from matrimonial cohabitation for a period of not less than three years immediately preceding the commencement of proceedings, or, alternatively, an unjustified withdrawal from matrimonial cohabitation for periods amounting in the aggregate to three years or more, over a period of five years immediately preceding the commencement of proceedings, provided that the respondent has persisted in the unjustified withdrawal from matrimonial cohabitation for a continuous period of at least one year immediately preceding the commencement of proceedings.

This recommendation was favoured by most witnesses giving evidence before the Royal Commission on Marriage and Divorce, which sat in England from 1951 to 1955.

I should perhaps observe that my strong preference would be to remove the necessity for introducing desertion as a ground for divorce, by including cases of desertion in what I call the separation provision, and I will speak to that in a moment.

I further submit that where desertion constitutes a ground for matrimonial relief, the courts should be empowered to make a finding of continuing desertion notwithstanding that the respondent is or has become insane. This is in accordance with the enactment in England and I think it would be a proper matter to be taken into consideration in Canada.

By way of generalization, I should say that subject to qualification in the case of matrimonial cruelty, it is clear that the matters I have discussed up to this time tend to reflect the matrimonial offence concept.

I think this admits of qualification in the light of my recommendation concerning matrimonial cruelty as a ground for divorce. Furthermore, I would suggest that it is an over-simplification to regard adultery, cruelty and desertion as offences which merely reflect a concept of guilt or innocence.

These grounds for divorce not only reflect culpable conduct but they reflect culpable conduct which has resulted in rendering further matrimonial cohabitation impossible or intolerable.

I think it is improper to regard them as offences per se and I remark to this effect in paragraph 81.

In subsequent paragraphs, I consider various types of conduct which, by no stretch of the imagination, could be regarded as falling directly within the matrimonial offence concept.

On page 36 of the brief, I recommend that presumed death constitute a ground for divorce.

In this context, legislation exists in a number of foreign jurisdictions, including England, which permit a spouse to obtain the remedy of divorce, on proof of facts which give rise to a presumption of death of the other spouse.

It is quite clear that this remedy or ground for relief will only be resorted to in isolated instances, but I feel that specific legislation should be introduced in Canada empowering the courts to decree dissolution of marriage in such cases.

Senator ASELTINE: We have it in several of the provinces.

Professor PAYNE: This does not exist in any Canadian jurisdiction. It cannot exist, because presumed death was not introduced as a ground for divorce in England until 1937, and it has never been independently introduced in the Canadian provinces prior to Confederation, and it has never been adopted by the federal Parliament in Canada since Confederation.

Senator ROEBUCK: No, but it is used in law in several cases.

Professor PAYNE: I think the position in the Canadian provinces today is that a certificate of presumed death may be available. This is rather distinct from a certificate of presumed death which is attached to a decree of divorce which empowers the petitioner to remarry and to remain remarried notwithstanding that the spouse, presumed dead, reappears.

Such a decree constitutes a guarantee that, in a case of presumed death, the petitioner will be protected in the event of such reappearance.

Mr. AIKEN: The provisions in the Ontario Marriage Act, as I understand them, protect the spouse who remarries, from the charge of bigamy.

Professor PAYNE: This is the position in Canadian law at the moment.

Senator ROEBUCK: That is in the Code.

Mr. AIKEN: You have said something about provincial legislation which permits a second marriage to remain a marriage regardless of reappearance.

Professor PAYNE: No, no. My recommendation would empower the courts in the Canadian provinces, not only to presume death but to decree divorce on such presumption.

Mr. AIKEN: It would be a divorce just as effective as if a person had appeared and put in a defence, but in this particular case the marriage is dissolved?

Professor PAYNE: The ultimate effect would be to ensure the right of remarriage without subsequent possibility of that marriage being impugned on the ground that the presumption of death was proved in the light of subsequent events to be false.

Mr. AIKEN: I am sorry, I misunderstood your statement. I thought you said there was such a provision in the provinces. My only knowledge was that it went towards permitting the marriage licence to be issued and protecting the spouse against the charge of bigamy at a later date.

Mr. McCLEAVE: We have that in a Nova Scotia statute recently, that on a person being missing for a number of years presumption of death can be granted, for general or specific purposes. It has never been used, to my knowledge, since I secured the first action revolving around marriage, but it has never been contested in the courts as to whether this was an effective way of getting a dissolution of marriage.

Professor PAYNE: I think it would be ineffective, since the Nova Scotia Legislature has no power to legislate on divorce.

Mr. McCLEAVE: You are raising considerable doubt in my mind. Perhaps I should be solving my clients' difficulties here instead of in Halifax.

Senator ROEBUCK: Is not the word "divorce" rather inappropriate?

Mr. McCLEAVE: Dissolution.

Senator ROEBUCK: Or even dissolution of a marriage which does not exist, if the person is dead. If the person is dead, there is no marriage and it cannot be dissolved or divorced. What is required is some phraseology whereby the judge says that the man is presumed dead and the wife may remarry.

Professor PAYNE: I think you have this terminology in Section 14 of the English Act, which may be acceptable to this committee and to the Federal Parliament.

Mr. AIKEN: You could say that it is presumed to have been dissolved and is hereby declared to be dissolved.

Professor PAYNE: In Section 14, "any married person who alleges that reasonable grounds exist for supposing that the other party to the marriage is dead may...present a petition to the court to have it presumed that the other party is dead and to have the marriage dissolved, and the court may, if satisfied that such reasonable grounds exist, make a decree of presumption of death and dissolution of marriage."

I am quoting from Section 14, which is reproduced in paragraph 82 of the brief.

The next ground which I recommend for introduction in Canada I call "living separate and apart."

I would recommend that divorce be available in Canada to either or both spouses where the husband and wife have lived separate and apart for a period of not less than three years immediately preceding the commencement of proceedings provided that the court is satisfied of the following conditions:

- (1) There is no reasonable likelihood of a resumption of matrimonial cohabitation;
- (2) The issue of a decree will not prove unduly harsh or oppressive to the respondent spouse;
- (3) Satisfactory arrangements have been or will be made to provide for the maintenance of the respondent spouse and any children of the family.

If I may speak to these provisos, I should perhaps say something of each. On the condition which speaks of no reasonable likelihood of a resumption of matrimonial cohabitation, my inclination would be towards the view that, where separation for three years is established to the satisfaction of the court, the court faced with that proof would then infer that there was no reasonable likelihood of a resumption of matrimonial cohabitation. I think this would be quite legitimate as an inference if there was a separation of three years or more.

Senator ASELTINE: Is that a ground in England?

Professor PAYNE: It is not, but I would suggest that in essence though not in detail the conclusion which I arrive at in my brief is supported by the conclusions or opinions expressed by the Law Commission in England in their report entitled "Reforms of the grounds of Divorce, the Field of Choice." I think it is quite clear that a reading of the entire report of the Law Commission indicates that the members of that Commission are in favour of introducing a living-apart provision to constitute a ground for divorce which shall not provide the exclusive criterion but which is to be placed in the statute books to supplement the existing grounds in England. Indeed, from what I have said previously, you will quite clearly see that my recommendation, in effect, mingle the concept of fault with the doctrine of marriage breakdown.

It is sometimes argued that it is inconsistent and illogical to have fault and non-fault grounds co-existing. It may be illogical. I will not speak to the logic of it, but it works. There is evidence of this in a variety of jurisdictions, and it seems to meet the needs of society in the present day, where in many cases marriages cannot be dissolved, notwithstanding that they have ceased to exist in substance, albeit not in law.

On the second condition referred to in Paragraph 83—

Co-Chairman Senator ROEBUCK: Just before you leave number one. Why is it necessary for the court to assume that there is no reasonable likelihood on the ground that they have already been separated for three years? The fact that an application is being made, and the applicant says that there is no likelihood of resumption, is that not sufficient on which to base a judgment?

Professor PAYNE: I think it is a sufficient basis for a provisional presumption. There may be cases, however, where the presumption could be rebutted. I certainly would not go so far as to suggest that it be a conclusive presumption, because that in fact would be to eliminate the proviso which I think is desirable in this context. So I would be inclined to say that the court should be entitled to infer that the resumption of matrimonial cohabitation is unlikely, but I would not go so far as to recommend that it be a conclusive presumption or that the proviso be eliminated.

Now, on the second condition, that the issue of a decree will not prove unduly harsh or oppressive to the respondent spouse, I think in principle a great deal can be said in favour of this condition. The difficulties arise primarily in determining when the issue of a decree will prove unduly harsh or oppressive. I certainly would not wish to precisely indicate the circumstances in which I would be inclined to the view that the decree would prove unduly harsh or oppressive.

It may be that some greater degree of precision would be necessary, if this proviso were produced in any statutory form.

I would draw the attention of this committee to criticisms of the proviso, which deals with the decree causing undue hardship to the respondent spouse, which appear in articles written by members of the Judiciary in commenting upon the Australian Matrimonial Causes Act 1959.

Chief Justice Burbury of the Supreme Court of Tasmania and Mr. Justice Selby, Judge in Divorce in the Supreme Court, New South Wales, both strongly criticized this formula which is in fact adopted in the Australian legislation.

Perhaps I should add that in the Australian legislation it must be shown that the undue hardship arose because of the conduct of the petitioner. This is quite explicitly spelled out in the Australian legislation.

The Law Commission in England adverted to this proviso and were again somewhat critical in their attitude towards it. They did agree that in principle a discretion should be reserved to the court. They proceeded to attempt to be more specific in defining what circumstances would be necessary for the exercise of discretion to take place, but it is my contention that their formula is as imprecise as that which presently exists in Australia, and that quite clearly certain problems will be presented to the courts if such a proviso is introduced in Canadian legislation.

Co-Chairman Senator ROEBUCK: Have you the reference to those two Australian cases?

Professor PAYNE: They are not cases, senator; they are articles which have been published by the two judges to whom I have referred. The first article by Chief Justice Burbury appears in 1963, Volume 36 of the Australian Law Journal, Page 283, and if you have any difficulty in obtaining a copy of this I would be pleased to forward a copy to you. The second article by Mr. Justice Selby is found in Volume 29 Modern Law Review, Page 473.

As I said earlier, they were very critical of the inadequacies or lack of precision attaching to the proviso in the Australian Act which relates to the issue whether the decree will prove unduly harsh or oppressive. If I could direct the committee's attention to the conclusions of the Law Commission in England, in Paragraph 119 of their report they suggest that the discretion should be for-

mulated as follows: "The Judge may in his discretion refuse to grant a divorce if satisfied that having regard to the conduct and interests of the parties and the interests of the children and other persons affected, it would be wrong to dissolve the marriage, notwithstanding the public interest in dissolving marriages which have irretrievably broken down."

As I stated previously, it is my opinion that that formula is no less imprecise than that adopted in the Australian legislation, and I find it difficult to project or suggest a more precisely defined formula, but would emphasize that I feel that a discretionary power should vest in the courts to refuse a decree in circumstances which are deemed to cause undue hardship or oppression to the respondent spouse, such hardship or oppression being caused by the conduct of the petitioner.

Co-Chairman Senator ROEBUCK: If you allow the court to deny an application on the ground that it should not be granted, would you leave it just in that undefined state?

Professor PAYNE: Probably the courts would wish for more guidance than is presently available in my recommendation. I think, however, that it is very difficult to introduce more precise legislation which gives effect to the reasoning which underlies that proviso, and I would suggest that here a certain amount of confidence must be reposed in the judiciary to resolve whether the issue of a decree is unjust, unduly harsh or oppressive in the particular light of the facts before the court.

Co-Chairman Mr. CAMERON: Would you like to illustrate what you would consider as being unjust, unduly harsh or oppressive?

Professor PAYNE: I think it might be partly covered by my third condition which appears on page 37 and which says that the court must be satisfied that satisfactory arrangements have been or will be made to provide for the maintenance of the respondent spouse and any children of the family.

Co-Chairman Mr. CAMERON: But what I am interested in are the words "unduly harsh or oppressive".

Professor PAYNE: If we look at proviso 3 it might be suggested that undue harshness might arise in the case of a person losing pension rights by reason of divorce proceedings. It is perhaps not difficult to decide what is harsh or oppressive in a financial context, but it is more difficult to define it in a context which does not involve financial considerations. In giving a ruling as to where to draw the line, I think I would need to be faced with a specific fact situation so as to look at the totality of the circumstances and only then would I be able to say that whether the issue of a decree would be unduly harsh. It would be easier to apply the concept than to define it more precisely.

I concede that the enactment of a living-apart provision as a ground for divorce represents a radical departure from the principles underlying the present grounds for divorce in Canada. I refer to this in paragraph 86 of my brief. It would permit the institution of divorce proceedings by a spouse who is *ex facie* partly or primarily responsible for the failure of the marriage. It could be argued and probably has been argued that a spouse who *ex facie* has been responsible for the breakdown of the marriage ought not to be allowed to proceed for divorce. If the committee were of this opinion, they might be inclined to favour the view adopted by the New York Joint Legislative Committee on Matrimonial and Family Laws which expressed the opinion in its 1966 report that voluntary separation should constitute a ground for divorce. I am of the opinion that this would be unwise. Divorce should not be confined to cases where the parties have separated and continue to be separated by consent, nor should it reflect the notion of guilt. I give reasons for this in paragraph 86. I suggest that allowing

the *ex facie* guilty spouse to proceed is not unreasonable, if one bears in mind the proviso to which I have referred earlier. I suggest further that it is often an oversimplification of the social facts to imply that a marriage breaks down because of the fault of only one of the spouses. I also suggest that where a marriage is irretrievably broken down and where it is a mere shell which has legal substance but no factual substance, then it is in the public interest that the marriage should be dissolved subject to the satisfaction of the provisos referred to in paragraph 83 to which I spoke a moment ago.

I now turn to the question of incurable insanity as a ground for divorce. In the light of what I said in connection with the recommendations concerning living apart as a ground for divorce, it might well be contended that it is unnecessary to create an independent ground for divorce in cases of incurable insanity. It might well be considered that if separation, whether voluntary or involuntary, whether involving fault or no fault on the part of the petitioner, is admitted as a ground for divorce, then this is sufficiently broad to include the case where a marriage has in fact ceased to exist by reason of post-marital insanity which is incurable. The reason I include the ground specifically in my recommendations is because of the experience in a number of American jurisdictions where the courts have held that cases of incurable insanity fall outside the ambit of living-apart provisions. It may be that I suggest incurable insanity as an independent ground for divorce, notwithstanding my recommendation on living apart as a ground for divorce, out of excessive caution. I do attempt to state the case for introducing insanity as an independent ground for divorce but fully realize that very difficult problems may arise from the introduction of such a ground. I advert to this in my brief and I point out that it introduces invidious distinctions between cases where marriage breaks down by reason of the mental incapacity of a spouse and cases where the marital consortium is destroyed by physical disability. I point out that it is difficult to justify a distinction being drawn between mental and physical illness from a medical standpoint. The justification, however, for introducing the incurable sanity ground is similar to that which I have stated when dealing with the living apart provision.

I suggest that if you have incurable insanity as a ground for divorce, it should require proof that the incurable insanity has existed for three years and it should also require proof that the person of unsound mind has been detained in a mental institution, hospital or other institution for a definite period subject to limited interruptions. In fact, I suggest that the provisions presently existing in the Matrimonial Causes Act (England), 1965 might constitute a model for legislation in Canada. The only radical change between that act and my recommendation is that I would recommend a period of three years rather than a period of five years.

Co-Chairman Senator ROEBUCK: When you say "incurable insanity", is it not a fact and within your knowledge in this regard that doctors will not declare insanity incurable unless it is of a very extreme type where the brain is destroyed or something of that kind which cannot be expected to be restored?

Professor PAYNE: I would say this is probably the case. It is certain that even if you have evidence of it adduced, you are only dealing with a limited number of petitions in the context of incurable insanity. Certainly, difficulties do arise in adducing medical evidence in proof of the fact of incurability. I concede that these difficulties exist, and it may be that a better approach would be to ensure that cases of what we call incurable insanity fall within the "living separate and apart" provision. If this could be ensured, I would prefer this as a technique, because I do feel that invidious comparisons can arise if we isolate mental health, leaving cases of physical disability or physical ill-health in a separate category affording no ground for matrimonial relief.

Co-Chairman Mr. CAMERON: What about the phrase "persistent mental illness" in lieu of "incurable insanity"?

Professor PAYNE: I think these phrases are both difficult to apply in the court room, because they necessarily involve a question of degree and opinion evidence. The material question is: "Is the person of such an unsound state of mind that the marriage is destroyed?" I believe an answer to this question requires opinion evidence, and I think the difficulties will not be any the less according to which formula you adopt if you favour insanity as an independent ground for divorce.

Co-Chairman Senator ROEBUCK: Instead of using "incurable insanity," would it not be better for the court to use the phrase "the probability of recovery is unlikely or sufficiently unlikely"? I know you would not get in any case, except the most extreme ones, medical evidence to establish that insanity was incurable. They do not know what the future is bringing forth, but they might say that the possibility of continued cohabitation is extremely unlikely.

Professor PAYNE: This might help. I am by no means sure it will eliminate the problem—; it may reduce the problem—if such a formula were adopted in place of that presently accepted in England. If it does, I am certainly in favour of dealing with it in that manner.

As a matter of preference, I would wish for the courts to include cases of insanity under a general "living-separate-and-apart" provision. I think this is where it belongs. I do not think it belongs in a separate category. It may be that my recommendation for insanity as an independent ground is presented out of excessive caution in light of the experience in certain American jurisdictions. You might quite properly regard the experience in American jurisdictions as irrelevant and my fear that the Canadian courts may follow the American decisions may lack substance. Hopefully it does, because I do feel cases of insanity could more properly fall subject to a "living-apart" provision. On the other hand, if a "living-apart" provision proved unacceptable as a ground for divorce in Canada, I think a case could be made whereby "incurable insanity" or "proof of mental illness running over a period of years with little likelihood of recovery" should constitute an independent ground for divorce. I think this reflects the fact that incurable insanity, like other events, may cause a marriage to break down and terminate in fact.

I think the function of the law of marriage and divorce should be to give effect to social realities by trying to maintain a balance between respect for the law as an institution and respect for marriage as an institution.

These are general considerations to which I have not addressed my attention in discussing the specific proposals as yet. They do constitute the bulk of the comment in the first 28 pages of the brief, and I have not got involved in a discussion of the general considerations which led to the formulation of specific recommendations. That summarizes the contents of the brief so far as the grounds for divorce are concerned.

Perhaps I might conclude this portion of my testimony by referring to the bars to matrimonial relief.

At the present time there are three absolute bars to matrimonial relief which apply in divorce proceedings across Canada: collusion, connivance and condonation.

Collusion has not been defined by statute and it is very difficult to define it in an absolute sense. Judicial definitions which have been adopted must be interpreted by reference to the facts of the particular case, and a general definition is therefore rather difficult to formulate.

I think that one of the primary objections to collusion as an absolute bar is that it tends to discourage spouses from attempting to resolve their matrimonial problems by mutual agreement. I am not suggesting in any way that the spouses should be free to determine the availability of the right to a divorce by mutual agreement, but rather they should have the power and right accorded by law to resolve certain of the ancillary problems which arise in a divorce case. Where a marriage has broken down the parties may be prepared to reach agreement on matters such as custody and maintenance. They should be free to do this without any fear of an allegation of collusion. At the present time, it is my opinion that they are not free to do anything without running the risk of a finding by the court of collusion.

Co-Chairman Senator ROEBUCK: That is not the case in our parliamentary court. The fact the parties agree, for instance, to the division of property and that sort of thing, usually after the adultery has been committed, has not been considered by us in recent years, and I am sure the same observation applies to Senator Aseltine in years gone by.

Senator ASELTINE: That is correct.

Senator ROEBUCK: Collusion has been found by me, at all events, to be an agreement to do something evil, such as to fabricate evidence or to commit adultery for the purpose of a court case.

Professor PAYNE: I think this may well be true in divorce proceedings conducted through the Senate. Generally speaking, however, I do feel that at the present time a solicitor may find it very unwise to suggest that the spouses get together to resolve their differences—that is, differences other than the issue of, “Shall there be a divorce or not?”

Mr. AIKEN: When you have 25 or more high court judges, each with a certain amount of discretion as to what collusion is, it means that there are many interpretations that people may run into.

Professor PAYNE: That is right. This is another general definition. Your case may be a test case—

Mr. MCCLEAVE: It is not like cruelty which is incapable of definition, but when you can smell it it is there.

Co-Chairman Senator ROEBUCK: I do not think that that is entirely true.

Professor PAYNE: I refer to my discussion of the *Shaw* case in *Power on Divorce*. That was quite clearly, in my estimation, a case of where the dissenting judge expressed the right conclusion. The unfortunate thing was that his was the dissenting judgment. The fact that there can be a division in the Court of Appeal shows up the difficulties in determining whether the respective spouses may resolve any issues arising incidentally to the contemplated divorce. The point is quite clearly established that one can have collusion in a good case—that is to say, in a case where the grounds for divorce quite clearly exist. I think the solution to the problem may be found in my recommendation that collusion be made a discretionary bar to divorce—

Co-Chairman Senator ROEBUCK: You would not make it discretionary if the parties colluded for the purpose of producing evidence of adultery, or because of want of evidence of adultery they fabricated it?

Professor PAYNE: I think in that situation one could regard it in two ways. One could either say that quite clearly the parties have not established a case according to the pleadings, and therefore the petition is dismissed, in which case you do not need to use the concept of collusion—you could just say that the plaintiff had failed to prove his or her case—or leave it as falling within the court's discretion. I am sure that the experience in England, where collusion is a

discretionary bar, would evidence a strong inclination toward—in fact a practice of—refusing to grant relief where there has been corruption and a defrauding of the court by manufactured evidence. I would certainly not concede that manufactured or trumped-up evidence should afford a remedy in the divorce courts. I do feel, however, that collusion should not be retained as an absolute bar to relief. It is too uncertain. It is a deterrent to attempts at reconciliation between spouses who are encountering marital difficulties. It is for this reason that I recommend that it be adopted as a discretionary bar, and that it be not retained as an absolute bar to matrimonial relief.

I further suggest in the alternative—although I might say that the alternative must be regarded as second best—that if a decision is taken to retain collusion as an absolute bar to divorce or other matrimonial relief then an attempt must be made to define this concept so that persons counselling their clients—I am referring to lawyers specifically here—will know what the legal position is. I think the lawyer practising today acts at his peril if he attempts to get the clients together in order to resolve problems which are incidental to the contemplated divorce.

Senator ASELTINE: I do not think you need to define it. We have got along pretty well in the courts, and in our own committee here, without a definition.

Co-Chairman Senator ROEBUCK: I do not think, however, it would be difficult to define it as a conspiracy between the parties for something evil, unlawful, corrupt, and so on. It has to have such an element in it before it is collusion. For instance, we have had many cases in which the husband has paid the expenses of the suit or the application. That is not collusion. He ought to pay them. At times when he is—

Senator ASELTINE: I thought that cases like that in the provincial courts did not affect the judge in any way at all.

Professor PAYNE: The cases in the courts of Canada, I believe—I will check on this—tend to suggest that if the husband pays the wife's costs this fact may not be regarded as collusive. In the converse situation where the wife pays the husband's costs—and this may be sensible from an economic standpoint, if the wife is earning a high income—then this is regarded by some courts as evidence of collusion. The danger of collusion being inferred by the court also arises where the parties seek to determine rights of custody and visitation, rights to the matrimonial home, rights to the division of property, et cetera.

I think quite clearly the courts should refuse matrimonial relief through divorce in cases where the evidence has been fabricated or where the grounds alleged in the petition do not exist, but I think there are other circumstances in Canadian judicial decisions which have been deemed to involve collusion and where it might well have been better for the court to exercise its discretion and grant the relief. A particular case to which I would refer here is the *Shaw* case, which I mentioned earlier.

On the issue of connivance, which is defined as an act done with corrupt intention to promote or encourage the commission of adultery, there has again been difficulty encountered, in my opinion, in applying the concept. Particular difficulty has arisen in cases which involve what is known as "passive acquiescence." I accordingly recommend that connivance also constitute a discretionary bar to matrimonial relief. If the courts follow the practice which I think is likely to be followed, they will refuse relief in the cases of *active* promotion of the commission of the offence complained of in the petition.

I further recommend that condonation, which can be regarded as forgiveness by a spouse of a matrimonial offense and a reinstatement of the other spouse into the matrimonial relationship, also constitute a discretionary, and not

an absolute, bar to relief. It is quite clear that under the present concept, the law of condonation effectively deters the spouses from any attempt at reconciliation. I think the position has to be changed in law if we are to encourage and promote attempts at reconciliation between the spouses. I think it is very important that steps be taken to amend the law of condonation so as to give effect to a policy which is aimed at promoting reconciliation in cases of matrimonial dispute.

Co-Chairman Senator ROEBUCK: Is not the purpose of the law with respect to condonation the determination not to allow one of the parties to hold over the head of the other the offence which, in our law, he or she has condoned or forgiven?

Professor PAYNE: This is the purpose.

Co-Chairman Senator ROEBUCK: So that if the parties decide to live together again the past is closed, according to our present law and understanding. The past is closed, and the parties are on an equal basis, unless the evil one commits some other offence?

Professor PAYNE: This is the position in law, and the effect of it is that a solicitor says to his client: "If you attempt a reconciliation and it fails then your remedy to divorce, which is presently available, will be lost to you." In other words, far from having any incentive in the legal regime which would encourage a solicitor to promote reconciliation, the law of condonation hampers and deters attempts at reconciliation between the parties. The law of condonation as presently established in practice precludes any attempt at reconciliation where the parties are uncertain of the prospect of the attempt proving successful.

Senator ASELTINE: And to resume co-habitation?

Co-Chairman Senator ROEBUCK: Would there not be exactly the reverse situation if somebody is advising the two parties that they should try it out, or to give it another try, and they knew it was discretionary on the part of the judge to call that condonation or not to call it condonation. I think I would advise against their trying it.

Professor PAYNE: I think the point of my recommendation is that the court may find condonation but nevertheless exercise a discretion and grant relief under the circumstances.

Co-Chairman Senator ROEBUCK: What you are saying is that in those circumstances one of them may hold over the head of the other while living together the possibility of reviving the old story to the detriment of a spouse, but may or may not be able to do it depending on the judge?

Professor PAYNE: I think that what happens in practice is that when a lawyer is employed by a client, he makes clear to his client that if a resumption of cohabitation occurs in an attempt to secure a reconciliation, and such resumption of cohabitation does not have this beneficial result, then the remedy of divorce is lost. This opinion I certainly accept, and it is shared by the Denning Committee which reported in 1947 on Procedure in Matrimonial Causes in England; by the Harris Committee in its 1948 report, and by the Royal Commission on Marriage and Divorce, 1951-1955, and would seem to reflect the opinion of members of the Bar with whom I have spoken.

Mr. AIKEN: From the viewpoint of a practicing solicitor who is asked for a legal opinion, you don't cohabit if you want to get a divorce.

Professor PAYNE: That is my impression, and that is why I suggest a discretion.

Mr. McCLEAVE: Would it not be simpler to have in the law something that could be used as a ground for the petition that nothing would be done without an honest attempt of reconciliation for a couple of months?

Professor PAYNE: This is what they have done in England. It has its dangers and puts the parties on trial for two months or less. It gives them an opportunity to make a single attempt at reconciliation. If they attempt reconciliation for one day and then they give up, the period is closed to them and the opportunity for attempting reconciliation is no longer available under the English statute. Under the recommendation I propose, the discretion may more effectively promote or encourage attempts at reconciliation.

Mr. McCLEAVE: Yours is a 25 per cent formula before a petition is lost?

Professor PAYNE: I am thinking of it in the light of grounds such as adultery, cruelty, bestiality. Certainly I do not think any traditional bars should attach to the "living apart" provision.

I would be inclined to the opinion that condonation should not constitute an absolute bar, but only a discretionary bar, and that no specific period should be designated for trial reconciliation. I think this method adopted in England is unfortunate, and I would hope my suggestion of a discretionary bar would prove to be more beneficial. It is difficult to know if it will be. This is something that has not been put to the test in jurisdictions of which I am aware, but I think it moves in the right general direction.

Co-Chairman Mr. CAMERON: It is now twenty minutes to six. Are there any questions on collusion, connivance and condonation?

Senator ASELTINE: I have some questions on other matters.

Co-Chairman Mr. CAMERON: Do you wish to ask them now? We hope that Professor Payne will be back.

Senator ASELTINE: I should like to get the benefit of his experience, and also to question him with respect to the doing away of parliamentary divorce.

Co-Chairman Mr. CAMERON: You will have that opportunity. I think Mr. Aiken has a question.

Mr. AIKEN: I wonder if Professor Payne would like to discuss the question of divorce within three years of marriage?

Professor PAYNE: I think it would be convenient to discuss that separately. The reason I discussed condonation, connivance and collusion today was to make it quite clear that my proposal is that these bars, and indeed, the traditional discretionary bars, presently applying throughout Canada, should not apply to the "living-apart" provision.

Co-Chairman Senator ROEBUCK: I am greatly impressed, Professor Payne, not only with your brief but your presentation; it is extremely practical, knowledgeable and right to the point. I shall look forward to your next appearance before us to continue your thought. In the meantime, please accept from me and the rest of the members of the committee our thanks for what you have done.

Professor PAYNE: I am most grateful—

Senator ASELTINE: May I add that over the weekend I read this brief from cover to cover, and I am very much pleased with it. I think it is one of the best expositions of the whole subject I have ever had the privilege of reading. I shall be delighted if Professor Payne comes back again.

Mr. McCLEAVE: I hate to call the professor a "legal Batman"; but this is our first serial witness, and I think he should be commended.

The committee adjourned.

APPENDIX "45"

THE FOLLOWING RESOLUTIONS WERE PASSED AT THE 4th ANNUAL MEETING OF THE CANADIAN UNITARIAN COUNCIL IN WINNIPEG ON MAY 8, 1965.

1. Divorce Reform

WHEREAS the grounds for divorce in Canada, which reflect the social needs and mores of an earlier era and which differ from Province to Province, require that individuals fit their situation to the grounds (i.e. adultery), rather than the grounds being adaptable to the individual situation; and WHEREAS marriage is a legal contract developed historically as a means of protection for woman and child; and WHEREAS in the context of modern Canadian society, the protection of woman and child no longer requires that a man and woman continue in a personal relationship they wish to end; and WHEREAS the nurture of the child, while best accomplished under the conditions of wholesome family life can seldom be well provided for under circumstances of undue tension or hostility between the parents; and WHEREAS society has no interest other than the well-being of the persons involved in forcing two persons who no longer care to co-habit as man and wife to continue legally in this relationship;

THEREFORE BE IT RESOLVED that the Canadian Unitarian Council 1965 Annual Meeting requests the governments concerned to amend their divorce laws along the following lines:

1. That in cases where both parties desire a divorce and there are no children, the divorce be granted upon the second application, after a six-months' waiting period following an initial joint application, subject to the following provisions concerning support:

- (a) if the parties agree upon support for either spouse, or agree to dispense with support, the provisions of such agreement should become part of the decree of divorce;
- (b) if the parties do not agree upon the question of support, this issue should be heard by and ruled upon by a domestic relations judge, such ruling to become part of the decree;
- (c) such hearing should be in camera, unless an open hearing is requested by one of the parties;
- (d) during the six months' waiting period counselling services should be made available to the parties but not be obligatory.

2. That in cases where one party only desires a divorce and there are no children, the divorce be granted upon the second application after a one-year waiting period following an initial application, subject to the same provisions concerning support as under 1. above, and the further provision that no penalty or financial burden be placed upon the applying party because of the initiative taken by such party. Counselling services should be made obligatory during the one-year waiting period.

3. That, to protect the interests of children, an Authority be established and competently staffed to confer with all parents applying for divorce concerning plans for custody and support of minor or dependent children.

4. That, in cases involving minor or dependent children, divorce be granted upon the second application of either or both parties after a one-year waiting period following an initial application, subject to the following provisions concerning custody and support of children and support of spouses:

- (a) where both parents and the Authority referred to under 3. above agree upon proposals for the custody and support of children as serving the best interests of the children, these proposals should become part of the decree of divorce;
- (b) where, in the view of either parent or the Authority, proposals for custody and/or support are not the best possible provision for the children, the issue of such provision should be heard by and ruled upon by a domestic relations judge, such ruling to become part of the decree of divorce,
 - (i) in such hearing, the Authority and/or either parent may call upon any source of information including social agency, welfare or other organization, or police report—which may aid in determining the best provision for the children, and
 - (ii) such hearing should be in camera, unless an open hearing is requested by one of the parents and approved by the Authority;
- (c) provision for the support of either spouse, or for dispensing with such support, should be established as under 1. above and become part of the decree of divorce.

APPENDIX "46"

BRIEF TO THE SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS ON DIVORCE

by

Julien D. Payne.

Definition of Scope Of this Brief

(1) It is noted that the Order of Reference of the Special Joint Committee of the Senate and House of Commons on Divorce is couched in broad general terms. This writer proposes to confine his attention to the following issues:

1. Grounds for Divorce;
2. Bars to Matrimonial Relief;
3. Protection of Children in Matrimonial Proceedings;
4. Alimony and Maintenance;
5. Marriage Guidance and Matrimonial Conciliation;
6. The Court which should exercise Jurisdiction in Matrimonial Proceedings
7. Domicile as a Basis of Jurisdiction in Matrimonial Causes;
8. Void and Voidable Marriages;
9. The Need for Sociological Research.

1. GROUNDS FOR DIVORCE

The Present Grounds For Divorce In Canada

(2) Adultery is a ground for divorce at the suit of either husband or wife in each of the Canadian provinces wherein divorce is permitted through judicial process.¹

(3) Rape, sodomy and bestiality are additional grounds for divorce in a suit by a wife in those provinces wherein The Divorce and Matrimonial Causes Act, (Eng.), 1857, applies.²

(4) In Nova Scotia there are additional grounds for divorce, namely, cruelty, impotence and kindred within the degrees prohibited by 32 Hen. XIII, ch. 38.³

(5) In New Brunswick and Prince Edward Island additional grounds for divorce include frigidity or impotence, and consanguinity within the degrees prohibited by the aforementioned statute. Since the New Brunswick statutes do not specifically include bestiality as a ground for divorce, it has been held that no decree of divorce shall be issued on proof of such offense.⁴

General Considerations

(6) Before setting out specific proposals for revision of the divorce laws in Canada, the writer purposes to examine certain general considerations.

The Function Of The Law Of Marriage And Divorce

(7) At the outset, it is essential to recognise that any revision of the law of marriage and divorce must seek to promote and maintain stable and healthy married life and safeguard the interests and welfare of children.

(8) As the Gorell Commission observed in its Report on Marriage and Divorce:⁵

"In considering what law should be laid down in the best interest of the whole community, the Senate should be guided by two principles:

(i) No law should be so harsh as to lead to its common disregard.

(ii) No law should be so lax as to lessen the regard for the sanctity of marriage."

(9) Any extension of the grounds of divorce in Canada will inevitably result in an increase in the divorce rate. It is submitted, however, that such resulting increase is not inherently evil if the remedy of divorce is available only in circumstances where the marriage has in fact irretrievably broken down.

(10) This writer accepts the conclusion expressed by Dr. J. P. Lichtenberger that:

"Divorce legislation has the function of regularising procedure in the interest of an orderly society, of safeguarding the rights of persons and of property when marriages for any reason have broken down, and when indirectly applied to the improvement of marital and impinging social and economic conditions, it can do much to forestall family disorganization and its consequence, divorce. But when it is applied directly to the control or diminution of divorces after marriages have already been destroyed, its effects are practically nil, and if too stringent and too rigidly enforced, it may easily create greater ills than it cures."⁶

Objections To Present Grounds For Divorce in Canada

(11) Recognition of adultery as the only ground for divorce in Canada tends to bring the administration of Justice into public disrepute. There are no doubt cases where the spouses commit the matrimonial offence of adultery specifically in order to obtain a divorce and there is a strong probability that many of the undefended cases, which constitute more than ninety per cent of all divorce cases, result from consensual arrangements or involve the nondisclosure of material facts to the court.⁷

(12) The limitation of the grounds for divorce in Canada to the offence of adultery tends to promote the formation of illicit unions and the birth of illegitimate children. There are presently in Canada many thousands of persons who, finding that the existing law offers no relief, are taking the law into their own hands by entering into "common law" unions and rearing children in conditions in which neither mother nor child has adequate social or financial protection. Many illicit unions have the quality of an enduring marriage and it is

a grievous hardship to the parties and their children that they are denied the opportunity for lawful wedlock and legitimate birth.

(13) Even if a marriage has irretrievably broken down, this fact cannot be recognised in Canada by the issue of a divorce decree unless one of the spouses has committed or is prepared to commit adultery or perjury. In the words of nine members of the Royal Commission on Marriage and Divorce which sat in England in 1951-1955: "We think it may be said that the law of divorce...is indeed weighted in favour of the least scrupulous, the least honourable and the least sensitive; and that nobody who is ready to provide a ground of divorce, who is careful to avoid any suggestion of connivance or collusion and who has a co-operative spouse, has any difficulty in securing a dissolution of the marriage."⁸

(14) Legally innocent spouses may refuse to petition for divorce from their legally guilty partners for many reasons ranging from moral or religious conviction to indolence or mere spite and such refusal may be persisted in notwithstanding the total and irreparable breakdown of marriage and the artificiality of the legal concept of guilt and innocence.

(15) The results ensuing from the present grounds for divorce in Canada, whether measured in terms of personal frustration, extra-marital unions, illegitimate births or abuse of the legal process, are extensive and socially damaging.

(16) In criticising the existing divorce laws in Canada, it may be appropriate to quote from the judgment of Sir Gorell Barnes, P., in *Dodd v. Dodd*⁹ since his criticisms of the English law existing in 1906 would seem directed at the same general conditions which presently prevail in Canada. Sir Gorell Barnes, P., stated:

"That the present state of the English law of divorce and separation is not satisfactory cannot be doubted. The law is full of inconsistencies, anomalies and inequalities amounting almost to absurdities; and it does not produce desirable results in certain important respects. Whether any, and what, remedy should be applied raises extremely difficult questions, the importance of which can hardly be over-estimated, for they touch the basis on which society rests, the principle of marriage being the fundamental basis upon which this and other civilised nations have built up their social systems; it would be most detrimental to the best interests of family life, society and the State to permit of divorces being lightly and easily obtained, or to allow any law which was wide enough to militate by its laxity against the principles of marriage...This judgment brings prominently forward the question whether, assuming that divorce is to be allowed at all,...and reform would be effective and adequate which did not abolish [judicial] separation..., place the sexes on an equality as regards offence and relief, and permit a decree being obtained for such ble and frustrate the object of marriage; and whether such reform would not largely tend to greater propriety and enhance that respect for the sanctity of the marriage tie which is so essential in the best interests of society and the State. It is sufficient at present to say that, from what I have pointed out, there appears to be good reason for reform and that probably it would be found that it should be in the direction above indicated."

The opinion expressed by Sir Gorell Barnes, P., in *Dodd v. Dodd*, *supra*, was endorsed by the majority of the members of the Royal Commission on Divorce and Matrimonial Causes which sat in England under the chairmanship of Lord Gorell in 1909-1912. The majority of members expressed the conclusion that judicial separation was a socially unsatisfactory remedy in cases where

married life had become intolerable and rejected the view that adultery should constitute the only ground for dissolution of a marriage. The majority recommended that desertion for more than three years, cruelty, incurable insanity, incurable drunkenness, and imprisonment under commuted death sentence should constitute additional grounds for divorce.⁽¹⁰⁾ The Minority Report, signed by the Archbishop of York, Sir William Anson and Sir Lewis Dibdin agreed in substance with most of the Majority's recommendations, but, whilst accepting additional grounds of nullity, emphatically rejected the proposal to extend the grounds of divorce.⁽¹¹⁾

Alternative Bases of Divorce Law

(17) There are four possible bases for divorce, and any one or more of them might conceivably be adopted as the underlying basis for a revision of Canadian divorce laws:

1. The Doctrine of the Matrimonial Offence

The present divorce laws in Canada are premised upon "the doctrine of the matrimonial offence", which imports that no spouse may obtain a divorce unless his or her partner has been guilty of a specified offence.

2. The Doctrine of Marriage Breakdown

The "doctrine of marriage breakdown", if adopted as the sole criterion for divorce, implies that there should be a single comprehensive ground which would allow divorce to be granted to either spouse upon proof that the marriage has irretrievably broken down.

3. Divorce by Mutual Consent

The essential characteristic of divorce by consent is that the spouses should be entitled to seek a divorce provided that they have mutually and voluntarily resolved to terminate their marriage.

4. Divorce at the Option of Either Spouse

Divorce at the option of either spouse implies the right of a spouse to unilaterally terminate at will his or her marriage status.

Effect Of Divorce Grounds Upon Divorce Rate

(18) It is commonly assumed that the number of divorces will depend upon the number and definition of grounds provided under the legal regime. This assumption, however, has been categorically denied by leading sociologists and scholars. See, for example, J. P. Lichtenberger, "Divorce Legislation" (1932) 160 *Annals* 116:

"The only perceptible result of changes in legal grounds is the redistribution of divorces on the basis of available grounds, without any effect upon their number. This is attested to by the fact there is not the slightest connection between the number of grounds in the several (American) states and their respective divorce rates."

See also R. Neuner, "Modern Divorce Law: The Compromise Solution" (1943) 28 *Iowa L. Rev.* 272:

"The number of divorces is not dependent on the number and definition of the divorce grounds. This statement must be qualified however. If a jurisdiction recognises only one or two narrowly defined divorce grounds—the best example is New York with adultery as the only

ground—the number of divorces granted every year is much smaller in those jurisdictions which adhere to the traditional scheme of divorce grounds. But if a system of various divorce grounds is adopted, it does not make much difference how they are defined; the legislator thereby loses control of the divorce situation.”

Two Fundamental Issues:

- (1) *Fault Or Failure As The Criterion for Divorce?*
- (2) *General Clause Or Enumerated Grounds?*

(19) As Professor Otto Kahn Freund observed in (1956) 19 Mod. L. Rev. 573 at p. 585, “[In considering proposals for divorce law reform] there are in fact two problems which it is advisable to distinguish. One is the problem of ‘fault or failure’, i.e., whether the law should dissolve a marriage only if in some sense its disintegration was due to the ‘guilt’ of either spouse, or whether the objective fact of disintegration should suffice. The other problem is that of ‘general clause or enumeration of grounds’, i.e., whether the proof of specific defined sets of facts should be required and sufficient or whether the court must be satisfied as to the general deterioration of the marriage, each single event being only an incident serving as evidence. These two problems are quite different. Thus it is possible to affirm the ‘failure’ principle *in toto* or in part, i.e., to reject the doctrine of the ‘matrimonial offence’ as the basis or the only basis of divorce and yet to argue in favour of a formulated ground or grounds of divorce which alone will enable the Court to terminate the marriage. This the present [English] law does in cases of insanity and this was the essence of the Bill which Mrs. Irene White, M.P. introduced in the House of Commons but withdrew when the Government undertook to appoint the Royal Commission. It was to the effect that, in addition to the traditional matrimonial ‘offences’, it should for either spouse be a ground for divorce that he or she had been separated from the other for seven years, that there was no reasonable prospect of reconciliation, and that suitable financial arrangements had been made for the protection of the wife. If this were accepted the law would still be based on the enumerative principle but it would embody the ‘failure’ in addition to the ‘fault’ idea. On the other hand, one can cling to the ‘fault’ principle, . . .but formulate a ‘general clause’, e.g. that the marriage will be dissolved if through the fault of either spouse or both spouses the marriage has disintegrated to such an extent that the spouses can no longer be expected to cohabit. It has been a pretty general experience that where legislation fails to provide a general clause of this kind, the courts will provide it. One (or two or more) of the formulated ‘matrimonial offences’ . . .will, under the pressure of social facts be ‘interpreted’ by the courts until it comes at least close to being an equivalent of a ‘general fault’ clause. This has happened in France. . .,in many of the states of the United States with ‘extreme’, ‘intolerable’ and other kinds of cruelty. . .and in England with ‘constructive desertion’ and to a small extent with ‘mental cruelty’.”¹²

(20) It is of interest to note that it is not uncommon, even in jurisdictions wherein a general clause has been statutorily introduced, for such a clause to be supplemented by other defined grounds for divorce. For example, section 142 of the Swiss Civil Code provides:

“If so deep a destruction of the marital relationship has occurred that continuance thereof cannot fairly be expected from the spouses, either spouse may sue for a divorce. [But] if the deep destruction can overwhelmingly be ascribed to one, the other only of the couple can sue for divorce.”

This general clause, however, is supplemented by additional grounds for divorce which include adultery, infamous crime, severe cruelty, desertion, and incurable insanity.

(21) Similarly in Western Germany there is a general clause which provides as follows:

“Where the domestic community of the spouses has ceased to exist for three years, and where by virtue of a deep-seated and irretrievable disruption of the matrimonial relationship, the restitution of a community of life corresponding to the nature of marriage cannot be expected, either spouse may apply for divorce. [But] where the spouse who makes the application has been wholly or overwhelmingly responsible for the disruption, the other spouse may object to the divorce. Such objection is to be disregarded where the maintenance of the marriage is not morally justified considering a proper estimate of the character of marriage and the total behaviour of both spouses. The application for divorce is to be refused where the properly understood interests of one or several minor children of the union demand the maintenance of the marriage.”

This general clause, like that in the Swiss Code, is also supplemented by additional grounds for divorce which include adultery, mental derangement, and incurable contagious loathsome disease.

(22) A similar pattern of divorce legislation may also be found in Sweden. Thus Professor Wolfgang Friedmann in his book entitled *Law in a Changing Society* at pages 213-214 observes:

“Among the contemporary Western systems, the Swedish Marriage Law of 1920 has probably gone farthest in the admission of the breakdown principle. Apart from the possibility of joint application by both spouses for a separation decree on the ground of ‘profound and lasting disruption’, which the Court has to accept without examination, a separation decree may also be granted on unilateral application, where the court finds that there has, in fact, been a profound and lasting disruption. Divorce can always be obtained one year after a judicial separation decree, provided the spouses have, in fact, lived separate during that year. Moreover, divorce may be obtained, without foregoing judicial separation, on certain ‘breakdown’ grounds, most important of which are actual separation for three years or mental insanity for more than three years without hope of recovery. These grounds for divorce stand side by side with a number of ‘fault’ grounds, so that the Swedish law combines in a sense the principles of consent, breakdown and fault.”

(23) It may well be contended that a general clause, whether based on the fault or non-fault concept, tends to uncertainty and imposes too great an onus upon the Court. This conclusion may well be reflected:

- (i) in the experience of Australia, New Zealand, and American and European jurisdictions which have introduced the marriage breakdown concept through specific “separation provisions” rather than under a general clause providing, for example, that a marriage shall be dissolved on proof that the disruption of the marriage is irreparable and attempts at reconciliation would be impracticable or futile, and
- (ii) in the traditional pattern of legislation adopted in Australia, New Zealand, and in the American and European jurisdictions which define specific offences in addition to or in substitution for a general fault clause.

(24) I should be realised, however, that whilst the general clause, whether premised upon fault or non-fault, imposes greater demands upon the court, it has the advantage of recognising that marriage and divorce involve complex human and social relationships which cannot simply be reduced to the objective fact of "separation" or to designated and specific offences premised upon a simple equation of guilt and innocence.

Objections to Divorce Law Regime Based Exclusively on a Fault Concept

(25) The arguments against retaining or promoting a divorce law regime premised exclusively upon the fault concept are substantial. They include the following:

- (i) The fault grounds for divorce do not in the majority of cases represent the real cause of the marriage breakdown. The doctrine of the matrimonial offence, with its consequential emphasis on legal guilt and innocence, is artificial for in real life it is comparatively rare to find total innocence on one side and total guilt on the other. Marriage breakdown cannot be reduced to a simple equation of guilt or innocence and these concepts cannot be effectively measured or evaluated.
- (ii) The refusal of divorce except on proof of a matrimonial offence precludes the State from recognising social realities in certain cases where the marriage has broken down. The argument that the State has an interest in promoting the family relationship becomes meaningless when the family relationship is no longer performing any useful function in promoting orderly adjustment between the sexes and the proper rearing of children.
- (iii) The fault concept with its corollary of the adversary system tends to promote unnecessary friction and tension between spouses who find it necessary to have recourse to the divorce court.
- (iv) The doctrine of the matrimonial offence places undue emphasis upon the past conduct of the spouses and does not effectively take into consideration the prospect of a viable future marital relationship.

Marriage Breakdown—A Triable Issue?

(26) It is sometimes contended that the introduction of marriage breakdown, in any form, as a basis for divorce imposes an impossible task upon the court. In the words of nine members of the Royal Commission on Marriage and Divorce which sat in England in 1951-55: "To determine whether or not a marriage had broken down is really not a triable issue."¹³ This opinion, however, would seem untenable in the light of experience in Australia, New Zealand, and American and European jurisdictions wherein the "marriage breakdown" concept has been effectively applied as a criterion for divorce under the "living apart" statutes.¹⁴

(27) It should further be observed that the "marriage breakdown" concept has already been effectively applied by Canadian Courts in relation to the discretionary bars to divorce and the absolute bar of condonation. With respect to the discretionary bars to divorce, the Canadian Courts have consistently followed *Blunt v. Blunt*¹⁵ which establishes that the circumstances that govern the exercise of the discretion "in the petitioners' favour" are as follows:

- (i) the position and interest of any children of the marriage;
- (ii) the interest of the party with whom the petitioner has been guilty of misconduct, with special regard to the prospect of their future marriage;
- (iii) the question whether, if the marriage is not dissolved, there is a prospect of reconciliation between husband and wife;

- (iv) the interest of the petitioner, and in particular the interest that the petitioner should be able to remarry and live respectably; and
- (v) the interest of the community at large, to be judged by maintaining a true balance for the binding sanctity of marriage and the social considerations which make it contrary to public policy to insist upon the maintenance of a union which has utterly broken down.

(28) Although the considerations formulated in *Blunt v. Blunt, supra*, were directed to the discretionary bar of the petitioner's adultery, they would appear applicable in respect of all the discretionary bars to divorce.¹⁶

(29) It is significant to observe that the application of the considerations set out in *Blunt v. Blunt, supra*, enable the Canadian Courts to give legal effect to the fact of marriage breakdown by granting a divorce to both parties. Thus, where each spouse has instituted proceedings for divorce on the ground of the other spouse's adultery and the respective charges have been proved, in the absence of collusion, connivance or condonation, the court may exercise any of the following powers:

- (i) it may exercise its discretion "in favour of" one party while dismissing the action of the other;
- (ii) it may refuse to exercise its discretion "in favour of" either party in which case both actions will be dismissed; or
- (iii) it may exercise its discretion "in favour of" both parties and grant a decree to each of them.

In recent years there has been an increasing tendency to adopt this third alternative in order to avoid any possible prejudice to the parties in subsequent proceedings.¹⁷ It is accordingly apparent that the Canadian Courts presently recognise and give legal effect to the fact of marriage breakdown notwithstanding that the grounds for divorce are premised upon the "offence concept".

(30) With respect to the absolute bar of condonation, it is well established that a matrimonial offence which has been condoned may be revived by subsequent matrimonial misconduct on the part of the offending spouse. Such misconduct which operates to revive the original offence need not itself constitute a ground for matrimonial relief; it is sufficient if the misconduct is such as if persisted in would render a continuation of marital consortium impossible.¹⁸ It is thus evident that, in determining whether a condoned offence has been revived so as to justify the issue of a divorce decree, the court will examine the subsequent matrimonial misconduct complained of with a view to discovering whether in fact the marriage has irretrievably broken down.

Legislative Recognition of Marriage Breakdown as a Ground for Divorce

(31) Recognition of marriage breakdown as a basis for matrimonial relief through divorce proceedings has been directly admitted in one form or another in Australia, New Zealand, in twenty-six jurisdictions in the U.S.A., and in several European countries. Such recognition is usually afforded under the so-called "living-apart" statutes.

Australia

(32) In Australia section 28 (m) of the Matrimonial Causes Act (Aust.), 1959 provides that a decree of divorce may be granted by the court on the petition of either spouse where "the parties to the marriage have separated and thereafter have lived separately and apart for a continuous period of not less than five years immediately preceding the date of the petition and there is no reasonable likelihood of cohabitation being resumed."

(33) For the purposes of section 28 (m), the parties to a marriage may be taken to have separated notwithstanding that the cohabitation was brought to an end by the action or conduct of only one of the spouses and even though such conduct constitutes desertion. A decree of divorce may also be granted on the ground specified under section 28 (m) notwithstanding that there was in existence at any material time:

- (i) a judicial decree suspending the obligation of the parties to the marriage to cohabit; or
- (ii) an agreement between the parties for separation.

(34) In certain circumstances, however, the Court must or may refuse to grant a decree on the ground of separation. Thus, section 37 of the Matrimonial Causes Act (Aust.), 1959, provides as follows:

“37.—(1) Where, on the hearing of a petition for a decree of dissolution of marriage on the ground specified in para. (m) of section 28 of this Act (in this section referred to as ‘the ground of separation’), the court is satisfied that, by reason of the conduct of the petitioner, whether before or after the separation commenced, or for any other reason, it would, in the particular circumstances of the case, be harsh and oppressive to the respondent, or contrary to the public interest, to grant a decree on that ground on the petition of the petitioner, the court shall refuse to make the decree sought.

(2) Where, in proceedings for a decree of dissolution of marriage on the ground of separation, the court is of opinion that it is just and proper in the circumstances of the case that the petitioner should make provision for the maintenance of the respondent or should make any other provision for the benefit of the respondent, whether by way of settlement of property or otherwise, the court shall not make a decree on that ground in favour of the petitioner until the petitioner has made arrangements to the satisfaction of the court to provide the maintenance or other benefits upon the decree becoming absolute.

(3) The court may, in its discretion, refuse to make a decree of dissolution of marriage on the ground of separation if the petitioner has, whether before or after the separation commenced, committed adultery that has not been condoned by the respondent or, having been so condoned, has been revived.

(4) Where petitions by both parties to a marriage for the dissolution of the marriage are before a court, the court shall not, upon either of the petitions, make a decree on the ground of separation if it is able properly to make a decree upon the other petition on any other ground.”

(35) It should be observed that section 40 of the Matrimonial Causes Act (Aust.), 1959, provides that no decree for the dissolution of marriage shall be issued if the petitioner, in bringing or prosecuting the proceedings, has been guilty of collusion with intent to cause a perversion of justice. The absolute bars of condonation and connivance and the traditional discretionary bars would, however, appear inapplicable to a petition for divorce on the ground specified in section 28 (m): see Matrimonial Causes Act, (Aust.) 1959, sections 39 and 41.

New Zealand

(36) Section 21 (1) of the Matrimonial Causes Act (New Zealand), 1963, provides that a petition for divorce may be presented to the court on any of the following grounds:

“(m) That the petitioner and respondent are parties to an agreement for separation, whether made by deed or other writing or orally, and that

the agreement is in full force and has been in full force for not less than three years.

(n) That—

- (i) The petitioner and respondent are parties to a decree of separation or a separation order made in New Zealand, or to a decree, order, or judgment made in any other country if that decree, order, or judgment has in that country the effect that the parties are not bound to live together; and
- (ii) That decree of separation, separation order, or other decree, order, or judgment is in full force and has been in full force for not less than three years.

(o) That the petitioner and respondent are living apart and are unlikely to be reconciled, and have been living apart for not less than seven years.”

(37) In respect of the grounds set out in section 21 (1) (m) and (n), *supra*, section 29 of the Matrimonial Causes Act (New Zealand), 1963, provides that the court shall dismiss the petition if the respondent opposes the granting of the decree and it is proved that the separation was due to the wrongful act or conduct of the petitioner.¹⁹

(38) The Court is also afforded a general statutory discretion to refuse a decree of divorce on the grounds set out in section 21 (1) (m), (n) and (o) notwithstanding that the petitioner has proved his case, provided that the court shall not, in the exercise of that discretion, refuse to grant a decree by reason only of the adultery of either party after their separation: Matrimonial Causes Act (New Zealand), 1963, section 30.

United States of America

(39) Twenty-six jurisdictions in the United States of America have qualified the traditional concept that divorce shall be granted only to the “innocent” spouse on proof that the respondent has committed a matrimonial offence by introducing statutory provisions whereby a divorce may be granted to spouses who have lived separate and apart for a specified number of years.

(40) The “living apart” provisions which have been enacted in the American jurisdictions have taken a variety of forms and include:

- (i) Provisions whereby the courts may, without regard to fault, grant a divorce at the suit of either spouse, where the spouses have lived separate and apart for a specified period pursuant to a judicial decree or order of separation.
- (ii) Provisions whereby the courts may grant a divorce to either spouse where the spouses have voluntarily separated and lived apart for a specified period.
- (iii) Provisions whereby the court may grant a divorce where the spouses have lived separate and apart for a specified period but where such relief is available only to a spouse who was not at fault in causing the separation.
- (iv) Provisions whereby the court may grant a divorce to either spouse where the spouses have lived separate and apart for a specified period, regardless of whether the separation was voluntary and/or attributable to the fault of either spouse.

(41) The above provisions have been examined in detail by Professor Walter Wadlington in an article entitled “Divorce Without Fault Without Perjury” which was published in (1966) 52 Virginia Law Review at pages 32-87.²⁰ It is accordingly unnecessary for this writer to duplicate Professor Wadlington’s

research by detailing the operation of "living apart" provisions which have been enacted in the majority of American jurisdictions. The writer would, however, take this opportunity to endorse the following conclusion which was expressed by Professor Wadlington:

"Of the [provisions] just outlined, the non-fault separation category [namely, category 4] would best effectuate a broad breakdown approach to divorce at this time—Several key features make the non-fault separation statute preferable at this stage. It has been proven workable in practice in the courts, and when properly drafted avoids the judicial injection of still prevalent fault concepts. If the separation time is reasonable, it can afford an opportunity for reconciliation and insure against precipitate action; at the same time, it is simple and quick enough to discourage the parties from resorting to other divorce routes which may promote perjury with respect to grounds or jurisdiction. By assuring that the parties have lived separately for a specified minimum period, it applies only to the marriage which has ceased to function and therefore should be dissolved, and it makes the dissolution process relatively painless by avoiding as much as possible (alimony disagreements sometimes to the contrary) the need for fixing blame or publicly airing private misconduct to the future detriment of the immediate parties and other family members".

European Countries

(42) A brief summary of the extent to which living apart provisions have been introduced in Europe as a ground for divorce may be found in an article entitled "Living Apart As A Ground For Divorce",²¹ the relevant sections of which read as follows:

"In Europe, living apart by the spouse is a ground for the granting of an absolute divorce in a number of countries, and the distinction is often made between a private separation and a living apart pursuant to permission granted either by an administrative authority or pursuant to a decree of divorce from bed and board.

For example, in Denmark, a decree of absolute divorce may be granted after a husband and wife have been *de facto* separated for four years, and in Germany an absolute divorce is available where the period of living apart has endured for three years.

The more common practice in Europe, however, in those countries where a legal separation may be granted by an administrative authority, or a divorce *a mensa et thoro* by a court, is the conversion of the separation or divorce from bed and board into an absolute divorce, after such period of time as is specified by statute.

In Denmark, a legal separation granted by an administrative authority may be converted into an absolute divorce two and a half years after the decree of separation, or eighteen months thereafter, provided the spouses agree. Out of all divorces granted in Denmark, half were in this category of conversion. In Sweden, a separation may be granted on the motion of both spouses, and converted, after one year, into a divorce. This was done in 5,549 of the 6,748 divorces granted in Sweden in 1948. In Norway the period is two years, but if the divorce is requested by both spouses, the time is reduced to one year.

In the Netherlands, also, a separation can be requested by mutual agreement of the spouses any time after two years from the date of the marriage, and it can be converted into an absolute divorce after five years if there has been no reconciliation. The court, however, must attempt a reconciliation during the proceedings for conversion.

In Switzerland, divorce is permitted without a finding of fault on the part of either of the spouses, but the judge in lieu of divorce may order a separation of from one to three years if he believes there is a chance of reconciliation, and after such period, or after three years if no period was fixed by the court, either spouse may request a divorce. In Turkey the period of time is similar to that in Switzerland, after which conversion may be sought. Under the former law of Hungary, a divorce after five years' separation, without declaration of fault on the part of either party, was permitted.

While in France, Belgium and Monaco, a divorce from bed and board is not permitted by consent of the parties, but only for specified grounds involving fault on the part of the defendant spouse, such legal separations are generally granted more freely by the courts than are absolute divorces, and they may be converted into an absolute divorce on petition of either party at the expiration of three years. Originally in France, the conversion could only be sought by the defendant in the separation case. The reason for this rule was the policy that a judicial separation was intended to be only temporary, since it was an anti-social situation, which should be terminated after an appropriate period by reconciliation, or if that was impossible, by conversion into an absolute divorce. It was considered wrong to permit one spouse to force the other to remain indefinitely in a status which was not a marriage, but where celibacy theoretically was enforced. Therefore, the defendant was permitted to convert the legal separation into an absolute divorce after three years. Later in 1884, the right of requesting a conversion was given to both spouses, and this is the law in France today."

General Comment In respect Of Legislative Recognition Of The Breakdown Concept In The Aforementioned Jurisdictions

(43) The preceding analysis will have indicated that Australia, New Zealand, many American jurisdictions and several European countries have enacted "living apart" provisions which reflect a realistic recognition of the fact that no useful purpose is achieved by the state insisting upon the legal continuance of the marriage bond in circumstances where the marriage has irretrievably broken down.

(44) To view the preceding analysis in perspective, however, it should be observed that whilst the legislative introduction of the marriage breakdown principle through "living apart" provisions has made substantial inroads upon the traditional offence concept in divorce proceedings, the vast majority of countries still theoretically adhere to the "doctrine of the matrimonial offence". Thus as Professor W. Friedmann, observes in his book entitled *Law In A Changing Society* at pages 214-215:

"Most of the contemporary laws still base their law of divorce on a number of enumerated 'faults': adultery, cruelty, desertion, violence, and the like. Some legal systems tend towards general definitions, others prefer the enumeration of a large number of specific offences, such as cruelty to children, gambling, drunkenness, sexual misconduct, etc. Adultery is the backbone of all the legal systems which make 'fault' the basis of their divorce jurisdiction.²² The only major open deviation now made in the law of England and Scotland—and all the British Dominions except Canada, in thirty American states, and in nine out of seventeen European countries, sampled in the Report of the (Morton) Commission—from the principle of 'fault' is the recognition of insanity as a ground for divorce (usually after a specified number of years). Here,

divorce is granted because fate—not fault—has made the continuation of the marriage impossible in anything but name.”

(45) But Professor Friedmann further observes:

“It would, however, be highly unrealistic to judge the present state of marriage and divorce by the enumeration of the grounds of divorce as stated in the various legal systems...Judicial interpretations have to a large extent condoned or sanctioned practices designed to satisfy the letter of the law, while violating its spirit...In the States in which the fault principle remains exclusive or predominant,...theories and concepts remain outwardly unchanged, but their meaning is altered...[Thus] where, under the pressure of social facts, divorce grounds are enlarged from adultery to ‘cruelty’, ‘violence’, ‘desertion’ and the like, it is still possible to proclaim that the principle of fault i.e. the exclusive dependence of divorce on the proof of guilt on the part of the other side, has been preserved. In fact, however, the reality of the law is transformed, either by processes of elastic interpretation, or by downright fictions reminiscent of the earlier history of the common law.”²³

(46) The previous analysis will have indicated that it is not uncommon for fault and non-fault grounds to co-exist under the same statute. Moreover the distinctions between statutory fault and non-fault grounds are frequently blurred by judicial interpretation and techniques.²⁴

Judicial Recognition of the Factor of Marriage Breakdown in Jurisdictions wherein the Traditional Fault Concept is Endorsed by the Legislature.

(47) Even in jurisdictions where matrimonial offences provide the only basis for divorce, the courts have tended to qualify the fault concept by interpreting offences such as cruelty and desertion in such a way as to render them substitutes for a general clause envisaging destruction of the marriage.²⁵ Thus the Report of the Royal Commission on Marriage and Divorce, Cmd. 9678 (1956), para. 153 states:

“Conduct by one spouse of a grave and weighty nature which makes married life unbearable for the other spouse may at the present time be pleaded before the court in one of several ways. If such conduct is accompanied by injury to health and the court is satisfied that the other spouse needs protection it will constitute legal cruelty, for which the remedy of divorce is immediately available. If one or more of the requirements of legal cruelty are lacking, but nevertheless there was present an intention, actual or presumed, on the part of one spouse to bring the married life to an end and to drive the other spouse from the home, the conduct will amount to constructive desertion, which, if persisted in for three years or more, will also give a right to divorce....”

(48) The recent English decisions in *Gollins v. Gollins* [1963] 3 W.L.R. 176 and in *Williams v. Williams* [1963] 3 W.L.R. 215 would tend to reinforce the conclusion expressed above since the House of Lords therein concluded that, in determining whether matrimonial cruelty has been committed, the courts should look not to the culpable intent of the allegedly cruel spouse but rather to the effect of his or her conduct upon the other spouse. The courts in England have thus established that in cases of alleged matrimonial cruelty the factor of marriage breakdown is as important, if not more important, than a mere determination of the issue of fault.

Should Marriage Breakdown Constitute The Only Ground or Criterion For Divorce?

(49) If Canada should elect to follow the example of the ten jurisdictions in the United States of America²⁶ which have statutory provisions whereby a divorce may be granted by the court to spouses who have lived separate and apart for a specified period, such relief being available without regard to whether the separation was voluntary and/or attributable to the fault of either spouse, then the question arises whether such provision should constitute the exclusive criterion for divorce. It may be argued that the introduction of such legislation in Canada would logically preclude the co-existence of statutory grounds for divorce premised upon a fault concept.²⁷

(50) It is submitted that the Canadian Parliament should strive to remedy grievances rather than seek to achieve theoretical perfection or logical harmony. Therefore, the real issue to be resolved is not whether the introduction of "non-fault separation" legislation is logically inconsistent with the co-existence of statutory grounds for divorce based upon proof of a "matrimonial offence" but rather whether such legislation would eliminate the need for grounds premised upon fault.

(51) It is generally conceded that in jurisdictions where divorce is based exclusively upon proof of a matrimonial offence, the commission of such an offence, is in many cases merely symptomatic of the fact that the marriage has broken down. It would nevertheless appear unrealistic to abandon the fault concept *in toto*. As Mr. Justice Scarman has observed in an address entitled "Family Law and Law Reform".

"Although it is true that white innocence and black guilt are seldom to be found in married life, comparisons of innocence and guilt do reflect genuine human experience and are necessary if divorce laws are to be administered justly and in the interests of the children. Since, therefore, one cannot wholly exclude from judicial consideration the doctrine of the matrimonial offence, I suggest that the wisest course is to use it properly to advance the objective we have in mind. I believe that society recognizes that a spouse should be able to get a divorce when he or she has been deserted, has been treated with cruelty, or has had to face the infidelity of adultery. Why should a spouse, if in a position to prove any of these three situations, have to go further and prove irretrievable breakdown, or consent, or failure of attempts at reconciliation? The ordinary man's sense of justice revolts at any such requirement. The law would do well to keep in touch with the ordinary man's idea of what is right and proper, and, though the lawyer can argue that the logical way to handle matrimonial offences is solely as evidence of underlying breakdown, I think this argument, if carried to a logical conclusion, would fail to win general approbation and would certainly impose a very much greater strain on the administration of justice than our limited resources in legal man power could meet.

Where the ordinary man criticises the law is in its exclusive reliance on the doctrine of the matrimonial offence.—I think that we could well follow the Australian and New Zealand precedent [*see supra*]*—and that if we did so the ordinary man's objection to the substantive law of divorce would be largely met—*

If one could add to the existing grounds for divorce that of separation or irretrievable breakdown one would be able at the same time to eliminate a number of other anomalies and defects—. It may be that in a reformed divorce law divorce would never be available as of right but only when the Court was satisfied that proper arrangements had been made for

the care and upbringing of the children and that reconciliation was impossible. Such discretion could well be a valuable part of the law and would be wholly different from that which the Court now purports to exercise in respect of the adultery or other offence of the petitioner”.

(52) It should be noted that the conclusion of Mr. Justice Scarman regarding the co-existence of matrimonial offences and marriage breakdown through non-fault separation provisions as grounds for divorce would appear to be reflected by legislation not only in Australia and New Zealand but also in jurisdictions in the United States of America and in Europe.²⁸

Dangers Of Fault And Non-Fault Grounds Co-Existing

(53) Where fault and non-fault grounds for divorce co-exist in a single jurisdiction, there is some danger that the courts will apply the same techniques irrespective of the nature of the ground for relief. Thus Professor Lawrence Rutman observes in an article entitled “Departure From Fault” (1961) 1 J1. of Family Law 181:

“The living-apart statutes express, on the surface at least, an exclusion of fault considerations in about half of the (American) states. In practice . . . this has not been the case. The introduction of technical terms, the reiteration of traditional jargon and the lack of continuity in thought are apparent in almost all the cases.”²⁹

Marriage Breakdown Through Living-Apart Statutes As Ground For Divorce: Effect On Divorce Rate.

(54) It is sometimes contended that the introduction of marriage breakdown, through non-fault separation provisions, as a ground for divorce would strike at the foundation of marriage in that it would result in a veritable flood of divorces. There is little doubt that immediately following the introduction of any new ground for divorce, there would be a substantial number of divorces sought to relieve the suffering which has been endured under the present Canadian divorce laws.

(55) The experience in Australia, however, where non-fault and fault grounds co-exist under the Matrimonial Causes Act, (Aust.), 1959, would indicate that the inclusion of marriage breakdown as a ground for divorce through non-fault separation provisions will not undermine the status of marriage nor result in any overwhelming flood of divorces. Thus, D. M. Selby, Judge in Divorce of The Supreme Court of New South Wales states:

“Since the (Matrimonial Causes) Act came into force, separation has run a consistent third place in popularity as a ground for divorce, as the following statistics of decrees of dissolution of marriage pronounced in Australia indicate:

	1961	1962	1963	1964	1965 (to June 30)
Desertion	3,638	3,645	3,531	3,468	1,735
Adultery	1,855	1,548	1,676	1,833	893
Separation	350	1,272	1,495	1,687	747
Total on all grounds	6,712	7,245	7,476	7,917	3,806

An analysis of these figures could support various speculations. Whilst the total number of decrees granted in 1961, 1962, 1963 and 1964 have increased each year, the decrees granted on the ground of desertion fell slightly each year from 1962 but those on the ground of separation

have risen each year. Whatever the reason for these trends, it is doubtful if they have any significance. The separation figures could be most misleading if an attempt were made to draw an inference from them. It may well be that they are swollen as a result of an accumulation of cases in which the ground of separation existed before 1961 but was not available as a ground for divorce until the coming into operation of the Act. Experience has shown that a number of suits brought on the ground of separation would have succeeded if brought on the ground of desertion. Less frequently, but from time to time, suits brought on the ground of separation could have been based on the ground of insanity. One conclusion may justifiably be reached. The inclusion in the Act of the ground of separation has not brought the flood of divorces which was so confidently prophesied."³⁰

(56) It is relevant to observe that the Australian statistics should be analysed and evaluated in the light of section 37(4) of the Matrimonial Causes Act (Aust.), 1959, which reads as follows:

"37 (4) Where petitions by both parties to a marriage for the dissolution of the marriage are before a court, the court shall not, upon either of the petitions, make a decree on the ground of separation if it is able properly to make a decree upon the other petition on any other ground."

Distinction Between Marriage Breakdown And Divorce By Consent

(57) It is sometimes suggested that the inclusion of "marriage breakdown", in any form, as a basis for divorce is equivalent to the introduction of divorce by consent.³¹ This contention, however, would seem invalid since divorce by consent implies that the spouses shall act as the sole judges of their own cause whereas divorce on proof of marriage breakdown requires an objective judicial analysis of all the material circumstances to determine whether the marriage has in fact broken down.

(58) Divorce by consent further implies that the State reserves no right to refuse a divorce sought pursuant to agreement between the spouses even though the marriage is viable and its termination would create a situation detrimental to the interests of the children of the family. Divorce on proof of marriage breakdown, on the other hand, implies a right, indeed an obligation, in the State to refuse matrimonial relief in cases where the marriage is found to be viable. It may be noted incidentally that the introduction of divorce on proof of marriage breakdown implies a further obligation on the State to provide adequate marriage guidance and conciliation procedures to persons contemplating marriage and to spouses who have encountered or are encountering serious marital difficulties.

Divorce By Consent

(59) The writer proposes to examine two questions, namely, (1) Does divorce by consent actually exist in Canada? (2) Should divorce by consent be sanctioned by express statutory enactment?

(60) It is unrealistic to assume that any divorce regime can effectively preclude divorce by consent. As C.P. Harvey, Q.C. observed in an article entitled "On the State of the Divorce Market" (1953) 16 Mod. L. Rev. p. 130: "A valid marriage... is the only condition precedent to divorce which cannot be circumvented somehow". This conclusion is confirmed in a study which was undertaken more than twenty years ago in respect of the actual operation of divorce in New York, wherein the then present grounds for divorce were confined to adultery.³²

The findings of this study may be summarised in the following observations published therein:

"The body of divorce law prevailing in New York, viewed *a priori*, would seem to offer fertile soil for the growth of collusion. . . . Factual study seems to support abstract speculation upon this point. Although statistics which may directly prove the number of collusive divorces are, and will, from the very nature of collusion, remain unavailable, several factors may be indicated which tend conjointly to substantiate its generally assumed prevalence. Prominent among these factors is a huge number of cases which are uncontested on the merits, and consequently tried with the aid of formulated questions of the 'black book' in a short space of time, without benefit of adequate cross-examination. Similarly persuasive are the large percentage of co-respondents who remain unnamed, the surprising state of undress in which the defendant and co-respondent are generally found, and the close relationships generally existing between the defendant and witnesses for the complainant. And the unusually short period commonly intervening between the alleged adultery and the service of process would constitute at least a suspicious circumstance. . . .

The situation seems to demand legislative inquiry, and at least a subsequent contraction, if not a complete bridging, of the gap which now exists between the legal rules and prevailing *mores*."

The conclusions set out in the above study would appear equally tenable today. Thus in the 1966 Report of the Joint Legislative Committee on Matrimonial and Family Laws to the Legislature of the State of New York the following statements appear:

"The New York one-ground adultery divorce law was out-of-date one hundred years ago. . . . Within the state the one-ground divorce law invited a peculiarly nasty combination of faked evidence, perjury and legal chicanery. . . . In 1947 New York Supreme Court Justice Henry Clay Greenberg estimated that seventy-five percent, at the very least, of New York Divorces were based upon 'phony raids'. . . . Professor Henry H. Foster . . . said before the committee, 'In the ninety odd per cent of divorce cases that are uncontested, judges and counsel engage in make believe, observing a ritual that lasts but a few minutes. Such is a travesty on the administration of justice and almost a criminal neglect of the social responsibility that a just society would assume. . . . In 1945, the Committee of Law Reform of the Association of the Bar of the City of New York recommended a liberalisation of our divorce laws so that we may thus eliminate what has come to be recognised as a scandal, growing out of wide-spread fraud, perjury, collusion, and connivance in the dissolution of marriages in this state.' . . . And one of the state's senior judges, Judge Meier Steinbrink said, 'These uncontested cases are not only a farce, they are utterly disgraceful, because the evidence is always the same. . . . Nor does the process take long—so quick are the judges in the matrimonial courts to clear their calendars and their consciences. . . . I have timed myself—one every seven and a half minutes—and that is how I happen to dispose of an average of seventy-five a day'. In Chenango County the committee was told, perhaps because of a more leisurely upstate pace, that the average default divorce takes one minute longer, that is eight and one-half minutes.

Another judge, Supreme Court Justice Benjamin Brenner observed, 'I firmly believe that our dissolution laws engender disrespect and contempt for law itself because the rule of law is perverted in the conduct and practice prevalent in unopposed matrimonial hearings. Judges are

often compelled to become silent participants in undisputed divorce proceedings based upon pre-arranged raids. . . . While there are legitimate divorce cases in which adultery is discovered . . . , a very substantial number of undefended suits end in decrees founded on collusion or perjurious testimony, since the evidence is uncontested and must be presumed to be true. Disrespect for the New York matrimonial law is often reflected in the judge's own feeling of frustration or chagrin, which he must experience in the course of such un-contested trials.³³

(61) In the light of the preceding studies, it may be contended that it is not unlikely that many of the divorces presently granted in Canada are in fact divorces by consent, because, in the undefended cases, which represent more than ninety per cent of all divorce cases, it is practically impossible for the court to detect whether there has been collusion, and further, the ground for divorce may be provided by one party in circumstances which do not amount to legal collusion. If this contention is accepted, then clearly it brings the law in Canada into disrepute and requires such revision of the divorce laws as will reduce the gap between legal theory and social practice.

(62) It is submitted, however, that marriage should not be regarded as a mere contract in which no one is concerned except the spouses. The children of the marriage, if any, are interested parties in the maintenance of a stable and healthy family life and the community at large also has a primary interest in promoting the stability of married life which is the cornerstone of our society. It is further submitted that the promotion of such marital stability is inconsistent with the formal recognition of divorce by consent. It is accordingly concluded that the State should continue to regulate the termination of the marriage status and that divorce should not be available merely at the will of both spouses.

Specific Proposals For Reform Of The Grounds For Divorce In Canada Adultery As A Ground For Divorce

(63) The commission of adultery by one spouse is almost universally recognised as entitling the other spouse to petition for the marriage to be dissolved. Adultery has long been recognised as a ground for divorce in Canada.

(64) This writer accepts the opinions expressed by eighteen members of the Royal Commission on Marriage and Divorce which sat in England in 1951-1955 and accordingly recommends that adultery should be retained as a ground for divorce in Canada. Eighteen members of the Royal Commission expressed the following opinions;

"115. Some English witnesses suggested that the law should be modified in respect of proceedings based on the commission of a single act of adultery. There were two proposals, namely, that relief should be denied entirely or that the court should have a discretion to delay granting relief so that the possibilities of reconciliation might be explored. It was said in support that a single act of adultery need not necessarily denote that the marriage has completely failed and should be dissolved; often, on learning of the adultery, the injured spouse may take proceedings in a fit of anger or pique or because he or she has been influenced by the advice of relatives and friends. If relief were to be refused or delayed, husband and wife would have time to try to resolve any underlying difficulties and might well come together again.

116. We have considered possible ways in which the law could be altered on one or other of the lines proposed. One course would be to say that divorce should be granted only on proof of an adulterous association. That, in our view, would amount to substituting a new ground of divorce for that of adultery. As one witness put it: 'The offence is adultery and as

far as the offence is concerned it does not make any difference whether it is a course of conduct or an isolated act'. Moreover, no relief would then be available, as in our opinion it should, to the person whose spouse has committed promiscuous acts of adultery.

117. Another course would be to say that only repeated acts of adultery should give ground for divorce. To this there is the practical objection that to obtain evidence of repeated acts of adultery might be very expensive, and sometimes impossible, if a spouse were particularly adept at concealing his adultery. But the real difficulty lies in deciding what should constitute 'repeated acts of adultery'. Could it be said of two acts of adultery separated by an interval of, say, five years that the element of repetition was present? Faced with this problem, the court might be led to set up a test under which, say, three acts of adultery within a reasonable period would constitute 'repeated acts'. The dividing line would be most arbitrary and we feel that no distinction can properly be made between the first and any other act of adultery. Every such act is inimical to the marriage relationship, and the adaption of any dividing line might lead to the view that a spouse could commit one or two acts of adultery with impunity. The position of the injured spouse must also be considered; he may feel that it would be impossible to resume life with his adulterous spouse after the commission of one act of adultery, particularly when a child is born as a result.

118. There remains the alternative suggestion that the court should have a discretion to delay granting a decree of divorce when the sole ground put forward is the commission of a single act of adultery. It would be difficult for the court to decide in what circumstances relief should be delayed; as we have said, as a matrimonial offence one act of adultery cannot properly be distinguished from another. Moreover, we do not think that the proposal would achieve its object of promoting reconciliation. Apart from the fact that at this final stage, when the case has been tried and the adultery proved, the prospects of a successful reconciliation must be very slight, we are satisfied that the element of compulsion should not be introduced into any machinery designed to bring about reconciliation.

119. In our view, and this was confirmed by several witnesses, the commission of an isolated act of adultery, where otherwise the marriage relationship is comparatively stable, is more often than not forgiven. We consider it preferable that the injured spouse should be left, as at present, with the choice of deciding whether to forgive the commission of a single act of adultery or to found divorce proceedings upon such conduct. We accordingly recommend that there should be no alteration in the law relating to adultery as a ground of divorce in England and Scotland."³⁴

(65) If it were considered advisable to permit divorce in Canada on proof of adultery only in circumstances where the court is satisfied that the offence has rendered the marriage irretrievably broken down and attempts at reconciliation would be impracticable or futile, the definition of cruelty hereinafter proposed³⁵ would seem sufficiently wide to enable the court to grant a divorce on the ground of cruelty where one spouse has committed adultery and the attendant circumstances are of such a character that the petitioner cannot reasonably be expected to be willing to cohabit with the respondent.

Adultery: Artificial Insemination By Donor

(66) If it is proposed to retain adultery as ground for divorce in Canada, it may be necessary for the Committee to examine whether the artificial insemination of a wife by a donor without the husband's consent should constitute a separate ground for divorce. There has been a conflict of judicial opinion on the

question whether the artificial insemination of a wife by a donor constitutes the matrimonial offence of adultery.³⁶

(67) It may be noted that the Royal Commission on Marriage and Divorce which sat in England in 1951-55 recommended that the artificial insemination of a wife by a donor without the husband's consent should constitute a separate ground for divorce at the instance of the husband.³⁷ This recommendation was endorsed by the Departmental Committee on Human Artificial Insemination which sat in England in 1958-1960.³⁸

Rape, Sodomy and Bestiality as Grounds for Divorce

(68) Rape, sodomy and bestiality are presently recognised as grounds for divorce at the suit of a wife in those Canadian provinces wherein the provisions of the Divorce and Matrimonial Causes Act (Eng.), 1857, apply.³⁹

(69) For reasons corresponding to those set out in paragraph 64, *supra*, it is submitted that these offences should constitute independent grounds for divorce in Canada at the suit of the innocent spouse.⁴⁰

(70) It is further submitted that equality between the sexes should be legally secured in respect of these offences and that divorce should be available to a husband or a wife whose spouse has committed any such offence.⁴¹

Cruelty As A Ground for Divorce

(71) Matrimonial cruelty constitutes a ground for judicial separation and alimony in most Canadian provinces and is a ground for divorce in Nova Scotia.⁴² Matrimonial cruelty also constitutes a ground for divorce in England⁴³ and in forty-six jurisdictions in the United States of America.⁴⁴

(72) Except in Alberta and Saskatchewan,⁴⁵ "cruelty" in relation to matrimonial causes has not been defined by statute and the governing principle which has been consistently applied in the other Canadian common-law provinces is that established by the decision in *Russel v. Russel* [1897] A.C. 395, wherein five out of nine Law Lords held that in order to constitute cruelty in matrimonial proceedings, the acts or conduct complained of must have caused "danger to life, limb or health, bodily or mental, or reasonable apprehension of [such danger]."⁴⁶

(73) In Alberta and Saskatchewan, cruelty is statutorily defined for purposes of judicial separation and alimony to include not only conduct which creates a danger to life, limb or health, but also any course of conduct which in the opinion of the court is grossly insulting or intolerable, or of such a character that the person seeking matrimonial relief could not reasonably be expected to live with the other spouse after he or she has been guilty of such conduct.⁴⁷

(74) It is submitted that cruelty should be introduced as a ground for divorce in the Canadian provinces and that it should be defined as meaning "any conduct that creates a danger to life, limb or health, bodily or mental, or a reasonable apprehension thereof and any conduct that in the opinion of the court is grossly insulting or intolerable: Provided that the conduct complained of shall be of such a character that the person seeking the divorce cannot be expected to be willing to continue or resume matrimonial cohabitation."

(75) It will be observed that this definition extends the criterion of cruelty adopted by the House of Lords in *Russell v. Russell*, *supra*, and is similar to the statutory definitions of cruelty adopted in Alberta and Saskatchewan. It may be of relevance to observe that the above proposed definition has received the approval of the Canadian Bar Association. Furthermore, in presenting evidence to the Royal Commission on Marriage and Divorce which sat in England in 1951-1955, the General Council of the Bar of England and Wales similarly

favoured an extension of the *Russell v. Russell* definition of matrimonial cruelty and stated that it would be undesirable to follow blindly the judicial definition of cruelty which was established more than fifty years ago in a setting of rights, duties, customs and manners which have undergone radical change.⁴⁸ The General Council of the Bar of England and Wales further observed that as a result of the *Russell v. Russell* definition of cruelty in England, a wife who can afford to consult and call a neurologist to give evidence may succeed in her petition for divorce whereas a wife who cannot afford such a luxury will fail.⁴⁹

(76) It is further submitted that cruelty should be so defined as to require the court to attach paramount importance to the character and consequences of the allegedly cruel conduct rather than to the culpable intent, if any, of the allegedly cruel spouse.⁵⁰ The purpose in recognising cruelty as a ground for divorce should not be to seek out guilt and inflict punishment but to afford relief from suffering, and it should therefore not be necessary for the petitioner to prove that the respondent's conduct was wilful or intentional. For example, if a continuation of the matrimonial cohabitation has been rendered impossible as a result of the respondent's habitual drunkenness or drug addiction, the absence of any wilful or culpable intent on the part of the respondent should constitute no answer to the charge of matrimonial cruelty.⁵¹

Desertion As A Ground For Divorce

(77) Desertion without cause for two years and upwards is presently recognised as a ground for judicial separation and alimony in the majority of the Canadian provinces.⁵² Desertion for a specified number of years is also recognised as a ground for divorce in forty-nine jurisdictions in the United States of America.⁵³ In England, a divorce may be granted to a petitioning spouse where the respondent has "deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition".⁵⁴ In calculating the statutory period during which the desertion must run, the courts in England are required to take "no account of any one period (not exceeding three months) during which the parties resumed cohabitation with a view to reconciliation."⁵⁵

(78) It is submitted that desertion, if persisted in over a period of years, effectively terminates the marital consortium and that it should be introduced as a ground for divorce in Canada. As was observed in the 1966 Report of the Joint Legislative Committee on Matrimonial and Family Laws to the Legislature of the State of New York:

"Probably no course of conduct more evidences a 'dead' marriage than the unjustified separation of one party to the marriage from the other."

This conclusion is supported by the experience of Charles F. Marden who acted as a "reconciliation master" in the State of New Jersey and who observes that "desertion cases are substantially a waste of time so far as reconciliation is concerned."⁵⁶

(79) It is further submitted that the offence of desertion should be so defined that the spouses are not deterred from resuming cohabitation in an attempt to secure an enduring reconciliation.⁵⁷ It is accordingly recommended that desertion as a ground for divorce in Canada should be constituted by (1) an unjustified withdrawal from matrimonial cohabitation for a period of not less than three years immediately preceding the commencement of proceedings or (2) an unjustified withdrawal from matrimonial cohabitation for periods amounting in the aggregate to three years or more, over a period of five years immediately preceding the commencement of proceedings, provided that the respondent has persisted in the unjustified withdrawal from matrimonial

cohabitation for a continuous period of at least one year immediately preceding the commencement of proceedings.

(80) It is further submitted that where desertion constitutes a ground for matrimonial relief, the courts should be empowered to make a finding of continuing desertion notwithstanding that the respondent is or has become insane. It is accordingly recommended that the insanity of the respondent spouse should not preclude a finding of desertion if the court is satisfied that the intention to withdraw from matrimonial cohabitation would have continued if the respondent spouse had not become insane.⁵⁸

Adultery, Cruelty And Desertion As Grounds For Divorce: General Comment

(81) It is an over-simplification to assume that these offences, which fundamentally conflict with marital obligations, merely reflect a concept of guilt and innocence. A suit for divorce based upon these offences is not instituted merely on account of the wrongful conduct of a spouse, but rather on account of the fact that by reason of such wrongful conduct, the marital relationship has become intolerable and practically impossible to continue. Nor is it strange, that where this result is produced by the misconduct of one party, the right to treat the marital relationship as terminated should rest exclusively with the other party.

Presumed Death As A Ground For Divorce

(82) It is submitted that legislation should be enacted in Canada empowering the courts to issue a decree of divorce if reasonable grounds exist for presuming the death of the petitioner's spouse. Such legislation might conceivably be modelled on sub-sections 1 and 3 of section 14 of the Matrimonial Causes Act, (Eng.), 1965, which read as follows:

"14.—(1) Any married person who alleges that reasonable grounds exist for supposing that the other party to the marriage is dead may . . . present a petition to the court to have it presumed that the other party is dead and to have the marriage dissolved, and the court may, if satisfied that such reasonable grounds exists, make a decree of presumption of death and dissolution of marriage.

(3) In any proceeding under this section the fact that for a period of seven years or more the other party to the marriage has been continually absent from the petitioner and the petitioner has no reason to believe that the other party has been living within that time shall be evidence that the other party is dead until the contrary is proved."⁵⁹

Living Separate And Apart As A Ground For Divorce

(83) It is recommended that divorce should be available in Canada to either or both spouses where the husband and wife have lived separate and apart for a period of not less than three years immediately preceding the commencement of proceedings provided that the court is satisfied that:

- (i) there is no reasonable likelihood of a resumption of matrimonial cohabitation;
- (ii) the issue of a decree will not prove unduly harsh or oppressive to the respondent spouse;⁶⁰ and
- (iii) satisfactory arrangements have been or will be made to provide for the maintenance of the respondent spouse and any children of the family.⁶¹

(84) If the right to divorce were introduced in Canada on the basis of the above recommendation, the issue of a decree should not be precluded by the traditional absolute and discretionary bars to relief⁶² but should be subject only to the provisos set out in the recommendation.⁶³ Thus the decision of the court should and would depend not so much upon the comparative rectitude of

the conduct of the spouses but rather upon the probability of their being able to re-establish a viable marital relationship.

(85) It is submitted that legislative implementation of the above recommendation would bring the divorce laws of Canada closer to social realities and that it would relieve undue hardship and reduce the number of illicit unions and illegitimate births. It would also tend to eliminate certain undesirable characteristics which attach to a divorce law regime based exclusively upon the concept of fault.⁶⁴

(86) It is fully realised that the above recommendation represents a radical departure from the principles underlying the present grounds for divorce in Canada since it would permit divorce proceedings to be instituted against a spouse who has been guilty of no matrimonial offense. It would further permit the institution of divorce proceedings by a spouse who is *ex facie* partly or primarily responsible for the failure of the marriage. It might be argued that in this latter case the spouse who is *ex facie* partly or primarily responsible for the separation and breakdown of the marriage ought not to be permitted to seek a divorce. Such an argument, however, would seem to ignore the following considerations:

- (i) It is frequently an over-simplification of the social facts to imply that a marriage breaks down because of the fault of only one of the spouses; and
- (ii) even if the petitioning spouse is primarily at fault, it is contrary to the public interest that the marriage should be regarded as continuing in law when in fact it has ceased to exist.

(87) It might further be argued that if divorce were admitted on the basis of the above recommendation, this would increase insecurity in marriage and lead to a diminution of confidence in and respect for the permanence of marriage. This argument, however, would seem to be refuted by sociological opinion and by statistical data in jurisdictions wherein the doctrine of the matrimonial offence as a criterion for divorce is supplemented by the doctrine of marriage breakdown operating through living-apart provisions.⁶⁵

(88) The above recommendation contemplates that the court may grant a divorce to either or both spouses where they have lived separate and apart for three years or more immediately preceding the commencement of proceedings, regardless of whether the separation was voluntary and/or attributable to the fault of either spouse.⁶⁶ It might accordingly be contended that where the separation has been agreed to by the spouses, the legislative implementation of the recommendation would be equivalent to the introduction of divorce by consent. It is difficult, however, to envisage parties to a viable marriage voluntarily condemning themselves to three years' separation in order that they may terminate their marriage and re-marry third parties.⁶⁷

Insurable Insanity As Ground For Divorce

(89) Where two parties enter into marriage, they may reasonably contemplate that their marital relationship will continue for their joint lives and it is reasonable to expect the parties to weather the customary storms that constitute the ordinary "fair wear and tear" of married life. It is unreasonable, however, to require the parties to be bound by the marriage tie in circumstances where incurable insanity supervenes and precludes the continuation of marital consortium.

(90) It is accordingly recommended that insanity should be introduced as a ground for divorce in Canada where a spouse of unsound mind has been detained as a patient in a mental institution or hospital for a continuous period of not less

than three years immediately preceding the commencement of proceedings and the court is satisfied that there is no reasonable prospect of a permanent resumption of cohabitation. Legislation introducing insanity as a ground for divorce in Canada might conceivably be modelled upon the provisions set out in sub-sections 1 and 3 of section 1 of the Matrimonial Causes Act, (Eng.), 1965, which read as follows:

1.—(1) ... [A] petition for divorce may be presented ... by the husband or the wife on the ground that the respondent ... is incurably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition....

(3) For the purposes of sub-section 1 [*supra*], a person of unsound mind shall be deemed to be under care and treatment while, and only while—

(a) he is liable to be detained in a hospital, mental nursing home or place of safety under the Mental Health Act, 1959...

(c) he is receiving treatment for mental illness in

(i) a hospital or other institution provided, approved, licensed, registered or exempted from registration by any Minister or other authority in the United Kingdom...; or

(ii) a hospital or other institution in any other country, being a hospital or institution in which his treatment is comparable with the treatment provided in any such hospital or institution as is mentioned in sub-paragraph (i) of this paragraph;

and, in determining for the purposes of the said subsection ... whether any period of care and treatment has been continuous, any interruption of the period for twenty-eight days or less shall be disregarded."⁶⁸

(91) It could be argued that if divorce were made available in Canada to spouses who have lived separate and apart for three years immediately preceding the commencement of proceedings,⁶⁹ it would be unnecessary to make independent provision for cases of insanity. Such an argument, however, would appear to ignore the decisions of courts in the United States, wherein statutes providing for divorce through non-fault separation provisions have been held inapplicable to cases where a spouse was insane, even though such spouse had been confined for a substantial period of time in a mental institution or hospital immediately preceding the commencement of proceedings.⁷⁰

(92) It may be of interest to observe that incurable insanity has been made a ground for divorce not only in England but also in several European countries and in no less than twenty-nine jurisdictions in the United States.⁷¹

(93) One objection that might be raised against the recognition of incurable insanity as a ground for divorce is that there is an absence of fault and the termination of matrimonial rights and obligations results from circumstances beyond the control of either spouse. It is submitted, however, that if a spouse becomes incurably insane and is detained as a patient in a mental institution or hospital for a long period of time, the objects of the marriage are frustrated and there is no justification for legal insistence upon continuation of the marriage where it has in fact ceased to exist.

(94) A further objection to recognising insanity as a ground for divorce is that it introduced an invidious distinction between cases where the marital consortium is destroyed by the supervening insanity of a spouse and cases where the consortium is destroyed or impaired by a supervening incurable physical disease or incapacitating injury. The distinction between mental and physical

illness may be regarded as invalid from a medical standpoint and unfair from a humanitarian standpoint. A distinction may, however, be made between the two cases on the ground that incurable insanity, unlike other incurable diseases or physical disabilities, results in a substantial change in the personality of the disabled party.⁷² Furthermore, the suggested recommendation, which requires detention of the insane spouse in a mental institution or hospital for a continuous period of three years immediately preceding commencement of the proceedings, envisages that no degree of matrimonial cohabitation is possible.⁷³ In cases of incurable physical illness or disability on the other hand, no similar condition necessarily ensues.

(95) It might also be argued that the recognition of insanity as a ground for divorce may inflict a severe blow to effective treatment of the mentally ill. This argument may, however, lack cogency if divorce is permitted only in circumstances where the court is satisfied that the insanity is incurable and a permanent resumption of matrimonial cohabitation is thereby precluded.

2. BARS TO MATRIMONIAL RELIEF

Collusion, Connivance and Condonation As Absolute Bars To Matrimonial Relief Collusion

(96) Collusion has not been defined by statute and the definitions formulated by the courts cannot be interpreted in an absolute sense but only by reference to the facts of the particular case to which they were applied.⁷⁴ It has been stated that collusion includes:

- “(a) Any agreement or conspiracy, to which the petitioner is a party which [as in the case of a covenant not to defend the action], tends to pervert or obstruct the course of justice;
- (b) Any agreement or conspiracy, to which the petitioner is a party to obtain a divorce by means of manufactured evidence.
- (c) Any agreement or conspiracy, to which the petitioner is a party to obtain a divorce by some fraud or deceit practised on the Court.”⁷⁵

(97) It is generally conceded that the uncertainty which attaches to the legal concept of collusion tends to discourage the spouses from mutually resolving their matrimonial problems and to deter the “innocent” spouse from making any attempt to effect a reconciliation.⁷⁶

(98) It is submitted that the court should be empowered to grant matrimonial relief notwithstanding that there has been a collusive bargain between the spouses provided that no substantial miscarriage of justice would result. It is accordingly recommended that collusion should be a discretionary and not an absolute bar to matrimonial relief.⁷⁷

(99) If it were decided that collusion should be retained as an absolute bar to matrimonial relief, then it is submitted that collusion should be defined by statute on the basis of the following considerations:

- (i) The spouses should be restrained from conspiring together to put forward a false case or to withhold a just defence.
- (ii) Matrimonial relief should not be available if one spouse has been bribed by the other spouse to take proceedings or has exacted a price from him or her for so doing.
- (iii) It should not amount to collusion if reasonable arrangements are arrived at between husband and wife, before the hearing of the suit, about financial provision for one spouse and the children, the division of the matrimonial home and its contents, the custody of, and access to, the children, and costs. It should be the duty of the petitioner to

disclose any such arrangements to the court at the hearing and the parties should be able to apply to the court before or after the presentation of the petition for its opinion on the reasonableness of any contemplated arrangements.⁷⁸

Connivance

(100) "Connivance may consist of any act done with corrupt intention of a husband or wife to promote or encourage either the initiation or the continuance of adultery of his or her spouse or it may consist of passive acquiescence in such adultery."⁷⁹

(101) It is submitted that the courts have encountered serious difficulties in applying the concept of connivance to particular fact situations and that there is no substantial reason why connivance should constitute an absolute bar to matrimonial relief in cases where a husband or wife has passively acquiesced in the commission of a matrimonial offence by his or her spouse.⁸⁰

(102) It is accordingly recommended that connivance should be made a discretionary rather than an absolute bar to matrimonial relief. It is contemplated that in the exercise of its discretion, the court would deny relief to a petitioning spouse who has actively conspired to produce the offence complained of in the petition but that the discretion might be exercised "in favour of" a petitioning spouse who has passively acquiesced in the commission of the offence complained of.

Condonation

(103) Where a matrimonial offence has been committed by a husband or wife, his or her spouse may condone the offence and waive the right to sue for matrimonial relief by resuming matrimonial cohabitation. A condoned offence may, however, be revived and if the offending spouse is guilty of subsequent matrimonial misconduct which renders further cohabitation impossible, the "innocent" spouse may institute proceedings for matrimonial relief in respect of the condoned offence.⁸¹

(104) It is generally recognized that the absolute bar of condonation tends to hamper attempts at reconciliation since the innocent spouse is naturally reluctant to resume matrimonial cohabitation in an attempt to effect reconciliation because such a resumption of cohabitation constitutes condonation and therefore precludes matrimonial relief if the attempted reconciliation proves to be unsuccessful.⁸²

(105) The Matrimonial Causes Act, (Eng.), 1965, section 42 provides that the matrimonial offences of "adultery and cruelty shall not be deemed to have been condoned by reason only of a resumption of cohabitation between the parties for one period not exceeding three months, or of anything done during such cohabitation, if it is proved that cohabitation was continued or resumed, as the case may be, with a view to effecting a reconciliation."

(106) It is submitted that the trial period of cohabitation which is extended under section 42, *supra*, may prove inadequate in so far as it is directed at promoting attempts at reconciliation between the spouses and that the same purpose might be better achieved by making condonation a discretionary rather than an absolute bar to matrimonial relief.⁸³

(107) It is arguable that under the present Canadian law, a husband's act of sexual intercourse with his wife after knowledge of her matrimonial offence constitutes conclusive evidence of his condonation of her offence but that a wife's act of sexual intercourse with her husband after knowledge of his matrimonial offence does not constitute conclusive evidence of her condonation of his offence.⁸⁴ It is submitted that all doubt in respect of this issue should be resolved

by legislation corresponding to that set out in section 42, subsection (1) of the Matrimonial Causes Act, (Eng.), 1965, which reads as follows:

"Any presumption of condonation which arises from the continuance or resumption of marital intercourse may be rebutted by evidence sufficient to negative the necessary intent."⁸⁵

Restrictions on Petitions for Divorce within three years of Marriage

(108) The introduction of extended grounds for divorce under the Matrimonial Causes Act, (Eng.), 1937, has been counterbalanced by a statutory restriction which precludes the presentation of a petition for divorce during the first three years of marriage.⁸⁶ To avoid injustice resulting from an arbitrary application of this restriction, the court may grant leave to a petitioner to present a divorce petition before the expiration of the three year period on the ground that the case is one of exceptional hardship suffered by the petitioner or of exceptional depravity on the part of the respondent.⁸⁷ Although the statutory restriction precludes the presentation of a divorce petition during the first three years of marriage, it does not preclude the prosecution of a petition based upon offences committed before the expiration of the prescribed period.⁸⁸

(109) The purpose of the above statutory restriction is to encourage spouses to resolve their differences in the period of adjustment which necessarily takes place during the first few years of married life, and thus to reduce the number of broken marriages.⁸⁹ Many witnesses appearing before The Royal Commission on Marriage and Divorce, (Eng.), 1951-55, were critical of the restriction for the following reasons. It was suggested that the restriction ignores the fundamental precept that where there has been a wrong, the law should not withhold a remedy. It was also suggested that the restriction does nothing to encourage spouses to attempt a reconciliation and does not deter them from taking divorce proceedings; where a matrimonial offence is committed by one spouse during the three year period, the other spouse merely waits for the period to elapse before instituting proceedings. The enforced waiting period may also drive both spouses into illicit unions. Moreover, in those cases where leave is given to present a petition within the prescribed period, the cost of obtaining the divorce is greatly increased by the extra proceedings required. Some witnesses suggested that the restriction should be entirely removed and others suggested that it should be modified by reducing the waiting period or by giving the court a wider discretion to allow proceedings to be instituted during the prescribed period. The Commission concluded that the practical effect of the restriction was a matter of conjecture but considered that it should be retained since it "may go some way towards diminishing [the] problem [of the broken marriage.]"⁹⁰ The Commission further considered that the prescribed period of three years should be retained and that any relaxation of the exceptions to the general rule would seriously impair the value of the restriction.⁹¹

(110) It is submitted that the denial of the right to proceed for a divorce during the first three years of marriage can be justified only if it affords a real opportunity to the spouses to establish or re-establish their marriage on a sound foundation. Withholding matrimonial relief for a prescribed period will not, in itself, produce such results and accordingly any such restriction must be reinforced by the state's assumption of a more positive role in marriage guidance and the provision of more adequate counselling and conciliation services for all families in need.

3. PROTECTION OF CHILDREN IN MATRIMONIAL PROCEEDINGS

(111) It is submitted that, in their pursuit of a decree of divorce or nullity, parents may and frequently do subordinate the interests of the children to their

personal interests and a judge may not be sufficiently informed of all the material facts to avoid any resulting hardship to the children.

(112) While it is recognised that the issue of a decree of divorce or nullity does not break up the family unit but merely affords legal recognition to the social fact of the broken home, it is essential that the court should protect the interests of any children whose "parents" seek to terminate the marriage by petitioning for a judicial decree.⁹²

(113) It is accordingly recommended that legislation should be introduced in Canada to protect the interests of affected children where proceedings for matrimonial relief are instituted by either spouse. Such legislation might follow the terms set out in section 33 of the Matrimonial Causes Act, (Eng.), 1965, which reads as follows:

"33.—(1) Notwithstanding anything in Part I of this Act but subject to the following subsection, the court shall not make absolute a decree of divorce or nullity of marriage in any proceedings begun after 31st December 1958, or make a decree of judicial separation in any such proceedings, unless it is satisfied as respects every relevant child who is under sixteen that—

- (a) arrangements for his care and upbringing have been made and are satisfactory or are the best that can be devised in the circumstances; or
- (b) it is impracticable for the party or parties appearing before the court to make any such arrangements.

(2) The court may if it thinks fit proceed without observing the requirements of the foregoing subsection if—

- (a) it appears that there are circumstances making it desirable that the decree should be made absolute or should be made, as the case may be, without delay; and
- (b) the court has obtained a satisfactory undertaking from either or both of the parties to bring the question of the arrangements for the children before the court within a specified time."⁹³

(114) If such legislation is introduced in Canada to protect the children of parties who have recourse to the courts for matrimonial relief, it will be necessary for the legislation to be supplemented by additional statutory provisions empowering the court to appoint a guardian *ad litem* to represent the children in the matrimonial proceeding and/or to receive reports and advice from qualified welfare officers of social workers appointed to or by the court.⁹⁴

(115) In England, three welfare officers are attached to the Divorce Division of the High Court in London and there is a similar officer in each divorce town. The welfare officers attached to the court provide marriage guidance and conciliation services to parties who have resort to the Divorce Court and they assume additional responsibilities in cases where there are children who would be affected by the granting of matrimonial relief to either spouse.

(116) It is recommended that welfare officers should be appointed to every court in Canada which exercises jurisdiction in matrimonial causes and that the functions of these officers should include the power to make investigations and submit reports to the court so as to assist the court in the disposition of issues which affect or relate to the care and upbringing of children.⁹⁵

(117) It is submitted that implementation of the above recommendation should not preclude the court from exercising a statutory discretion to appoint a guardian *ad litem* to represent the interests of children who may be affected by

the disposition of inter-spousal proceedings. As Judge Hansen⁹⁶ has observed:

"[The] emphasis upon the necessity of legal representation for children in divorce actions is not inconsistent with the role or importance of the social service investigator in securing information and evaluating such information for the benefit of the court."⁹⁷

4. ALIMONY AND MAINTENANCE

Governing Principles

(118) The principle underlying the judicial power to grant alimony or maintenance is that the obligation of the husband to support his wife or his former wife who is without adequate means of support is more than a private matter: it is an obligation in which society has a deep concern. The right to claim alimony or maintenance is available only to a wife and it requires proof that the husband has committed a matrimonial offence.⁹⁸ Although, in the absence of a provincial statute providing otherwise, a wife guilty of adultery may be granted maintenance in an action for divorce under the Divorce and Matrimonial Causes Act (Eng.), 1857, she will not, in an absence of a statutory provision to the contrary, be granted alimony in an independent action therefor, unless her adultery has been connived at or condoned by the husband or his conduct has conduced to the adultery.⁹⁹

(119) It is submitted that the courts should never permit fault to become the decisive factor in applications for alimony or maintenance. Two reasons may be put forward in support of this submission. First, any decision on the issue of fault tends to be somewhat arbitrary since there is usually a substantial conflict in the evidence introduced before the court and it is difficult, if not impossible, to evaluate the degree of fault attributable to either spouse. Secondly, regardless of the conduct of the spouses, society has an economic interest in alimony and maintenance proceedings since, if the wife, because of her own misconduct, is barred from receiving alimony or maintenance, public assistance may become necessary, and the economic burden is thereby shifted from the husband to the taxpayer.

(120) It is accordingly recommended that, in determining whether alimony or maintenance should be awarded, the court should place primary emphasis upon the financial resources and needs of the affected parties. The arguments which may be adduced in favour of radical revision of the procedural and substantive law relating to alimony and maintenance are well expressed by Hofstadter, J. in *Doyle v. Doyle*, 150 N.Y.S. 2d 909 (1957) who stated:

"In the interest of the litigants and of the efficient administration of justice, there must be a renovation in the procedures for handling family matters in the court and, more particularly, in the principles relating to alimony and support.

From the point of view of procedure, it is manifest that there is a dire need of an integrated court, properly staffed and equipped with social aids, to handle all family matters. ...so that a court dealing with the family will be able to prescribe comprehensive and final relief rather than piecemeal and temporary palliatives... Further, in an effort to reduce the numerous applications for rehearings and modifications of support allowances, consideration must be given to the use of more efficient methods employed in other jurisdictions to determine the financial capacity of the husband and the need of the wife. Standardized budgets for various income groups, court auditing offices equipped with accountants and investigators, sworn financial statements, etc. should be instituted.

However, changes in procedure alone are not sufficient; a shift in the basis of awards is requisite. The perverse system which now obtains for the fixing of alimony and support is unjust in concept and faulty in application. It is unfair to men and to women. Honest and deserving women get too little—their children likewise—and others far too much for their own good and that of society. In evolving a modern system for fixing alimony and support the elements of (1) fault, (2) financial capacity, and (3) need, must be reappraised.

Alimony should not be a reward for virtue nor a punishment for guilt. The element of fault should be de-emphasized. Fault should not be a bar to alimony except in cases of gross culpability, such as infidelity or abandonment. In most cases neither party is at fault or both are in some degree. Generally, family break-ups are not due to specific acts of either spouse, legal fictions notwithstanding. They result rather from general malaise to which both have contributed. Fault usually comes after malaise has set in; it is the symptom not the cause of domestic discord.

The factor of need, too, must be adjusted to women's new position in our society. The married woman has come a long way since the days of Blackstone when she has no legal identity apart from her husband's; she is no longer the Victorian creature, 'something better than her husband's dog, a little dearer than his horse.' She is now the equal of man, socially, politically and economically. It is time that consonant with this new approach to woman's status we develop a modern basis for fixing alimony and support which will have its roots in reality.

A practical approach in awarding alimony would be to proceed on the basis of what we may term 'net need', the wife's actual financial requisite less her current assets and earning potential in relation to her husband's capacity to pay. If a woman proves need she should have support—but when she can, she should also be required to mitigate her husband's burden either by her own financial means or earning potential or both. The want alimony seeks to solve is economic—for alimony is basically the statutory substitute for the marital obligation of a husband to support his wife.

Each case must be treated as its particular circumstances indicate for there are many variables that should be taken into account in the determination of alimony. If a woman has contributed however indirectly to her husband's career and helped to increase his substance she may rightfully be regarded as entitled to a share of his gain. A woman who has devoted the greater part of her time to caring for a home and children has had little opportunity to learn the skills necessary to earn a living in our competitive society. The court should and will take cognizance of her plight.

But the same considerations do not operate in the case of a young woman who in all but form has remained alien to her husband's interest. Why should ex-wives and separated women seek a preferred status in which they shall toil not, neither shall they spin. Alimony was originally devised by society to protect those without power of ownership of earning resources. It was never intended to assure a perpetual state of secured indolence. It should not be suffered to convert a host of physically and mentally competent women into an army of alimony drones.

Ironically, inflated alimony awards are frequently not only financially disastrous to the man but psychologically deleterious to the woman. She remains hopelessly entangled in the web of the past, never establishing a new and independent life but 'wandering between two worlds one already dead the other powerless to be born.'

In the field of matrimonial litigation and alimony awards the husband and wife are not the sole parties. Society itself has locus standi for it is deeply affected in vital aspects. For the benefit of all concerned, we must proceed in a climate of sanity that will reflect modern reality and in a spirit of sympathetic understanding that will achieve and equity."

Equality of the Spouses

(121) The husband under common law and statute has always been required to assume the primary responsibility for maintaining his spouse and children, and, with few exceptions, no corresponding obligations have been placed upon the wife.¹⁰⁰ It is submitted that the legal and economic emancipation of married women which has taken place during the last century justifies the imposition of reciprocal support obligations upon the husband and wife and that legislation should be introduced to promote a greater equality of rights and obligations between the spouses and parents. Such legislation might be modelled upon the statutory provisions which have been enacted in England or in certain jurisdictions in the United States of America. Thus, the courts might be empowered to order the wife to make payments for the maintenance of any child of the family who has been committed to the custody of another person or local authority. The wife might also be required to contribute towards the maintenance of her husband where he is unable to support himself or his family by reason of disability of mind or body.¹⁰¹

5. MARRIAGE GUIDANCE AND MATRIMONIAL CONCILIATION

(122) It is submitted that the State should take positive steps to prevent marriage breakdown by providing for the development and expansion of marriage guidance and matrimonial conciliation services.

Education And Preparation For Marriage

(123) The stability and success of marriage and family life will depend in large measure upon the outlook of persons entering into marriage. Education for marriage and family life is, therefore, of fundamental importance.

(124) The Committee on Procedure in Matrimonial Causes, (Eng.), 1946-1947, has expressed the following opinion:

"We have been much impressed by the evidence of experienced workers in this field that the basic causes of marriage failure are to be found in false ideas and unsound emotional attitudes developed before marriage, in youth and even in childhood. The right time to correct those ideas and attitudes is before marriage. There is a need for a carefully graded system of general education for marriage, parenthood and family living to be available to all young people as they grow up, through the enlightened co-operation of their parents, teachers and pastors, and in addition specific preparation of engaged couples to give them instruction and guidance to ensure the success of their marriage. Valuable work is already being done on these lines and its extension is much to be desired."¹⁰²

(125) It is submitted that difficulties encountered in married life can frequently be forestalled by education and preparation for marriage. Education for marriage and family life should, therefore, be recognized as being no less important than education for a profession or trade. Although specific programmes providing education and preparation for marriage are already sponsored by various social agencies and by churches, there is a great need to co-ordinate and expand these programmes so as to make them available to all persons throughout Canada. It might also be helpful if a handbook were provided

to all persons who contemplate marriage so that they may be better informed of the responsibilities assumed on the celebration of marriage. Such a handbook might well emphasize the importance of spouses seeking early expert advice where marital difficulties are encountered. It is, of course, essential that any programme of education or preparation for marriage should be supervised or directed by properly qualified and well-trained personnel.

Matrimonial Conciliation

(126) It is submitted that the State should seek to promote a reconciliation between spouses who encounter disharmony in their marital relationship and that to achieve this result it is essential that the existing facilities for marriage guidance and matrimonial conciliation in Canada be expanded.

(127) It is recommended that on every petition for matrimonial relief, the court should be required to consider the possibility of a reconciliation of the spouses through counselling and, where the court is satisfied that there is a reasonable prospect of reconciliation, it should be statutorily empowered to adjourn the proceedings and designate an agency or suitable person with training and experience in marriage counselling to assist the spouses in reconsidering their position.¹⁰³ The court should also be empowered to make interim orders for the maintenance of a spouse and/or for the custody and maintenance of any child of the family where an adjournment is ordered for the purpose of affording the spouses an opportunity to become reconciled.¹⁰⁴

(128) It is fully realised that the effectiveness and value of such legislation will be determined in the final analysis by the day-to-day work required to implement the legislation and it is therefore vital that adequate financial means and well-qualified and trained personnel should be available to provide the necessary counselling and conciliation services.¹⁰⁵

(129) It is submitted that well-developed and co-ordinated programmes of marriage counselling cannot exist unless account is taken of the following circumstances:

1. The prospects of reconciliation are greater in the early stages of marital disharmony than in the later stages and the chances of securing matrimonial reconciliation are reduced where either spouse has instituted legal proceedings for matrimonial relief.¹⁰⁶ It is essential therefore that the general public should be brought to realise the importance of seeking expert marriage guidance, without delay, when tensions occur in the marital relationship and that efforts be made to remove the impression which undoubtedly exists that there is something shameful in seeking advice on marital problems. It may well be that the press and broadcasting media could be used to advantage in informing the public of the need for and the nature and extent of marriage guidance services available in the community.¹⁰⁷ While this writer is of the opinion that the courts should be statutorily empowered to adjourn legal proceedings and refer the spouses in suitable cases to a qualified marriage counsellor or an approved agency, it is strongly urged that conciliation services must not be made dependent upon the machinery of the courts or confined to spouses who have recourse to legal proceedings.

2. At least one of the spouses must sincerely favour an attempt at matrimonial reconciliation through counselling. The fact that a spouse seeks help indicates that he or she has not lost all willingness to co-operate and in that state of mind there is hope of reconciliation, but anything in the nature of compulsion is unlikely to yield successful results.¹⁰⁸

3. Counselling and conciliation to be successful must take place in a frank and uninhibited atmosphere and each spouse must have complete assurance that nothing he or she says will be disclosed without permission or used to his or her prejudice in any subsequent matrimonial proceedings. It is therefore desirable that any communication between a spouse and a marriage counsellor or conciliator should be privileged from disclosure and that the legal privilege should extend not only to the spouses but also to the counsellor or conciliator to whom the communication is made.¹⁰⁹

4. Matrimonial reconciliation through counselling demands the help of a well-trained and qualified person of wide sympathy and understanding who is able to win the confidence of those persons with whom he deals. The personal factor is so important that churches, voluntary social agencies and individuals may achieve greater success in securing reconciliations than any State institution would secure unless it were able to escape the tendency of such an institution to become impersonal.¹¹⁰ It is accordingly submitted that the voluntary agencies which presently offer marriage guidance should be encouraged to expand their facilities and that if such expansion is hampered by the lack of funds, then approved agencies should receive financial aid from the State.

5. The law of condonation and collusion deters attempts at matrimonial reconciliation and should be amended so that genuine attempts at reconciliation will not preclude subsequent legal remedies if the attempts prove unsuccessful.¹¹¹ It is therefore recommended that condonation and collusion should constitute discretionary and not absolute bars to relief in matrimonial proceedings.¹¹²

6. THE COURT WHICH SHOULD EXERCISE JURISDICTION IN MATRIMONIAL CAUSES

(130) Jurisdiction in "matrimonial causes" is presently vested exclusively in the Superior Courts of each province. An extensive and important jurisdiction in matrimonial proceedings is nevertheless exercised throughout Canada by Juvenile and Family Courts or by Magistrate's Courts. A valuable feature of these courts of summary jurisdiction is that they have attached to them trained probation officers and counsellors who often succeed in promoting reconciliation between disputing spouses. It is submitted that, if jurisdiction in matrimonial causes continues to be vested exclusively in the Superior Courts, then adequate counselling and conciliation services should be available to persons who have recourse to these Courts for matrimonial relief.

(131) It is further submitted that an examination should be made of the feasibility of establishing throughout Canada special Family Courts to exercise an exclusive jurisdiction over all issues affecting and arising from the marital or familial relationship.

Objections To Superior Courts Retaining Exclusive Jurisdiction Over Matrimonial Causes

(132) The principal objections which may be raised against the exclusive exercise of jurisdiction over matrimonial causes¹¹⁴ by the Superior Courts are as follows:

- (i) The procedure in the Superior Courts is involved and expensive.
- (ii) The Superior Courts are unfamiliar to most people and the procedure and atmosphere of these Courts is not conducive to a therapeutic or conciliatory approach to marital or familial problems.¹¹⁵

*Advantages of Family Courts Exercising
Exclusive Jurisdiction Over All Issues
Affecting And Arising From The
Marital Or Familial Relationship*

(133) The establishment of Family Courts to exercise an exclusive jurisdiction over all matters affecting the marital or familial relationship would have the following advantages:

- (i) A single court with an exclusive jurisdiction over matrimonial and familial proceedings could be better equipped at less cost with expert counselling staff and this would facilitate a therapeutic and conciliatory approach to marital and familial problems and thus place a greater emphasis upon reconciliation as an alternative to a legal decree.
- (ii) A single court with an exclusive jurisdiction over matrimonial and familial proceedings would eliminate conflicts of jurisdiction where two courts in the same province are seised of the same problem and would also facilitate the more effective preparation of family case histories which would be of substantial value to the court in the disposition of proceedings for matrimonial or familial relief.¹¹⁸

Conclusions and Recommendations

(134) It is submitted that all courts which exercise jurisdiction over matrimonial and familial proceedings should be provided with an adequate counselling staff and conciliation machinery. It is accordingly recommended that a staff of counsellors and conciliators should be attached to such courts for the purposes of promoting reconciliation between spouses and aiding the court in the disposition of issues relating to children.¹¹⁷ It may be argued that once a married person has instituted legal proceedings against his or her spouse, there is little prospect of securing matrimonial reconciliation through counselling.¹¹⁸ This argument, however, would appear to run counter to the experience of specialised courts in the United States of America, e.g. the Toledo Family Court and the Los Angeles Conciliation Court.¹¹⁹

(135) It is further recommended that specialised Family Courts, with an adequate counselling staff, should be established in regional areas and in large towns throughout Canada to exercise an exclusive jurisdiction over all matrimonial and familial proceedings.¹²⁰ If such a radical reform is not considered practicable at the present time, then it is recommended that:

- (i) The County Court should exercise an exclusive jurisdiction in undefended matrimonial causes, and in defended matrimonial causes¹²¹ with the consent of the parties.¹²²
- (ii) Any party to a defended matrimonial cause should be entitled to demand a trial in the Supreme Court.¹²³
- (iii) There should be a right of appeal from the County Court directly to the Court of Appeal.

7. DOMICILE AS A BASIS OF JURISDICTION IN MATRIMONIAL CAUSES

(136) It is submitted that hardship and uncertainty would be avoided if the bases of jurisdiction in matrimonial causes¹²⁴ and recognition of foreign judgments were modernised and codified on logical lines. This writer proposes to confine his attention to domicile as the basis of jurisdiction in divorce proceedings but recommends that a review should be undertaken of the bases of jurisdiction in other matrimonial causes, including nullity and judicial separation.¹²⁵

Domicile As The Basis Of Jurisdiction In Divorce Proceedings

(137) The general rule in Canada is that a court may exercise jurisdiction in divorce only if the parties are domiciled in the province wherein the proceedings are instituted.¹²⁶ A married woman automatically acquires the domicile of her husband on marriage and retains his domicile so long as the marriage subsists.¹²⁷ Since the cumulative effect of these rules would result in substantial hardship to a wife whose husband has deserted her and established a domicile in another jurisdiction, section 2 of the Divorce Jurisdiction Act, R.S.C., 1952, ch. 84 provides that a married woman who has been deserted by her husband for a period of two years and upwards may institute divorce proceedings in the courts of the province wherein the husband was domiciled immediately prior to desertion.¹²⁸

(138) The concept of the unity of domicile between spouses derives from the former common law doctrine whereby the husband and wife were regarded as one person.¹²⁹ This doctrine has been eroded by the legal, social and economic emancipation of the married woman and it is accordingly recommended that the unity of domicile rule should be abolished. Although the hardship resulting to the married woman from this rule has been mitigated by the aforementioned legislation, it is submitted that more effective protection would be afforded if legislation were adopted in Canada empowering the married woman to establish an independent domicile for the purpose of instituting matrimonial proceedings, including proceedings for the dissolution of marriage.¹³⁰

(139) It is further submitted that the provincial concept of domicile might well be replaced by a national concept and that either spouse who is domiciled in Canada should be entitled to institute matrimonial proceedings in any province provided that such spouse has resided in the province wherein relief is sought for not less than one year immediately preceding commencement of the proceedings.¹³¹

8. VOID AND VOIDABLE MARRIAGES

Capacity to Marry

(140) A marriage is void on the ground of lack of legal capacity to marry where one or both of the parties has been a party to a prior valid marriage which has not been terminated by death or by law, or where the parties are related to one another within the prohibited degrees of consanguinity or affinity, or where the consent to the marriage is vitiated by mental incapacity, intoxication, non-age, duress, fraud or mistake.¹³² A marriage may also be void for lack of compliance with the formal requirements of the *lex loci celebrationis*.¹³³

(141) In certain jurisdictions the grounds upon which a marriage shall be deemed to be void have been reduced to statutory form. In New Zealand, for example, section 7 of the Matrimonial Proceedings Act, (New Zealand), 1963, reads as follows:

"7. A marriage governed by New Zealand law shall be void *ab initio*, whether or not a decree of nullity has been granted, where any of the following grounds exist, and in no other case:

- (a) In the case of a marriage that is governed by New Zealand law so far as it relates to capacity to marry—
 - (i) That at the time of the ceremony of marriage either party to the marriage was already married;
 - (ii) That, whether by reason of duress or mistake or insanity or otherwise, there was at the time of the marriage an absence of consent by either party to marriage to the other party;
 - (iii) That the parties to the marriage are within the prohibited degrees of relationship set out in the ... Marriage Act, 1955, and

no order is in force under subsection (2) of section 15 of that Act dispensing with the prohibition:

- (b) In the case of a marriage that is governed by New Zealand law so far as it relates to the formalities of marriage, that the parties knowingly and wilfully married without a marriage licence, or in the absence of an officiating minister or Registrar of Marriages, in contravention of the provisions of the Marriage Act, 1955.”¹³⁴

(142) It is submitted that legislative provisions corresponding to those set out in section 7(a), *supra*, which regulate legal capacity to marry, might well be enacted by the Federal Parliament in Canada and that such legislation would reduce the uncertainty which presently attaches to the common law.¹³⁵ Legislative provisions corresponding to section 7 (b), *supra*, which relate to the formal requirements of a valid marriage, would seem, however, to fall within the exclusive jurisdictional competence of the provincial legislatures.¹³⁶

Age of Marriage

(143) There appears to be a relatively high incidence of marriage breakdown in cases where the spouses married at a very early age. It is recommended that legislation should be enacted by the Federal Parliament in Canada raising the minimum legal age for marriage to eighteen years. It is further recommended that such legislation should provide that, where a marriage has been celebrated between parties, one of whom has not attained the age of eighteen years, the marriage shall be voidable at the suit of the party who was under age at the time of the celebration of the marriage.¹³⁷ It is recognized that such legislation is not self-sufficient and that it should be supplemented by more adequate preparation of the young for marriage.¹³⁸

Capacity to Marry Wife's Sister or Divorced Husband's Brother

(144) Under sections 2 and 3 of the Marriage and Divorce Act, R.S.C., 1952, ch. 176, a man may marry his deceased wife's sister and a woman may marry her deceased husband's brother.¹³⁹ In the light of conflicting decisions in *Re Schepull and Bekeschus and Provincial Secretary* [1954] O.R. 67 and in *Crickmay v. Crickmay* (1966) 57 D.L.R. (2d) 159 (B.C.),¹⁴⁰ it is uncertain whether the relationship of affinity is terminated by divorce so as to entitle a man to marry his divorced wife's sister and a woman to marry her divorced husband's brother. It is recommended that legislation should be enacted to resolve this uncertainty and that such legislation should take the following form:

“When a decree for divorce has been made absolute, it shall be lawful for the respective parties to marry again as if the prior marriage had been dissolved by death.”

Voidable Marriages

(145) Subject to the recommendation set out in paragraph 143, *supra*, this writer does not propose to recommend the introduction of any new grounds for annulment of marriage.

(146) It may be of interest, however, to observe that section 9(1) of the Matrimonial Causes Act, (Eng.), 1965, supplements the common law ground of impotence by providing that a marriage shall be voidable on the ground:

- (a) that the marriage has not been consummated owing to the wilful refusal of the respondent to consummate it; or
- (b) that at the time of the marriage, either party to the marriage—
 - (i) was of unsound mind, or

- (ii) was suffering from mental disorder so as to be unfitted for marriage and the procreation of children, or
- (iii) was subject to recurrent fits of insanity or epilepsy; or
- (c) that the respondent was at the time of the marriage suffering from venereal disease in a communicable form; or
- (d) that the respondent was at the time of the marriage pregnant by some person other than the petitioner.¹⁴¹

The Matrimonial Causes Act, (Eng.), 1965, section 9(2) further provides that the court shall not grant a decree of nullity in a case falling within paragraphs (b), (c) and (d), *supra*, unless it is satisfied that:

- (a) the petitioner was at the time of the marriage ignorant of the facts alleged; and
- (b) proceedings were instituted within a year from the date of the marriage;¹⁴² and
- (c) marital intercourse with the consent of the petitioner has not taken place since the petitioner discovered the existence of the grounds for a decree of annulment.¹⁴³

It will be observed that the above conditions do not apply to a petition for annulment of marriage on the ground of the respondent's wilful refusal to consummate the marriage. With respect to this ground of annulment, it might seem more logical if it were made a ground for divorce, since a decree of nullity is ordinarily granted for some defect or incapacity existing at the time of the marriage ceremony and wilful refusal to consummate the marriage necessarily arises only after the marriage has been celebrated.¹⁴⁴ Since, however, wilful refusal to consummate the marriage may constitute evidence of impotence in proceedings for annulment of marriage, certain difficulties might be encountered if wilful refusal to consummate the marriage were introduced as a ground for divorce while impotence were retained as a ground for annulment.¹⁴⁵

9. THE NEED FOR SOCIOLOGICAL RESEARCH

(147) It is submitted that that organised research should be undertaken with respect to the Family in Canada in order to determine crucial issues which are presently merely matters for conjecture. Such research might examine, *inter alia*, the following issues:

- (i) the relative stability of religious and civil marriages;
- (ii) the stability of marriages in which one or both parties come from a broken home in relation to the general stability of marriage;
- (iii) the stability of marriages of divorcees in relation to the general stability of marriage;
- (iv) childlessness as a factor in marriage breakdown;
- (v) the causal connection between the trend to earlier marriage and the incidence of marriage breakdown; and
- (vi) the facilities for marriage guidance and education for marriage and their effect on marriage stability.

(148) It is further submitted that effective research can only be undertaken if adequate statistical data is compiled through centralised agencies and that the State should aske positive steps to promote the continuing collection of statistical data relating to the Family in Canada.

FOOTNOTES

1. *Power on Divorce* (1964, 2nd ed.), at p. 24.
2. *Ibid.*
3. *Op cit*, at p. 26.
4. *Ibid.*
5. Report of the Royal Commission on Divorce and Matrimonial Causes, (Eng.), 1909-1912: Cmd. 6478 (1912), para. 242.
6. J. P. Lichtenberger, "Divorce Legislation" (1932) 160 *Annals* 116.
7. See *infra*, sub-heading "Divorce By Consent".
8. Report of the Royal Commission on Marriage and Divorce (Eng.), 1951-1955: 9678 (1956), para. 70.
9. [1906] P. 189, at pp. 207-208.
10. Cmd. 6478 (1912), paras 236-329.
11. Cmd. 6478 (1912) at pp. 171-191.
12. See *infra*, sub-heading "Living Separate And Apart As A Ground For Divorce".
13. Cmd. 9678 (1956), para. 69 (xxxiv).
14. See *infra*, sub-heading "Legislative Recognition Of Marriage Breakdown As A Ground For Divorce".
15. [1943] A.C. 517 (H.L.).
16. See *Power on Divorce* (1964, 2nd ed.), at pp. 115 and 125.
17. *Op cit*, at p. 110.
18. *Op cit*, at p. 62.
19. *Quaere* whether such provision should have provided for discretion in the light of the reasonableness of the respondent's objection to divorce rather than the unreasonableness of the petitioner's matrimonial conduct: see Kahn Freund, "Divorce Law Reform?" (1956) 19 *Mod. L. R.* 573 at p. 589.
20. See also Henry H. Foster, Jr., and Doris Jonas Freed, "Living Apart As A Ground For Divorce" (Monograph No. 4, Section of Family Law American Bar Association).
21. See footnote 20, *supra*.
22. See Cmd. 9678 (1956), at p. 376 *et seq.*
23. See *infra*, sub-heading "Judicial Recognition Of The Factor Of Marriage In Jurisdictions Wherein The Traditional Fault Concept Is Endorsed by the Legislature".
24. See *infra* para. 48, and sub-heading "Dangers of Fault and Non-Fault Grounds Co-existing".
25. See Freidmann, *op. cit.*, *supra*, para. 45. See also Kahn Freund, "Divorce Law Reform?" (1956) 19 *Mod. L. Rev.* 573.
26. See Alabama Code tit. 34 §22 (1959); Arkansas Stat. Ann. §34-1202 (7) (Supp. 1965); Arizona Rev. Stat. Ann. §25-312 (7) (1956); Idaho Code Ann. §32-610 (1963); Kentucky Rev. Ann. §403. 020 (1) (b) (1963); Louisiana Rev. Stat. Ann. §9: 301 (1965); Texas Rev. Civ. Stat. art. 4629 (4) (1960); Virginia Code Ann. §20-91 (9) (Supp. 1964); Washington Rev. Code §26.08.020 (9) (1958) and Puerto Rico Laws Ass. tit. 31 §321 (9) (1955).
27. See H. Silving, "Divorce Without Fault" (1944) 29 *Iowa L. Rev.* 527:
 "The destruction of the factual marital relation gains ground as a divorce reason. This evolution takes place at the expense of the fault principle. The logical conclusion to thich the acceptance of the 'destruction

of the marital relation' as a divorce ground leads is the total exclusion of fault in divorce law: If in some cases marriage can be dissolved on the ground of 'destruction' alone, without allegation of fault, there is no real justification for permitting 'fault' problems to be raised in other cases."

28. See *supra*, sub-heading "Legislative Recognition Of Marriage Breakdown As A Ground For Divorce".
29. (1961) 1 J1 of Fam. Law 181, at p. 206.
30. "The Development Of Divorce Law In Australia" (1966) 29 Mod. L. Rev. 473, at pp. 475-476.
31. See, for example, the opinions expressed by nine members of the Royal Commission on Marriage and Divorce, (Eng), 1951-1955: Cmd. 9678 (1956), para. 69 (xxxiv-xxxv).
32. "Collusive and Consensual Divorce and The New York Anomaly" (1936) 36 Calif. L. Rev. 1121.
33. See Rutman, "Departure From Fault" (1961) 1 Journal of Family Law 181, at p. 192:

"It is unrealistic to fail to recognise that in practice numerous divorces are carried out under circumstances of mutual consent. It is one of the factors which has brought law into disrepute that it continues to regard the litigation as an adversary proceeding, and, not as it is in many cases, a mutual arrangement. The number of undefended cases is but further evidence which goes to prove this well-accepted statement."

See also Minutes of Evidence Taken Before the Royal Commission on Marriage and Divorce, 1951-1955, at p. 15 wherein Professor L.C.B. Gower, a former solicitor, expressed the following opinion.

"Although neither England nor France officially recognises divorce by consent, in fact there is never any difficulty in obtaining a divorce in either country if the parties are in agreement. The only point on which opinions may differ is as to the proportion of divorces which may be regarded as collusive or based on bogus grounds. Among the upper income groups I would say that it is well over half the total of undefended cases, although among the poorer classes, whose cases are handled under the Legal Aid Scheme, it seems to be considerably lower... But whatever the proportion, there is no doubt that many divorces are now granted where there are no true grounds, and provided that the parties are in agreement there is never the slightest difficulty in obtaining a dissolution.

This state of affairs has two consequences:

- (i) It enables the party who is the less anxious for a divorce to hold up to ransom the other who is eager to obtain one, and thus to extort unduly favourable financial arrangements from him.
- (ii) It involves the parties often in the degrading business of actual or pretended adultery and always in deceiving the court; it forces their lawyers to be un-willing participants in the travesty of justice and it brings the whole administration of the law in disrepute."

See also Minutes of Evidence Taken Before The Royal Commission on Marriage and Divorce, 1951-1955, at p. 304, where another solicitor, Mr. W. Heyting stated:

"I feel that there is a considerable amount of collusion in one form or another, but... solicitors are not parties to it and the reason for that is this; the more intelligent people are, the more they know perfectly well what the law is on this subject and they just don't tell their solicitor the whole truth in the matter. The solicitor may have very strong suspicions and it is his duty to ask his client specifically about collusion and draw the

client's attention to the law on this matter. I am sure in the vast majority of cases he does this. But if a client denies it, there is very little more the solicitor can do whatever his suspicions may be."

34. Cmd. 9678 (1956), paras. 115-119.

35. See *infra*, sub-heading "Cruelty As A Ground For Divorce".

36. See *Power on Divorce* (1964, 2nd ed.), at pp. 417-418.

37. Cmd. 9678 (1956), para. 90.

38. Cmd. 1105 (1960), paras. 115-117.

See Payne, "Artificial Insemination Heterologous and the Matrimonial Offence of Adultery" (1961) 40 N.C.L. Rev. 111, at 114:

"It should be observed that the committee made no recommendation providing a matrimonial remedy for the wife whose husband donated semen for purposes of artificial insemination. This omission is unfortunate in so far as it re-introduces inequality between the sexes before the law. There are, of course, certain practical difficulties which impede the application of similar recommendations to the husband donor for, under present conditions, the anonymity which surrounds the donor's identity will generally preclude discovery of the offence by the wife. Although this particular difficulty might be met by statutory control or regulation of the practice of artificial insemination, other difficult legal problems would remain. For example, would the husband be penalised where his donation of semen was made before marriage but utilised subsequent thereto?"

Semble the proposed definition of cruelty hereinafter set out may afford a basis for matrimonial relief in cases where a spouse has, without the consent of his or her partner, been party to the practice of artificial insemination heterologous: see *infra*, sub-heading, "Cruelty As A ground For Divorce".

39. See *Power on Divorce* (1964, 2nd ed) at p. 24-25.

40. See paragraph 65, *supra*.

41. See Cmd. 9678 (1956), paragraph 210, wherein the Royal Commission on Marriage and Divorce recommend that either spouse should be entitled to divorce on proof that his or her partner has committed sodomy or bestiality.

42. See *Power on Divorce* (1964, 2nd ed.) at pp. 25-26 and 473-474.

43. Matrimonial Causes Act, (Eng.), 1965, section 1.

44. See 1966 Report of the Joint Legislative Committee on Matrimonial and Family Laws to the Legislature of the State of New York. See appendix to this brief for summary of the recommendations set out in the aforementioned Report.

45. See *infra*, paragraph 73.

46. See *Power on Divorce* (1964, 2nd ed.) at pp. 474-479.

46. See Domestic Relations Act, R.S.A., 1955, ch. 89, section 7(2); Queen's Bench Act, S.S., 1960, ch. 35, section 25(3). See also *Power on Divorce* (1964, 2nd ed.) at pp. 485-486.

48. Minutes of Evidence Taken Before The Royal Commission on Marriage and Divorce, 1951-1955, at p. 30.

49. *Ibid.*

50. It is accordingly submitted that the formula adopted in drafting legislation should read as follows: "the respondent has since the celebration of the marriage so conducted [himself] . . ."

It should be noted that the recent decision of the House of Lords in *Gollins v. Gollins* [1963] 3 W.L.R. 176 indicates that the concept of ma-

trimonial cruelty in England requires the court to examine the character of the conduct complained of and the effect it produces on a spouse of normal susceptibility. Where such conduct is of such a character that the petitioning spouse cannot reasonably be expected to endure it, matrimonial cruelty will be established and the respondent's state of mind may be deemed irrelevant. See also *Williams v. Williams*, footnote 51, *infra*.

51. See *Williams v. Williams* [1963] 3 W.L.R. 215, wherein the House of Lords held that the respondent's insanity does not necessarily constitute a defence to a charge of matrimonial cruelty in divorce proceedings.

As to insanity as a defence to divorce proceedings instituted in England on the ground of desertion, see Matrimonial Causes Act, (Eng.), 1965. This legislation implements the recommendation of the Royal Commission on Marriage and Divorce, (Eng.), 1951-1955, that desertion should not be interrupted or precluded by the insanity of the deserting spouse if it appears to the court that desertion would have occurred or continued had the respondent spouse not become insane: see Cmd. 9678 (1956), paras. 257-261.

52. See *Power on Divorce* (1964, 2nd ed.) at pp. 269 and 488-489.
53. See 1966 Report of the Joint Legislative Committee on Matrimonial and Family Laws to the Legislature of the State of New York [reprinted in the appendix to this brief].
54. Matrimonial Causes Act, (Eng.), 1965, section 1 (1) (a) (ii).
55. Matrimonial Causes Act, (Eng.), 1965, section 1 (2).
56. See Report of New Jersey Supreme Court's Committee on Reconciliation—1960, relevant section of which are reproduced in Goldstein and Katz, *The Family And The Law*, at pp. 155-159:

"An analysis of the first 1,398 cases in which the Masters held reconciliation conferences indicated that the possibilities of reconciliation vary widely depending upon the nature of the complaint. This is well illustrated by the following table:

Nature of Complaint	Number of Cases	Number of Reconciliations	Percentages of Reconciliations
1. Annulment	10	0	0
2. Desertion	715	1	0
3. Adultery	204	8	3.8
4. Separate Maintenance	137	11	8
5. Extreme Cruelty	332	29	8.7
Total of all cases	1,398	49	3.5
Total 3, 4 and 5 above	673	48	7.1

Thus the record of reconciliations in separate maintenance and extreme cruelty cases is in sharp contrast to that in annulment and desertion cases where reconciliation efforts proved almost completely fruitless. In the opinion of the Masters the lack of success in the desertion cases is not attributable to the grounds of divorce *per se*, but rather to the time factor. In desertion cases the reconciliation conferences generally come three or more years after the parties have actually separated. Almost invariably they have made their adjustments to living apart and are not the least interested in making the effort to start life together all over again. In cases brought on other grounds, the fact that the parties come before the Masters at an earlier date accounts for the better reconciliation results."

57. It is generally conceded that the offence of desertion was introduced as a ground for divorce in England under the Matrimonial Causes Act, (Eng.), 1937, militated against the possibility of reconciliation between the

spouses since it required proof of desertion for a period of three years *immediately preceding presentation of the petition for divorce*. Attempts to bring husband and wife together were accordingly frustrated by the spouses' knowledge that if the attempts at reconciliation failed a further three years' desertion would be required before a divorce could be granted. This unfortunate result of the definition of desertion adopted in the Matrimonial Causes Act, (Eng.), 1937, has now been alleviated to some extent by the provisions set out in section 1 (2) of the Matrimonial Causes Act, (Eng.), 1965: see text to footnote 55, *supra*. But see A. Irvine, "The Concept of Reconciliation And The Matrimonial Causes Act, 1963" (1966) 82 L.Q.R. 525.

58. See text to and contents of footnote 51, *supra*. See also section 1 (2) of the Matrimonial Causes Act, (Eng.), 1965, which reads as follows:
"... [F] or the purposes of a petition for divorce, the court may treat a period of desertion as having continued at a time when the deserting party was incapable of continuing the necessary intention if the evidence before the court is such that, had that party not been so incapable, the court would have inferred that that intention continued at that time."
59. As to domicile and ordinary residence in England as the basis for the exercise of jurisdiction in respect of this ground for divorce, see Matrimonial Causes Act, (Eng.), section 14, sub-sections (2) and (5). The provisions of sections 5 (7) to 8 of the Matrimonial Causes Act, (Eng.), 1965, which relate to the issue of a decree nisi, the right of intervention by the Queen's Proctor or any other person, and the right of divorced persons to remarry, apply in respect of presumed death as a ground for divorce: see Matrimonial Causes Act, (Eng.), 1965, section 14, sub-section 4.
60. It is submitted that in determining whether the issue of a divorce decree would prove unduly harsh or oppressive to the respondent spouse, the court should not deny matrimonial relief merely because the respondent spouse objects to divorce for reasons of conscience or religious conviction. Such a spouse may give effect to his or her conscience or religious convictions notwithstanding the issue of a divorce decree by declining to exercise the right of remarriage which ensues from the fact of divorce. See *Painter v. Painter* (1963) 4 F.L.R. 216, at 220 and compare *Judd v. Judd* (1961) 3 F.L.R. 207. See generally *McDonald v. McDonald* (1964) 64 S.R. (N.S.W.) 435 and Selby, (J.), "The Development of Divorce Law in Australia (1966) 29 Mod. L. Rev. 473, especially pp. 477-482.
61. It might be argued that it would be more logical to enact a statutory formula which simply empowered the court to grant a decree of dissolution of marriage "if it is satisfied that the marriage has irretrievably broken down." A general clause of this nature, however, though superficially attractive, would impose an insuperable burden on the courts as presently constituted.

As to the extent to which foreign jurisdictions have recognized marriage breakdown, through separation provisions, as a criterion for divorce, see *supra*, sub-heading "Legislative Recognition of Marriage Breakdown As A Ground For Divorce".

62. See *infra*, sub-heading "Collusion, Connivance And Condonation As Absolute Bars To Matrimonial Relief". See also *supra*, paras. 27-29.
63. But see *infra*, sub-heading Protection of Children In Matrimonial Proceedings.
64. See *supra*, sub-headings "Objections To Present Grounds For Divorce In Canada"; "Objections To Divorce Law Regime Based Exclusively On A Fault Concept"; "Divorce By Consent".

65. See *supra*, sub-headings "The Function Of The Law Of Marriage And Divorce"; "Effect Of Divorce Grounds Upon Divorce Rate"; "Marriage Breakdown Through Living Apart Statutes As Ground For Divorce: Effect On Divorce Rate".

66. See *supra*, paras. 40-41.

If this recommendation were endorsed by the Canadian Parliament without qualification, it would seem unnecessary to introduce desertion as a separate ground for divorce. Compare the recommendations and opinions set out in the Report of the Joint Legislative Committee on Matrimonial and Family Laws to the Legislature of the State of New York (reprinted in the appendix to this brief), which favour desertion and *voluntary* separation as independent grounds for divorce.

67. See *supra*, sub-heading "Distinction Between Marriage Breakdown And Divorce By Consent".

68. Compare the following recommendation submitted by the Royal Medical-Psychological Association to the Royal Commission on Marriage and Divorce, (Eng.), 1951-1955:

"A petition for divorce may be presented to the court on the ground that the respondent:

(a) is suffering from mental disorder which has been present continuously for a period of five years, and that his or her mental state is now such that recovery is extremely unlikely; or

(b) has at the time of the presentation of the petition been under care and treatment as a patient in one or more mental hospitals (or licensed houses) continuously for a period of one year."

69. See *supra*, sub-heading "Living Separate And Apart As A Ground For Divorce".

70. See *Lee v. Lee*, 182 N.C. 61, 108 S.E. 352 (1921); *Serio v. Serio*, 201 Ark. 11, 143 S.W. 2d 1097 (1940); *Messick v. Messick*, 177 Ky. 337, 197 S.W. 792 (1917). See generally, W. E. McCurdy, "Insanity As A Ground For Annulment Or Divorce In English And American Law" (1943) 29 Va. L. Rev. 771.

71. See Ploscowe and Freed, *Family Law: Cases and Materials* (1963) at p. 199:

"A number of states authorize divorce for incurable insanity occurring after marriage. They usually require that insanity be hopeless and incurable, that the insane person have been insane and confined to an institution for a specified period prior to action for divorce, and that the insanity be certified to by two or more physicians. They generally require that the sane person offer proof of ability or bond to support the insane spouse."

For examples of the statutory variations adopted in American jurisdictions wherein insanity constitutes a ground for divorce, see W. E. McCurdy, "Insanity As A Ground For Annulment Or Divorce In English And American Law" (1943) 29 Va. L. Rev. 771.

72. See W. E. McCurdy, (1943) 29 Va. L. Rev. 771.

73. See *supra*, paragraph 90.

74. *Power on Divorce* (1964, 2nd. ed.), p. 77.

75. Per Norris, J. in *Johnson v. Johnson* (1960) 23 D.L.R. (2d) 740, at 750.

76. See Final Report of the Committee on Procedure in Matrimonial Causes, (Eng.), 1946-1947: Cmd. 7024 (1947), paras. 22 and 29. See also Report of The Royal Commission on Marriage and Divorce, (Eng.), 1951-1955: Cmd. 9678 (1956), paras. 230-235.

77. See Matrimonial Causes Act, (Eng.), 1965, sections 5 and 12 which provide that collusion shall constitute a discretionary bar to relief in proceedings for divorce or judicial separation. See *Head (formerly Cox) v. Head* [1964] P. 228; *Ashlee v. Ashlee* (1963) 107 Sol. Jo. 892; *Dredge v. Dredge*, The Times, January 18th, 1964; *Mulhouse v. Mulhouse* [1964] 2 W.L.R. 808, [1964] 2 All E. R. 50.
78. See Report of the Royal Commission on Marriage and Divorce, (Eng.), 1951-1955: Cmd. 9678 (1956), paras. 234-235.
79. Per Laidlaw, J. A. in *Maddock v. Maddock* (1958) O.R. 810 (Ont. C.A.).
80. See the 1966 Report of the Joint Legislative Committee on Matrimonial and Family Laws to the Legislature of the State of New York, wherein it is recommended that the traditional bars of collusion and connivance should be replaced by the defence that the plaintiff "conspired to procure" the offence complained of: see appendix, *infra*.
81. See *Power on Divorce* (1964, 2nd ed.), pp. 50-64.
82. See Final Report of the Committee on Procedure in Matrimonial Causes, (Eng.), 1946-1947: Cmd. 7024 (1947), paras. 22 and 29. See also Report of the Royal Commission on Marriage and Divorce, (Eng.), 1951-1955: Cmd. 9678 (1956), paras. 237-246.
83. See Payne, "The Concept of Condonation in Matrimonial Causes: Its Functional Significance and Fundamental Nature" (1961) 26 Sask. Bar Rev. 4. See also J. S. Bradway, "Forgive And Forget: Condonation Today" (1962) 2 Jl. of Fam. Law 116; A. Irvine, "The Concept of 'Reconciliation' And The Matrimonial Causes Act, 1963" (1966) 82 L.S.R. 525.
84. See *Power on Divorce* (1948, 1st ed.), p. 36. Compare *Power on Divorce* (1964, 2nd ed.), pp. 56-59. See also Payne, "The Concept of Condonation in Matrimonial Causes: A Restatement of *Henderson v. Henderson and Crellin*" (1961) 26 Sask. Bar Rev. 53.
85. Namely, the bilateral intent to resume matrimonial cohabitation or to be reconciled: see texts and article cited in footnote 84, *supra*.
86. Matrimonial Causes Act, (Eng.), 1937, sec. 1 (1). See now Matrimonial Causes Act, (Eng.), 1965, sec. 2, which reads as follows:

"2.—(1) Subject the next following subsection, no petition for divorce shall be presented to the court before the expiration of the period of three years from the date of the marriage (hereafter in this section referred to as 'the specified period').

(2) A judge of the court may, on an application made to him, allow the presentation of a petition for divorce within the specified period on the ground that the case is one of exceptional hardship suffered by the petitioner or of exceptional depravity on the part of the respondent; but in determining the application the judge shall have regard to the interests of any relevant child and to the question whether there is reasonable probability of a reconciliation between the parties during the specified period.

(3) Nothing in this section shall be deemed to prohibit the presentation of a petition based upon matters which occurred before the expiration of the specified period."

For corresponding legislation in Australia, see Matrimonial Causes Act, (Aust.), 1959, sect. 43, which reads as follows:

"43. *Petition within three years of marriage*.—(1) Subject to this section, proceedings for a decree of dissolution of marriage shall not be instituted within three years after the date of the marriage except by leave of the court.

(2) Nothing in this section shall be taken to require the leave of the court to the institution of proceedings for a decree of dissolution of marriage on one or more of the grounds specified in paragraphs (a), (c) and (e) of section twenty-eight of this Act,* and on no other ground, or to the institution of proceedings for a decree of dissolution of marriage by way of cross-proceedings.

(3) The court shall not grant leave under this section to institute proceedings except on the ground that to refuse to grant that leave would impose exceptional hardship on the applicant or that the case is one involving exceptional depravity on the part of the other party to the marriage.

(4) In determining an application for leave to institute proceedings under this section, the court shall have regard to the interests of any children of the marriage and to the question whether there is any reasonable probability of a reconciliation between the parties before the expiration of the period of three years after the date of the marriage.

(5) Where, at the hearing of proceedings that have been instituted by leave of the court under this section, the court is satisfied that the leave was obtained by misrepresentation or concealment of material facts, the court may—

- (a) adjourn the hearing for such period as the court thinks fit; or
- (b) dismiss the petition on the ground that the leave was so obtained.

(6) Where, in a case to which the last preceding sub-section applies, there is a cross-petition, if the court adjourns or dismisses the petition under that sub-section, it shall also adjourn for the same period, or dismiss, as the case may be, the cross-petition, but if the court, having regard to the provisions of this section, thinks it proper to proceed to hear and determine the cross-petition, it may do so, and in that case it shall also proceed to hear and determine the petition.

(7) The dismissal of a petition or a cross-petition under sub-section (5) or (6) of this section does not prejudice any subsequent proceedings on the same, or substantially the same, facts as those constituting the ground on which the dismissed petition or cross-petition was brought.

(8) Nothing in this section prevents the institution of proceedings, after the period of three years from the date of the marriage, based upon matters which have occurred within that period.

(9) In this section, a reference to the leave of the court shall be deemed to include a reference to leave granted by a court on appeal."

[*The grounds for divorce set out in section 28, paragraphs (a), (c) and (e) are adultery, wilful and persistent refusal to consummate the marriage, and rape, sodomy or bestiality.]

87. See footnote 86, *supra*.

88. See footnote 86, *supra*.

89. Report of the Royal Commission on Marriage and Divorce, (Eng.), 1951-1955: Cmd. 9678 (1956), para. 215.

90. See Cmd. 9678 (1956), paras. 212-217.

91. *Ibid*.

92. See generally Judge R. W. Hansen, "Guardians Ad Litem in Divorce and Custody Cases: Protection of the Child's Interests" (1964) 4 JI of Fam. Law 181; R. W. Hansen, "The Role And Rights Of Children In Divorce Actions" (1966) 6 JI of Fam. Law 1.

See also *Kritzik v. Kritzik*, 21 Wis. 2d 442, 124 N.W. 2d 581 (1963), wherein Wilkie, J. stated:

"In making his determinations as to what conditions of a divorce judgment would serve the interests of the children involved, the trial

court does not function solely as an arbiter between two private parties. Rather, in his role as a family court, the trial court represents the interests of society in promoting the stability and best interests of the family. It is his task to determine what provisions and terms would best guarantee an opportunity for the children involved to grow to mature and responsible citizens, regardless of the desires of the respective parties. This power [reflects] a recognition that children involved in a divorce are always disadvantaged parties and that the law must take affirmative steps to protect their welfare."

93. For additional provisions relating to the powers of the court to make orders for the custody, maintenance and supervision of children, see Matrimonial Causes Act, (Eng.), 1965, sections 34-37.

See also Matrimonial Causes Act, R.S.O., 1960, ch. 232, sections 5 and 6 and especially section 6, sub-sections (2) and (6), which read as follows:

"6. - (2) Where the statement of claim in any action for the dissolution of marriage contains particulars as to any child of the marriage who is under sixteen years of age at the time of the commencement of the action, the Official Guardian shall cause an investigation to be made and shall report to the court upon all matters relating to the custody, maintenance and education of the child.

(6) Notwithstanding that no claim for custody or maintenance of the child is made in the action, the judge presiding at the trial may make such order as to the custody or maintenance, or both, of the child as may seem proper."

94. See R. W. Hansen, "The Role and Rights of Children in Divorce Actions" (1966) 6 JI of Fam. Law 1, at p. 90:

"(The) emphasis upon the necessity of legal representation for children in divorce actions is not inconsistent with the role or importance of the social service investigator in securing information for the benefit of the court. As the (decision in *Wendland v. Wendland*, 29 Wis. 2d 145, 138 N.W. 2d 185 (1965)) points out, 'Although the court, as here, may call upon the department of domestic conciliation for an independent investigation and report, a guardian ad litem for the children, as an advocate for their interests, may well be in a position to conduct a further investigation and present evidence to the court that will help it reach its custody determination.' The twin requirements of legal representation for the children and a social service evaluation of their situation represent an inter-disciplinary approach to protecting the rights of children and to lessening the trauma of marriage dissolution upon the children. Both represent 'affirmative steps' that a court can take to determine and protect the welfare of children. That this requires additional time and requires additional expense for the divorce-seekers must be conceded. 'But . . . this extra consideration is due the children who are not to be buffeted around as mere chattels in a divorce controversy, but rather are to be treated as interested and affected parties whose welfare should be the prime concern of the court, in its custody determinations'."

95. See Final Report of the Committee on Procedure in Matrimonial Causes, (Eng.), 1946-1947: Cmd. 7024 (1947), paras. 29-34.
96. Circuit Judge, Family Court, Milwaukee, Wisconsin.
97. See contents of footnote 94, *supra*.
98. See *Power on Divorce* (1964, 2nd ed.), chs. XV and XXIII.
99. *Power on Divorce* (1964, 2nd ed.), p. 273.
100. See *Power on Divorce* (1964, 2nd ed.), chs. XV and XXIII.

101. See Matrimonial Causes Act, (Eng.), 1965, sections 15, 17, 20, 21, 33; Matrimonial Proceedings (Magistrates' Courts) Act, (Eng.), 1960, section 2. See also Vernier, *American Family Law* (1935), Vol. 3 §161.
102. Final Report of the Committee on Procedure in Matrimonial Causes: Cmd. 7024 (1947), para. 5. These conclusions are endorsed in the Report of the Royal Commission on Marriage and Divorce, (Eng.), 1951-1955: Cmd. 9678 (1956), paras. 329-330. See also the Report of the Royal Commission on Population, (Eng.), 1945-1950: Cmd. 7695, wherein it is recommended that preparation for family life should be given a more prominent place in the educational system through (i) a wide development of sex education in the schools; (ii) the adjustment of school curricula to raise the status of the practical crafts of homemaking and subjects relating to married life; and (iii) the development of special courses at colleges and centres of adult education relating to the psychological aspects of marriage as well as the ordinary domestic subjects. It should be noted that the Royal Commission on Population emphasized that the co-operation of the churches and other organisations is essential to ensure proper education and preparation for marriage.

103. See Matrimonial Proceedings Act (New Zealand), 1963, secs. 4-5:

"4.—(1) Where any proceedings for separation or restitution of conjugal rights or dissolution of a voidable marriage or divorce have been instituted,—

- (a) It shall be the duty of the Court to give consideration, from time to time, to the possibility of a reconciliation of the parties to the marriage; and
- (b) If at any time it appears to the Court, either from the nature of the case, the evidence in the proceedings, or the attitude of those parties, or of either of them, that there is a reasonable possibility of such a reconciliation, the Court may adjourn the proceedings to afford those parties an opportunity to become reconciled, and may nominate a suitable person with experience or training in marriage counselling, or in special circumstances some other suitable person, to endeavour to effect a reconciliation.

(2) If, not less than twenty-eight days after an adjournment under sub-section (1) of this section has taken place, either of the parties to the marriage requests that the hearing be proceeded with, the hearing shall be resumed.

5.—(1) No evidence of any information received by, or of anything said or of any admission made to a person nominated pursuant to subsection (1) of section 4 of this Act in the course of an endeavour to effect a reconciliation under that section shall be admissible in any Court or before any person acting judicially.

(2) Every person nominated pursuant to subsection (1) of section 4 of this Act who, except in so far as it is necessary for him to do so for the proper discharge of his functions under section 4 of this Act, discloses to any person any information received by him or any statement or admission made to him in the course of an endeavour to effect a reconciliation under that section commits an offence, and is liable on summary conviction to a fine not exceeding fifty pounds."

See also Matrimonial Causes Act, (Australia), 1959, secs: 14-17:

"14. *Reconciliation*.—(1) It is the duty of the court in which a matrimonial cause has been instituted to give consideration, from time to time, to the possibility of a reconciliation of the parties to the marriage (unless the proceedings are of such a nature that it would not be appropriate to do so), and if at any time it appears to the Judge constituting the

court, either from the nature of the case, the evidence in the proceedings or the attitude of those parties, or of either of them, or of counsel, that there is a reasonable possibility of such a reconciliation, the Judge may do all or any of the following:

- (a) adjourn the proceedings to afford those parties an opportunity of becoming reconciled or to enable anything to be done in accordance with either of the next two succeeding paragraphs;
- (b) with the consent of those parties, interview them in chambers, with or without counsel, as the Judge thinks proper, with a view to effecting a reconciliation;
- (c) nominate—
 - (i) an approved marriage guidance organization or a person with experience or training in marriage conciliation; or
 - (ii) in special circumstances, some other suitable person, to endeavour, with the consent of those parties, to effect a reconciliation.

(2) If, not less than fourteen days after an adjournment under the last preceding sub-section has taken place, either of the parties to the marriage requests that the hearing be proceeded with, the Judge shall resume the hearing, or arrangements shall be made for the proceedings to be dealt with by another Judge, as the case requires, as soon as practicable.

15. Hearing when reconciliation fails.—Where a Judge has acted as conciliator under paragraph (b) of sub-section (1) of the last preceding section but the attempt to effect a reconciliation has failed, the Judge shall not, except at the request of the parties to the proceedings, continue to hear the proceedings, or determine the proceedings, and, in the absence of such a request, arrangements shall be made for the proceedings to be dealt with by another Judge.

16. Statements etc. made in course of attempt to effect reconciliation.—Evidence of anything said or of any admission made in the course of an endeavour to effect a reconciliation under this Part is not admissible in any court (whether exercising federal jurisdiction or not) or in proceedings before a person authorized by a law of the Commonwealth or of a State or Territory of the Commonwealth, or by consent of parties, to hear, receive and examine evidence.

17. Marriage Conciliator to take oath of secrecy.—A marriage conciliator shall, before entering upon the performance of his functions as such a conciliator, make and subscribe, before a person authorized under the law of the Commonwealth or of a State or a Territory to which this Act applies to take affidavits, an oath or affirmation of secrecy in accordance with the form in the First Schedule to this Act."

104. See Matrimonial Causes Act, (Eng.), 1965, section 34 and Matrimonial Proceedings (Magistrates' Courts) Act, (Eng.), 1960, section 6.

105. Although the shortage of trained counsellors and social workers in Canada makes this a counsel of perfection at the present time, too much emphasis cannot be laid upon the importance of the best and fullest professional training for marriage counsellors conciliators.

See Matrimonial Causes Act, (Australia), 1959, sections 9-13, which read as follows:

"9. *Grants to approved marriage guidance organizations.*—The Attorney-General may, from time to time, out of moneys appropriated by the Parliament for the purposes of this Part, grant to an approved marriage guidance organization, upon such conditions as he thinks fit, such sums by way of financial assistance as he determines.

10. *Approval of marriage guidance organizations.*—(1) A voluntary organization may apply to the Attorney-General for approval under this Part as a marriage guidance organization.

(2) The Attorney-General may approve any such organization as a marriage guidance organization where he is satisfied that—

- (a) the organization is willing and able to engage in marriage guidance; and
- (b) marriage guidance constitutes or will constitute the whole or the major part of its activities.

(3) The approval of an organization under this section may be given subject to such conditions as the Attorney-General determines.

(4) Where the approval of an organization has been given subject to conditions, the Attorney-General may, from time to time, revoke or vary all or any of those conditions or add further conditions.

(5) The Attorney-General may, at any time, revoke the approval of an organization where—

- (a) the organization has not complied with a condition of the approval of the organization;
- (b) the organization has not furnished, in accordance with the next succeeding section, a statement or report that the organization was required by that section to furnish; or
- (c) the Attorney-General is satisfied that the organization is not adequately carrying out marriage guidance.

(6) Notice of the approval of an organization under this section, and of the revocation of such an approval, shall be published in the Gazette.

11. *Reports etc. by approved marriage guidance organizations.*—(1) An approved marriage guidance organization shall, not later than the thirty-first day of December in each year, furnish to the Attorney-General, in respect of the year that ended on the last preceding thirtieth day of June—

- (a) an audited financial statement of the receipts and expenditure of the organization, in which receipts and expenditure in respect of its marriage guidance activities are shown separately from other receipts and expenditure; and
- (b) a report on its marriage guidance activities, including information as to the number of cases dealt with by the organization during the year.

(2) Where the Attorney-General is satisfied that it would be impracticable for an organization to comply with the requirements of the last preceding sub-section or that the application of those requirements to an organization would be unduly onerous, he may, by writing under his hand, exempt the organization, wholly or in part, from those requirements.

12. *Admissions etc. made to marriage guidance counsellors.*—(1) A marriage guidance counsellor is not competent or compellable, in any proceedings before a court (whether exercising federal jurisdiction or not) or before a person authorized by a law of the Commonwealth or of a State or Territory of the Commonwealth, or by consent of parties, to hear, receive and examine evidence, to disclose any admission or communication made to him in his capacity as a marriage guidance counsellor.

(2) A marriage guidance counsellor shall, before entering upon the performance of his functions as such a counsellor, make and subscribe, before a person authorized under the law of the Commonwealth or of a State or a Territory to which this Act applies to take affidavits, an oath or affirmation of secrecy in accordance with the form in the First Schedule to this Act.

13. Application of Part to certain branches and sections of voluntary organizations.—A reference in this Part to a voluntary organization shall be deemed to include a reference to a branch or section of such an organization, being a branch or section identified by a distinct name and in respect of which separate financial accounts are maintained.”

106. See Final Report of the Committee on Procedure in Matrimonial Causes, (Eng.) 1946-1947: Cmd. 7024 (1947), para. 22. See also Report of the Royal Commission on Marriage and Divorce, (Eng.) 1951-1955: Cmd. 9678 (1956), para. 340.

107. But see Cmd. 7024 (1947), para. 29 (iii).

108. See Cmd. 7024 (1947), para. 22; Cmd. 9678 (1956), para. 340. But compare H. H. Foster, Jr. “Conciliation And Counselling In The Courts In Family Law Cases” (1966) 41 N.Y.U. Law Rev. 353 at p. 380:

“It should be understood...that if competent professional personnel are available, [a compulsory] system should reach and save more marriages than a voluntary system. Although compulsory conciliation may be useless in some cases, the results in Wisconsin demonstrate that success is possible. It has been noted that conclusions based on surface observations as to the unlikelihood of a reconciliation are not always reliable and that sometimes the parties who show the greatest hostility are the ones who later resolve their difficulties. There may also be the factor of saving face so that a party who would consider it a sign of weakness to ask for a conference may willingly submit to compulsory conciliation.”

It will be observed that Professor Foster states that a compulsory scheme of conciliation requires an adequate supply of competent professional personnel. It is submitted that the immediate introduction into Canada of any compulsory conciliation scheme would be doomed to failure by reason of the lack of a sufficient number of trained counsellors and conciliators.

109. See Report of the Royal Commission on Marriage and Divorce, (Eng.), 1951-1955: Cmd. 9678 (1956), paras. 357-358:

“At present the court will treat as privileged communications made by husband or wife to a person acting as a conciliator, such as a counsellor, probation officer, doctor or clergyman. This privilege, however, is vested in the spouses and the conciliator may be obliged to disclose confidences to the court if neither spouse claims privilege. From the point of view of the individual client it may be sufficient if he is assured that he can discuss matters in complete frankness with a marriage guidance counsellor without risk of disclosure. But we think that the interests of those engaged in counselling must also be considered, and unless there is complete freedom in discussion, the whole basis of conciliation may ultimately be destroyed...[The task of counsellors] demands special qualities and therefore the number of persons suitable for this work is limited. If marriage guidance counsellors find themselves compelled to give evidence in court in matrimonial proceedings this fact may deter suitable persons from [engaging in] this work...Further, the knowledge that if he is unsuccessful in his attempt at conciliation he may be called upon to give evidence in court is not likely to assist the counsellor in his task; and if there were to be frequent appearances in court of marriage guidance counsellors the public might well lose confidence in the marriage guidance movement, and those in difficulty would become increasingly hesitant to use their services. We think that [these] considerations cannot be met by anything short of a provision that the evidence of counsellors is not to be admissible in matrimonial cases.”

Compare the Final Report of the Committee on Procedure in Matrimonial Causes, (Eng.), 1946-1947: Cmd. 7024 (1947), para. 29 (x). See also

Matrimonial Proceedings Act, (New Zealand), 1963, section 5 and Matrimonial Causes Act, (Australia), 1959, sections 16-17 [reprinted *supra*, footnote 103].

110. See Final Report of the Committee on Procedure in Matrimonial Causes, (Eng.), 1946-1947: Cmd. 7024 (1947) para. 22 (vi); Report of the Departmental Committee on Grants for the Development of Marriage Guidance, (Eng.): Cmd. 7566 (1948), para. 12; Report of the Royal Commission on Marriage and Divorce, (Eng.), 1951-1955: Cmd. 9678 (1956), para. 341.
111. See *supra*, sub-heading "Collusion, Connivance And Condonation As Absolute Bars to Matrimonial Relief."
112. *Ibid.*
113. For present purposes a "matrimonial cause may be defined to include proceedings for divorce, nullity, judicial separation, restitution of conjugal rights, jactitation of marriage and independent or ancillary proceedings for alimony or maintenance. Qualification to the statement set out in the text must be admitted in so far as divorce is only permitted to persons domiciled in Quebec and Newfoundland through the legislative process. Furthermore the remedies of judicial separation and restitution of conjugal rights are not available in the province of Ontario: see *Vamvakidis v. Kirkoff*, 64 O.L.R. 585, [1930] 2 D.L.R. 877 (Ont. C.A.).
114. See footnote 113, *supra*.
115. But see Report of the Royal Commission on Marriage and Divorce, (Eng.), 1951-1955: Cmd. 9678 (1956), paras. 749-750:

"The principle which has hitherto prevailed is clearly stated in the ... Report of the Gorell Commission:

'...the gravity of divorce and other matrimonial cases, affecting as they do the family life, the status of the parties, the interests of their children, and the interest of the State in the moral and social well-being of its citizens, makes it desirable to provide, if possible, that, even for the poorest persons, these cases should be determined by the superior courts of the country assisted by the attendance of the Bar...'

We accept that principle as sound, and as being just as applicable today as it was in 1912. We also agree with the view of the Denning Committee that the manner in which divorce is effected does influence the attitude of the community towards the status of marriage. The Committee said:

'If there is a careful and dignified proceeding such as obtains in the High Court for the undoing of a marriage, then quite unconsciously the people will have a much more respectful view of the marriage tie and of the marriage status than they would if divorce were effected informally in an inferior court.'

We endorse these words:"

For criticism of the conclusion expressed, *supra*, see O. R. McGregor, *Divorce in England* (Heinemann, 1957) at pp. 170-175. See *infra*, subheading "Advantages of Family Courts Exercising Exclusive Jurisdiction Over All Issues Affecting And Arising From the Marital or Familial Relationship." See also footnote 122, *infra*.

116. See L. Neville Brown, "Matrimonial Maintenance In The United States", (1966) British Institute Of International And Comparative Law Series 13—*Parental Custody and Matrimonial Maintenance: A Symposium*, at pp. 179-180.

See also Sir Frederick Pollock, Letter to Daily Telegraph, November 14th, 1936:

"For some time I have thought that the cause of discontent with English jurisdiction in matrimonial causes lies deeper than controversies over the grounds for divorce or separation. When our divorce court was created its method and procedure were modelled, rather as a matter of course, on those of our civil courts in matters of ordinary litigation. The business of the court is to do justice on the claims and defences raised by the parties; it has little power of initiation or inquiry, and very little of intervention. At most it can find occasion to make suggestions for a settlement. Such is the frame of our civil procedure and quite a good one for dealing with men's disputes on matters of trade and property and their individual and collective relations as neighbours and fellow-citizens. The application of that scheme to family relations and to marriage in particular is, in my humble opinion, all wrong. A better analogy may be found in the paternal jurisdiction of the old Court of Chancery over its wards, exercised to this day by the judges of the Chancery Division, to the general satisfaction of all concerned. A court for matrimonial causes should have conciliation for its first object, should have the carriage of the case in its own hands and should be entrusted with wide discretion. It should have power to grant a final decree of divorce when, after full inquiry and consideration, reconciliation proves impracticable, or to make a decree *nisi* with a discretionary term of anything from three to twelve months."

117. See Final Report of the Committee on Procedure in Matrimonial Causes, (Eng.), 1946-1947: Cmd. 7024 (1947), para. 29.
118. See text to and contents of footnote 106, *supra*.
119. See H. H. Foster, Jr. "Conciliation And Counselling In The Courts In Family Law Cases" (1966) 41 N.Y.U. Law Rev. 353.
120. See Scarman, J. "Family Law and Law Reform" (public lecture presented at the University of Bristol, March 18th, 1966), noted in (1966) 15 Law Gdn 7.
121. For the purposes of this recommendation, "matrimonial causes" may be defined according to the contents of footnote 113, *supra*.
122. It may be of interest to observe that the Lord Chancellor recently announced that undefended divorce cases in England will be transferred from the High Court to the County Court in the near future: see 722 H.L. Debates 1262.

See also *Re Supreme Court Act Amendment Act 1964 (B.C.)*, *Attorney-General of British Columbia v. McKenzie* (1965) 51 D.L.R. (2d) 623 (S.C.C.) (wherein provincial legislation empowering County Court Judges to exercise jurisdiction over divorce and matrimonial causes was held *intra vires*).
123. Quaere whether the County Court should have the discretionary power to refer the issues to the Supreme Court where children will be affected by the disposition of the inter-spousal proceedings.
124. See footnote 113, *supra*, wherein "matrimonial cause" is defined.
125. See Report of the Royal Commission on Marriage and Divorce, (Eng.), 1951-1955: Cmd. 9678 (1956), paras. 772-919. See also Payne, "Jurisdiction in Nullity Proceedings" (1961) 26 Sask. Bar Rev. 53; Payne, "Recognition of Foreign Divorce Decrees in Canadian Courts" (1961) 10 I.C.L.Q. 846.
126. See *Power on Divorce* (1964, 2nd ed.) at p. 392.
127. See *Power on Divorce* (1964, 2nd ed.) at pp. 387-388.

128. See also section 40 of Matrimonial Causes Act, (Eng.), 1965, which reads as follows:

“40.—(1) Without prejudice to any jurisdiction exercisable by the court apart from this section, the court shall have jurisdiction to entertain proceedings by a wife, notwithstanding that the husband is not domiciled in England,—

(a) in the case of proceedings under this Act [other than proceedings for divorce on presumed death (which is governed by section 14) and proceedings in respect of maintenance agreements], if—

(i) the wife has been deserted by her husband, or

(ii) the husband has been deported from the United Kingdom . . . and the husband was immediately before the desertion or deportation domiciled in England;

(b) in the case of proceedings for divorce or nullity of marriage, if—

(i) the wife is resident in England and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings, and

(ii) the husband is not domiciled in any other part of the United Kingdom or in the Channel Islands or the Isle of Man.

(2) In any proceedings in which the court has jurisdiction by virtue of the foregoing subsection the issues shall be determined in accordance with the law that would have been applicable thereto if both parties were domiciled in England at the time of the proceedings.”

129. See *Atty.-Gen. for Alberta v. Cook* [1926] A.C. 444, at pp. 460-461.

130. It may be of interest to observe that the provisions of the Divorce Jurisdiction Act, R.S.C., 1952, ch. 84 (see text to footnote 128, *supra*) differ fundamentally from the clauses set out in the original bill, namely Bill No. 111, 1st Session, 16th Parliament, 17-18 Geo. V, 1926-1927. The clauses of this Bill, unlike those of the Act, specifically sought to empower the married woman to acquire an independent domicile and clauses 2 and 3 read as follows:

“2. For the purposes of this Act a married women,

(a) who is judicially separated or otherwise living separate and apart from her husband; or

(b) who either before or after the passing of this Act has been deserted by and lived separate and apart from her husband for a period of two years, and is still living apart from her husband;

may acquire a domicile for herself as though she were a *feme sole* and may commence an action for divorce praying that her marriage may be dissolved on any grounds that entitle her to such divorce in any court having jurisdiction to grant a divorce *a vinculo matrimonii*.

3. For the purposes of this Act a wife deserted by and living apart from her husband shall be deemed to retain the domicile of her husband at the time she was so deserted until she has acquired a domicile of her own choice.”

See also Matrimonial Causes Act, (Australia), 1959, section 24, reproduced in footnote 131, *infra*.

131. See Matrimonial Causes Act, (Australia), 1959, sections 23 and 24, which read as follows:

“23.—(4) Proceedings for a decree of dissolution of marriage or for a decree of nullity of a voidable marriage shall not be instituted under this Act except by a person domiciled in Australia.

(5) Proceedings for a decree of nullity of a void marriage or for a decree of judicial separation, restitution of conjugal rights or jactitation

of marriage shall not be instituted under this Act except by a person domiciled or resident in Australia.

(7) Without prejudice to the application of sub-sections (4) and (5) of this section in relation to proceedings in the Supreme Court of a Territory to which this Act applies, jurisdiction under this Act in a matrimonial cause instituted under this Act is not conferred on the Supreme Court of such a Territory unless at least one of the parties to the proceedings—

- (a) is, at the date of the institution of the proceedings ordinarily resident in the Territory; or
- (b) has been resident in the Territory for a period of not less than six months immediately preceding this date.

24.—(1) For the purposes of this Act, a deserted wife who was domiciled in Australia either immediately before her marriage or immediately before the desertion shall be deemed to be domiciled in Australia.

(2) For the purposes of this Act, a wife who is resident in Australia at the date of instituting proceedings under this Act and has been so resident for the period of three years immediately preceding that date shall be deemed to be domiciled in Australia at that date.”

See also Matrimonial Proceedings Act. (New Zealand), 1959, sections 6, 9, 18 and 20 which read as follows:

“6. A petition for a decree of nullity of a void marriage, whether the marriage is governed by New Zealand law or not, may be presented to the Court in the following cases, and in no other case:

- (a) where the petitioner or the respondent is domiciled or resident in New Zealand; or
- (b) where the marriage was solemnised in New Zealand.

9. A petition for separation...or for restitution of conjugal rights may be presented to the Court where the petitioner or the respondent is domiciled or resident in New Zealand at the time the petition is presented, and in no other case.

18. A petition for dissolution of a voidable marriage...may be presented to the Court by either party to the marriage where the petitioner or the respondent is domiciled in New Zealand, and in no other case.

20. A petition for divorce from the other party to the marriage may be presented to the Court by any married person where the petitioner or the respondent is at the time of the petition domiciled in New Zealand and, where the ground alleged in the petition is one of those specified in paragraphs (m), (n) and (o) of section 21 of this Act*, has been domiciled or resident in New Zealand for two years immediately preceding the filing of the petition, and in no other case.”

[*See *supra*, sub-heading “Legislative Recognition Of Marriage Break-down As A Ground For Divorce: New Zealand”]

It may be of relevance to observe that Australia, unlike New Zealand, has a federal system of government and that prior to the enactment of the Matrimonial Causes Act, (Australia), 1959, a state concept of domicile was applied as a basis for the exercise of jurisdiction in matrimonial causes.

See S. J. Skelly, “A Canadian Domicile” (1966) 9 Can. Bar. J1 493.

132. See *Power on Divorce* (1964, 2nd ed.), chs. XI and XVIII. See also D. Tolstoy, “Void And Voidable Marriages” (1964) 27 Mod. L. Rev. 385. See *infra*, footnote 135.

133. See *Power on Divorce* (1964, 2nd. ed) at pp. 375-382.

134. Compare Matrimonial Causes Act, (Australia), 1959, sections 18-20.

135. There is, for example, some difference of judicial opinion concerning the effect of duress upon a marriage. See *H. v. H.* [1954] P. 258 (void); *Silver (otherwise Kraft) v. Silver* [1955] 1 W.L.R. 728 (void); *Parojcic (otherwise Ivetic) v. Parojcic* [1958] 1 W.L.R. 1280 (voidable); *Mahadervan v. Mahadervan* [1963] 2 W.L.R. 271 (voidable); *Kawaluk v. Kawaluk* [1927] 3 D.L.R. 493 (voidable).

A marriage, within the prohibited degrees of consanguinity or affinity is, it seems, void *ab initio* in some provinces but only voidable in others: see *Power on Divorce* (1964, 2nd ed.) at pp. 195 and 342-345.

See also D. Tolstoy, "Void And Voidable Marriages" (1964) 27 Mod. L. Rev. 385 D. Vernon, "Annulment Of Marriage: A Proposed Model Act" (1963) 12 JI of Pub. Law 143.

136. See *Hobson v. Gray (otherwise Hobson or French)* (1958) 25 W.W.R. (N.S.) 82 (Alta.).
137. For full discussion of this issue, see D. Mendes da Costa "Working Paper On The Ontario Marriage Act" (unpublished paper prepared for the Ontario Law Reform Commission).
138. See *supra*, sub-heading "Marriage Guidance And Matrimonial Conciliation—Education And Preparation For Marriage."
139. Sections 2 and 3 of the Marriage and Divorce Act, R.S.C., 1952, ch. 176, read as follows:

"2. A marriage is not invalid merely because the woman is a sister of a deceased wife of the man, or a daughter of a sister or brother of a deceased wife of the man.

3. A marriage is not invalid merely because the man is a brother of a deceased husband of the woman, or a son of a brother or sister of a deceased husband of the woman."

140. See also *Teagle v. Teagle* (1952) 6 W.W.R. (N.S.) 327 (B.C.).
141. See also Matrimonial Causes Act, (Australia), 1959, section 21; Matrimonial Proceedings Act, (New Zealand), 1963, section 18.
142. The limitation period operates to bar relief even though the petitioner had no opportunity during the first year of marriage to discover the facts which constitute a ground for annulment. If sec. 9 of the Matrimonial Causes Act, (Eng.), 1965, were adopted as the basis for legislation in Canada, it would seem advisable to provide that the one year limitation period shall run only from the date when the petitioner discovered, or had a reasonable opportunity of discovering, the facts which constitute a ground for relief in proceedings for the annulment of the marriage. In the alternative, it is submitted that the court should have a statutory discretion to waive the one year limitation period.
143. Compare Matrimonial Causes Act, (Australia), 1959, sections 48-50; Matrimonial Proceedings Act, (New Zealand), 1963, section 18, sub-sections 3, 4 and 5.
144. See Report of the Royal Commission on Marriage and Divorce, (Eng.), 1951-1955: Cmd. 9678 (1956), paras. 88-89. See also Matrimonial Causes Act, (Australia), 1959, sections 21 and 28, whereunder impotence constitutes a ground for annulment of the marriage and wilful refusal to consummate the marriage constitutes a ground for divorce. Compare the Matrimonial Causes Act, (Eng.), 1965, section 9 (1) and Matrimonial Proceedings Act, (New Zealand), 1965, section 18, whereunder wilful refusal to consummate the marriage constitutes a ground of annulment.

The respondent's wilful refusal to consummate the marriage may be deemed to constitute cruelty within the definition proposed in paragraph 74, *supra*

145. See contents of footnote 144, *supra*.

1966 REPORT OF THE JOINT LEGISLATIVE COMMITTEE ON
MATRIMONIAL AND FAMILY LAWS TO THE LEGISLATURE
OF THE STATE OF NEW YORK: PROPOSED CHANGES
IN THE DOMESTIC RELATIONS LAW

§170. Action for divorce. An action for divorce may be maintained by a husband or wife to procure a judgment divorcing the parties and dissolving the marriage on any of the following grounds:

- (1) The cruel and inhuman treatment of the plaintiff by defendant.
- (2) The abandonment of the plaintiff by the defendant for a period of two or more years.
- (3) The sentencing of the defendant to imprisonment for a minimum period of five or more years, after the marriage of plaintiff and defendant except that no divorce shall be granted on this ground unless the defendant has been imprisoned for a period of two or more years pursuant to such sentencing.
- (4) The commission of an act of adultery, provided that adultery for the purposes of articles ten, eleven and eleven-A of the domestic relations law, is hereby defined as the commission of an act of sexual or deviate sexual intercourse, voluntarily performed by the defendant, with a person other than the plaintiff after the marriage of plaintiff and defendant.
- (5) The husband and wife voluntarily have lived apart for a continuous period of two or more years because of estrangement due to marital difficulties.

The most notorious feature of New York State's presently inadequate divorce law is its reliance upon adultery as the sole ground for dissolving a marriage by divorce. The Committee proposes that divorces be granted on four additional grounds, each of which has stood the test of time in sister states for many years: and, as far as two of these grounds are concerned, in New York as well. The time has come to recognize grounds for divorce not so much as penalties for culpable behavior of husbands and wives, but, as manifestations of dead marriages, marriage that should be terminated for the mutual protection and well being of the parties and, in most instances, of their children. It is this context that grounds for divorce should be analyzed.

1. *Cruel and Inhuman Treatment*

Since 1813, the law of New York has recognized cruel and inhuman treatment of one party to the marriage by the other as a sufficient breach of the matrimonial relationship to justify termination of most of the incidents of the marriage. *Erkenbrach v. Erkenbrach*, 96 N.Y. 456. For all these years, cruel and inhuman treatment has been recognized as a ground for a judgment of separation; Domestic Relations Law §200.

The New York Courts in construing the concept of cruel and inhuman treatment have delineated between the relatively trivial acts of unpleasantness which are a feature of many marriages, and those acts which seriously violate the marriage vows. *Preason v. Preason*, 230 N. Y. 141; *Uhlmann v. Uhlmann*, 17 Abb. NC 236. Eating crackers in bed, extravagance, marital arguments, occasional demonstrations of anger are not, under the decisions of the New York courts, cruel and inhuman treatment.

The view of the New York courts is as follows:

"Mere austerity of temper, petulance of manners, rudeness of language, even occasional sallies of passion, if they do not threaten bodily

harm, do not amount of legal cruelty. 'These things may cause discomfort, mental anguish and suffering, but...' the answer is that courts of justice do not pretend to furnish cures for all the miseries of human life." *Kennedy V. Kennedy*, 73 N.Y. 369, 374.

On the other hand, the concept of "cruel and inhuman treatment" is sufficiently broad to permit our courts to adjust it to psychological reality:

"The terms 'extreme cruelty' and 'cruel and inhuman treatment' are equivalent and are broad enough to include such behavior of one party as may be reasonably said so to affect the other physically or mentally as seriously to impair health. Cruelty is not limited to bodily hazard and hardship. If it were, a husband might constantly and without cause publicly call his wife a vile and shameless bawd so long as he did not strike her or threaten to strike her, and thus might intentionally break down her health and destroy her reason..." *Pearson v. Pearson*, 230 N.Y. 141, 146 (See *Avdoyan v. Avdoyan*, 265 App. Div. 763, 40 N.Y.S. 2d 665).

Recognition of cruel and inhuman treatment of one party of the marriage by the other as a ground for divorce would conform the law to the real reason that most citizens require matrimonial dissolution, the protection of the innocent spouse's health or safety. Cruel and inhuman treatment would also be available as a ground where the offending spouse mistreats the children of the marriage. *Bihin v. Bihin*, 17 Abb. Pr. 19; *Taylor v. Taylor*, 74 Hun. 639, 26 N.Y.S. 246.

Adoption of this ground of cruel and inhuman treatment renders unnecessary separate grounds for divorce dealing with the problems caused by drug addiction or habitual intoxication. Recognizing, as the Committee does, that these two conditions are in the nature of psychological diseases, divorce should not be granted on the ground that a husband or wife has fallen prey to drunkenness or addiction unless it seriously impairs the health or safety of the non-alcoholic or non-addict spouse. *Kissam v. Kissam*, 21 App. Div. 142, 47 N.Y.S. 270. To grant divorce on the specific grounds of alcoholism or narcotics addiction might also raise serious questions of definition. See *Straub v. Straub*, 208 App. Div. 663, 204 N.Y.S. 61.

Forty-six of New York's sister states have adopted cruelty as a standard for granting divorce and only two of these states require actual personal violence as a basis for finding such cruelty. Twenty-six of these states recognize mental cruelty as grounds for divorce on subjective evidence; and the remaining 18 require the injured party to show, by medical evidence or objective means, that mental cruelty has impaired the injured party's health or, if allowed to continue, would have such an effect before a divorce may be granted. New York, by adopting the "cruel and inhuman treatment" formula previously developed by its own legislature and its courts, would follow the pattern of those 18 states requiring objective evidence of impairment of health or the likelihood of that impairment before a divorce could be granted for cruelty other than personal violence.

2. Abandonment for a Period of Two Years or More

Probably no course of conduct more evidences a "dead" marriage than the unjustified separation of one party to a marriage from the other. Forty-nine of New York's sister states recognize abandonment or, as it is often described, desertion, as a ground for a divorce. New York has recognized abandonment as grounds for separation since 1813. *Erkenbaugh v. Erkenbaugh*, 96 N.Y. 456 and presently furnishes abandonment as a ground for separation under §200 of the *Domestic Relations Law*.

The Committee's proposal, unlike the ground for separation, is to permit divorce by reason of abandonment only where it has continued for a period of two years or more, thus, demonstrating to the state that the marriage is now a mere legal formality which condemns the innocent party to a life of either unwanted celibacy or concubinage.

Abandonment, as developed by the New York courts is well defined. Whether characterized as "abandonment" or "desertion" for purposes of discussion, it has been described as:

"a voluntary separation of one party from the other without justification, with the intention of not returning." *Williams v. Williams*, 130 N.Y. 193, 197; also *Berg v. Berg*, 289 N.Y. 513.

Nor does the Committee propose to change the law that where an innocent party is forced to separate by reason of the wrongdoing of the other, the separation, unilateral though it may be, is not an abandonment by the innocent spouse, but is a constructive abandonment by the guilty one.

In *Uhlman v. Uhlmann*, the elements of "abandonment" were defined by the court:

"It seems to me that to constitute an abandonment under the statute two elements are necessary.

One is a final departure with the intention not to return. This intention may be shown expressly or may be implied by conduct. . . . The next essential fact, I think is, that there should be no sufficient reason for leaving. A man might maltreat his wife to the last point of endurance by personal abuse, or . . . bring a mistress into the house to annoy her, and so forth, and she might fully leave in consequence. This would not be abandonment, within the meaning of the statute, which must contemplate a wrongful or unjustifiable act of leaving." *Uhlmann v. Uhlmann*, 17 Abb. NC 236, 260.

The need for broadening the grounds for divorce in New York to include abandonment or desertion has been recognized for years. Failure to provide such a ground for the dissolution of marriage by divorce constitutes a penalty inflicted on the innocent but abandoned husband or wife who seeks a normal, natural life for self and, in many instance, for family.

3. *Sentencing to imprisonment for a minimum period of five years or more and imprisonment pursuant to that sentencing for two years or more.*

New York State has long recognized that incarceration of a convict for life is "civil death", and for that formalistic reason permitted a wife to regard herself as a widow.¹ The effect was to permit remarriage for those husbands or wives who were wed to "lifers".

Forty-six other states have recognized that conviction of a crime may furnish justifiable reasons for dissolution of marriage. First, the incarceration of the wrongdoer requires the innocent spouse to suffer the restrictions of marriage with none of its emotional or economic advantages, much like the abandoned husband or wife; second, the commission of certain crimes is an act which necessarily shames the innocent spouse, and, even more unfortunately, often blemishes the innocent children.

The statutes of sister states reflect these two considerations: For example, in ten states the right to a divorce is predicated on the period of imprisonment of the party to be divorced.² In others, divorce will be granted if the divorced party has been found guilty of certain classes of crimes.³

The Committee's proposal seeks to reflect both of these basic policies. By providing that the wrongdoer must be sentenced to imprisonment for a minimum of five years or more, the statute restricts its application only to those who

have been guilty of the most serious felonies.⁴ On the other hand, the proposal provides that the divorced spouse must be imprisoned for at least two years prior to the divorce being granted; this serves the purpose of (1) braking the natural but sometimes too rash inclination to dissolve a marriage upon the conviction of the wrongdoing party; (2) giving the convicted party an opportunity to obtain his or her release from prison prior to dissolution of the marriage through reversal of the conviction on appeal.

4. Adultery

Adultery has, of course, been New York's sole ground for divorce since 1787. The Committee has seen fit to retain it although some witnesses have pointed out that a single act of adultery is perhaps the weakest of all grounds on which to predicate dissolution of a marriage.

The Committee has consistently been presented with the problem of a homosexual partner to a marriage. Under the present law homosexual acts by a husband or wife with a third person are no adultery. *Cohen v. Cohen*, 200 Misc. 19, 103 N.Y.S. 2d 426. It is possible that if the homosexual conduct deleteriously affects the health of the innocent spouse, it will be characterized as "cruel and inhuman treatment". *Goldsmith v. Goldsmith*, 151 Misc. 198, 270 N.Y. Supp. 47 (heterosexual conduct) (but see *McClinton v. McClinton*, 200 N.Y.S. 2d 987). It is the Committee's view that the homosexual activity is as sufficient a ground for divorce as heterosexual activity with a person other than the offender's spouse. For that reason, the provision as to adultery has been expanded to encompass homosexuality and sodomy as defined under the *Revised Penal Law* which will become effective September 1, 1967. The members of the Committee recognize the possibility that in matrimonial litigation there may be attempts to misuse this ground for divorce, but trust that safeguards such as Section 235 of the *Domestic Relations Law* and the good judgment and standards of the attorneys of the State will make such fears unwarranted. On balance then, the peculiar anomaly of granting divorce because of heterosexual adulterous activity and refusing it in cases of such activity when it is of homosexual nature, should be abolished.

5. Voluntarily living apart for a continuous period of two or more years because of estrangement due to marital difficulties.

All of the other proposals of the Committee for broadening the grounds for divorce in New York emphasize the concept that either one of the parties is at fault or the tensions of an unhealthy marriage cause one of the parties to engage in anti-social conduct before a divorce can be granted. Just as adultery is a "fault" ground, so too are cruel and inhuman treatment, abandonment, and imprisonment "fault" grounds for divorce.

The State's interest in the welfare of its citizens is the basis for its interest in their matrimonial arrangements. If a couple demonstrates to the state that their marriage is dead, the state should then, with appropriate safeguards for the parties and their children, recognize the need for divorce. To do otherwise is to defeat the purposes for which matrimonial law is established—stability for the individual and his family.

One of the most convincing ways in which it can be demonstrated that a marriage is "dead" is proof that a particular couple had lived separately and apart for a continuous period of years. McCurdy, "Divorce—A Suggested Approach", 9 *Vanderbilt Law Review* 685.

In a study co-authored by an advisor to the Committee the rationale of "living apart" as a ground for divorce is set forth:

"The traditional concept that a divorce should be granted only to an innocent spouse for grounds based upon specific marital misconduct of

the other has been tempered by the incorporation into the divorce laws of twenty-five American jurisdictions of an additional ground for divorce, namely, that of living apart and separate for a specified period of years. The underlying reason for this legislative action has been a realistic recognition of the fact that where a marriage is dead, as evidenced by the objective proof of a separation between husband and wife which had endured for a substantial period, no good purpose is to be served, either for the parties or the state, by a continuance in theory of a marriage bond which is meaningless in fact." Foster and Freed, "Living Apart as a Ground for Divorce", N.Y.L.J. May 17, 1965, Vol. 153, No. 94, page 1, col. 4.

Adoption of living apart as a ground for divorce would, the Committee submits, constitute legislative recognition of the needs of those of our citizens who are unwilling to indulge in the usual bitterness of a matrimonial action, but desperately require the law to recognize the actual death of their marriage.

A noted American philosopher analyzing past deprecatory criticism by others of human nature, wrote that the stratagem was "Give a dog a bad name and hang him". The living apart proposal has been treated to these same techniques of misrepresentation. "Divorce by consent" this provision has been called by some, "divorce at will" by others. Whatever the virtues or vices of divorce by consent, the living apart recommendation can hardly be so described.

The only socially justifiable reason for granting divorce, in the last analysis, can be that the continuation of the marriage bond be undesirable from the point of view of injury to the parties and the family. The true justification for "adultery", "cruel and inhuman treatment" and "abandonment" as grounds for divorce is that they reflect a sick relationship not that they are penalties of a quasi-penal nature meted out to a guilty party. Living apart is a similar demonstration of a socially useless and undesirable relationship.

The decisive factor in living apart as a ground for divorce is the period of time the parties must live apart to demonstrate conclusively the death of their marriage. It is noteworthy that the District of Columbia, after many years of providing a five year separation as ground for divorce, has only recently had that requirement reduced to one year by the Congress of the United States, D. C. Code, Section 16-904. It is true that if a couple need only live apart for a short period of time, a week or a month, such living apart would demonstrate nothing to the state and would, in practical effect, mean that divorce was for the asking. However, where, as in the Committee's proposal, a period of two years or more must elapse before divorce can be granted, the living apart demonstrates the irreconcilability of the parties.

The Committee's proposal would require three elements to be established for a divorce to be granted on the ground of living apart: (1) the parties have lived apart for a continuous period of two years or more; (2) the reason for their living apart was due to marital difficulties; and (3) either the initial separation was by agreement or at some subsequent time, two years before the divorce is granted, both parties have agreed to the continuation of the estrangement.⁵

In requiring the period of living apart to be voluntary on the part of both parties to the marriage, the Committee has rejected the view that has been accepted in a number of other states providing living apart as grounds for divorce; Foster and Freed, "Living Apart as a Ground for Divorce", N.Y.L.J. May 17, 1965, page 4, cl 3-8; McCurdy, "Divorce—A Suggested Approach", 9 Vanderbilt Law Review, 685, 701.

The requirement that living apart be voluntary in order to qualify for a divorce will discourage parties from unilaterally abandoning their marriages and thereafter seeking divorce. It is the intention of the Committee that living apart

be capable of ripening into divorce only where the parties both recognize that they are incapable of living together. *Stumpf v. Stumpf*, 228 Md. 350, 179 A. 2d 893; *Lewis v. Lewis*, 219 Md. 313, 149 A. 2d 403; *Moran v. Moran*, 219 Md. 339, 149 A. 2d 399; *Jakubke v. Jakubke*, 125 Wis. 635, 104 N.W. 704; *Pruett v. Pruett*, 247 N.C. 13, 100 S. E. 2d 296.

The most typical situation covered by the Committee's proposal would be the couple who commence living apart because they recognize their mutual incapacity to live together as man and wife, and after the passage of at least two years (during which time it is presumed, the social pressures of family, religious and social groups would have had an opportunity to induce reconciliation of the couple) either party could obtain a divorce.

Another situation which will be considered under the proposed provision will be where separation was originally unilateral, but both parties thereafter became reconciled to the separation and now both recognize that the marriage was no longer worth attempting to save. *Richardson v. Richardson*, 257 N.C. 705, 127 S.E. 2d 525; *Helgott v. Helgott*, *supra*; *Jakubke v. Jakubke*, *supra*.

However, where the separation is rooted in abandonment or misconduct and the innocent party refuses to recognize the need for the separation then divorce will not be granted. *Martin v. Martin*, 160 F. 2d 20 (App. D. C.); *Stumpf v. Stumpf*, *supra*; *Sanders v. Sanders*, 135 Wis. 613, 116 N.W. 17; *Williams v. Williams*, 224 N.C. 91, 29 S.E. 2d 39.

§ 200. Action for separation. An action may be maintained by a husband or wife against the other party to the marriage to procure a judgment separating the parties from bed and board, forever, or for a limited time, for any of the following causes:

1. The cruel and inhuman treatment of the plaintiff by the defendant.
2. The abandonment of the plaintiff by the defendant.
3. Where the wife is plaintiff, the neglect or refusal of the defendant to provide for her.
4. The commission of an act of adultery by the defendant.
5. The sentencing of the defendant to imprisonment for a minimum period of five or more years, after the marriage of plaintiff and defendant except that no separation shall be granted on this ground unless the defendant has been imprisoned for a period of two or more years pursuant to such sentencing.

Much testimony before the Committee leveled criticism at the existence the action for judicial separation in New York. Critics claimed that the separation action was generally used as a device to extract high alimony from a spouse who wished to escape the bonds of marriage. The claim was further made that judicial separation condemned the parties to unwanted concubinage or celibacy; that it was purposeless and ineffective, that it should be abolished.

The Committee recognized that a substantial number of the citizens of this State do not, for religious or other personal reasons, recognize divorce for themselves or their marital partners. For these people, separation from bed and board is often the only remedy by which they can obtain necessary judicial relief. Although the Committee recognizes defects in the existence of separation remedy—that after a period of living separate and apart under such a decree, the is, at the present time, ill advised for the above reasons.

Suggestions have been made by some witnesses, expert in the law of other jurisdictions, that judicial separation be treated as an intermediate temporary remedy—that after a period of living separate and apart under such a decree, the separation would ripen into a divorce.⁶

To transform the separation action into a vehicle for ultimate divorce on request of either party has the serious disadvantage of permitting, or even encouraging, a party to marriage to violate his marital vows, suffer a judicial separation because of this violation, and ultimately be rewarded with a divorce at his petition.

Two modifications of the grounds for separation have been adopted in order to bring the separation statute into conformity with the proposed grounds for divorce: (1) the definition of adultery has been expanded to include homosexuality, and (2) the Committee has proposed that separation be available in the case of an imprisonment which would constitute grounds for divorce under §170 of the proposed statute. These changes are consistent with the Committee's stated purpose of making the separation action an alternative matrimonial remedy for those citizens who do not, for reasons of conscience, believing in divorce, but do require the intermediate remedy of separation.

The grounds for separation differ from the proposed grounds for divorce in two ways. The Committee has seen no reason to limit the ground of abandonment in separation actions to a period of two years or more and the Committee has proposed the continuation of nonsupport as a ground for separation.

As to nonsupport, the Committee believed that the failure of a husband to support his wife, while a serious breach of his matrimonial duty, should not be a ground for divorce. Of course, if that nonsupport were sufficiently linked with acts that adversely affect the wife's health, it might constitute cruel and inhuman treatment, a matrimonial violation of greater significance and which would justify the granting of divorce. On the other hand, there would seem no objection to giving a wife a limited remedy where she can prove calculated nonsupport on the part of the husband. *Sengstack v. Sengstack*, 4 N. Y. 2d 502, 172 N.Y.S. 2d 337.

The Committee has also taken the opportunity to propose deletion of that portion of the present section 200 (2) which grants the right to separation because of conduct which "may render it unsafe and improper . . . to cohabit . . .",

The redundancy of this ground for separation with cruel and inhuman treatment was first pointed out in 1832:

"The original statute, but more especially the Revised Statutes, have specified 'cruel and inhuman treatment,' and 'such conduct on the part of the husband towards his wife as may render it unsafe and improper for her to cohabit with him,' as, apparently distinct causes of divorce: and yet, I do not well perceive how they can be distinguished; because that which would render it 'unsafe and improper,' could not be anything less than *cruelty*, according to the definition we have received. It must be actual personal violence, menaces or threats, creating reasonable apprehension of bodily harm, which could alone render it 'unsafe' for a wife to remain with a husband; and those very acts would constitute a case of 'cruel and inhuman treatment.' They appear to me synonymous and convertible terms. Chancellor Kent has, I think, favored this construction. 'Probably,' says he, 'the word *unsafe* in our statute may mean the same thing as the reasonable apprehension of bodily hurt in the English cases:' 2 Kent's Com. 126, 2d edit., and see his opinion in *Barrere v. Barrere*, to which he refers." *Mason v. Mason*, 1 Edw. Ch. 278, 291, 292.

§212. Defenses to actions for divorce and separation. (a) The defenses of recrimination, condonation, connivance and collusion are hereby abolished. However, a plaintiff shall not be entitled to a divorce or separation on a ground therefor which plaintiff has conspired to procure or which has been willingly forgiven by plaintiff. A divorce shall not be denied by reason of the foregoing

when it is established by satisfactory proof that the parties voluntarily have lived apart for a continuous period of two or more years.

(b) Where both plaintiff and defendant have proved grounds for divorce, the court may grant a judgment of divorce to either or both parties except that no divorce shall be granted in favor of a party who did not request such relief in the pleadings.

1. The Abolition of Defenses

Section 212 of the Committee's proposed Statute modifies and, in some cases, abolishes the traditional defenses to a divorce action. No subject in matrimonial law has aroused so much bitter controversy among experts as the question of the defenses available in actions for divorce. The Committee's proposal is to update and make more flexible those defenses which have valid reasons for their existence. As to the others, the Committee recommends abolition.

(a) Recrimination.

§171(4) of the *Domestic Relations Law* currently provides that divorce is to be denied a plaintiff—

“Where the plaintiff has also been guilty of adultery under such circumstances that defendant would have been entitled, if innocent, to a divorce.”

This is recrimination. *Weiger v. Weiger*, 270 App. Div. 770, 59 N.Y.S. 2d 444. There is no reason to refuse a divorce to a couple who are each not respecting their marital vows unless the brutal view is taken that divorce is a reward for the innocent and punishment for the guilty. To the extent that there is reluctance to give either side a “victory” in granting judgment to one or the other, proposed §212(b), discussed below, is applicable. If we take a rational and common sense view of divorce as a legal remedy to couples whose marriage is hopelessly dead, recrimination as a defense is senseless. Recrimination in New York has also been applied as grounds for denying a separation because the suing party was guilty of “marital misconduct” *Hawkins v. Hawkins*, 193 N.Y., 409; *Petrella v. Petrella*, 23 A.D. 2d 489, 255 N.Y.S. 2d 962; *Walker v. Walker*, 282 App. Div. 671, 122 N.Y.S. 2d 209; aff'd 307 N.Y. 750. This, in New York, was embodied in the ancestral statute of §202 of the *Domestic Relations Law*.⁸

There would also seem to be no reason for recrimination to be a defense in an action for divorce based upon grounds other than adultery.

Is a wife promiscuous because her husband beats her regularly? Or does her husband beat her regularly because she is promiscuous? In either event, the acts of each indicate that the marriage is dangerous to the parties and should, at the request of either, be dissolved.

On the other hand, as was indicated in our discussion of abandonment and cruel and inhuman treatment above, it is an integral part of the cause of action to show that there was no justification for the wrongful act alleged as a ground for divorce (i.e. if a wife is forced to leave her husband because of his bad conduct, she has not “abandoned” him). *Silberstein v. Silberstein*, 218 N.Y. 525; *In re Lapenna's Estate*, 16 A.D. 2d 665, 226 N.Y. S. 2d 497. See as to “provocation” for cruel and inhuman treatment, *Barker v. Barker*, 168 App. Div. 212, 153 N.Y.S. 256; *Moulton v. Moulton*, 2 Barb. Ch. 309, *Hopper v. Hopper*, 11 Paige 46, (all of which appear to recognize a defense of provocation in New York, but, all of which were decided after the enactment in 1813 of the ancestor of Domestic Relations Law, §202).

Recrimination differs as a defense in that the misconduct alleged need not be related to the ground sued upon; thus, it goes not necessarily to an explanation of the act of cruelty or abandonment, but to the plaintiff's capacity to sue on

any ground; it is, in essence, a disqualification from suit *Doe v. Roe*, 23 Hun. 19; *Richardson v. Richardson*, 114 N.Y.S. 912; *Axelrod v. Axelrod*, 2 Misc. 2d 79, 150 N.Y.S. 2d 633.

If we reject the idea of "tit for tat" as a defense in matrimonial litigation, there represents perhaps one valid rationale for the doctrine of recrimination. Considerable testimony was presented to the Committee that the separation action has been transformed into a weapon used by wives to "trap" their errant husbands into a legal status that denied them the benefits of both bachelorhood and marriage. The wife then, in effect, extorts ransom from the husband in the form of a property settlement or excessive alimony before she consents to the arrangement of a migratory divorce. It has been forcefully argued that Section 202 of the *Domestic Relations Law* at least offers the husband a practical defense which would often discourage avaricious wives from undertaking such perversions of the separation action. For this reason, the Committee, with some reluctance, proposes retention of Section 202 for the present, although it proposes the immediate abolition of recrimination in divorce actions.

(b) *Condonation, Collusion and Connivance.*

The Committee recognized the need to permit a reconciling married couple to be able to "wash the slate clean" with respect to past conduct. To the extent that the defense of condonation achieves this, it is a necessary feature of the law. However, the advantage of the new formulation adopted, i.e. that the ground for divorce must have been "willingly forgiven" presents the court with a more flexible and meaningful statement. The defense is adopted from the proposed revision of Pennsylvania's Divorce Code,⁹ in the commentary to which, it was noted:

"Condonation is made less rigid. It is necessary under the proposed section that it be 'willing and voluntary'. If there is physical compulsion, or economic necessity, the court may find that despite cohabitation there was no condonation. See 21 Minn. L. Rev. 408 (1937), 6 A.L.R. 1157 (1920), 47 A.L.R. 576 (1927)"

With respect to the abolition of the defenses of connivance and collusion, the Committee has, in their stead, permitted the defense that the plaintiff "conspired to procure" the ground for divorce. As to this formulation, the Pennsylvania revisers note:

"It is hoped that the proposed code provision will eliminate the difficulty which occurs in making a distinction between the case where the husband affords an opportunity or procures the adultery of his wife, or, on the other hand, was merely seeking to get evidence of her unfaithfulness. Under this section, he must have conspired to procure the commission of the offense."¹⁰

Of course, this conspiracy to procure would apply to any other ground for divorce, including cruel and inhuman treatment or abandonment.

2. *Judgment of Divorce to Both Parties*

§212 (a) in the proposed statute has abolished the defense of recrimination in divorce actions.¹¹ It is then probable that in many actions for divorce both plaintiffs and defendants will be able to satisfy the court of the existence of grounds for their divorce. The Committee therefore recommends that the Court in such cases be given the power to award judgments in favor of both parties where each has demanded such relief in the pleadings, thus giving the other notice of their demand for a divorce. See *Rakestraw v. Rakestraw*, 345 P. 2d. 888 (Okla.).

At least six other states now sanction the award of judgments to both plaintiffs and defendants in matrimonial actions by court decision: California, *Hendricks v. Hendricks*, 125 Cal. App. 2d 239, 270 P. 2d 80; *DeBurgh v. DeBurgh*, 39 Cal. 2d 858, 250 P. 2d 598; *Mueller v. Mueller*, 44 Cal. 2d 527, 282 P. 2d 869; Florida, *Simmons v. Simmons*, 122 Fla. 325, 165 So. 2d 45, Idaho, *Farmer v. Farmer*, 81 Idaho 251, 340 P. 2d 441; Oklahoma, *Mitchell v. Mitchell*, 385 P. 2d 482 (Okla.); by statutes: Oklahoma Stat. Ann., tit. 12, Sec. 1275; Minnesota, Stat. Ann. Sec. 518.06; Washington, Rev. Code Sec. 26.08.150.

Adoption of the proposed section will also be explicit recognition by this state of the reality that in many marriages the responsibility for its disruption lies with both husband and wife:

§213. Limitations on actions for divorce and separation. No action for divorce or separation may be maintained on a ground which arose more than five years before the date of the commencement of that action for divorce or separation except where:

(a) The defendant has abandoned the plaintiff and defendant has not resumed living with plaintiff.

(b) The parties voluntarily have lived apart for a continuous period of two years or more because of estrangement due to marital difficulties and have not resumed living together.

The Committee proposes to retain the existing five year statute of limitations as to the bringing of divorce actions: Domestic Relations Law, §171 (3). However, the Committee has eliminated application of the statute of limitations in those cases where there has been a continuous abandonment in excess of five years, thus eliminating the trap that *Coyne v. Coyne*, 297 N.Y. 927 and *Berkely v. Berkely*, 142 N.Y.S. 2d 273 lay for the unwary. This same exception is, on the same reasoning, made applicable to those who are voluntarily living apart for a continuous period which would exceed the five year limitation of Section 213 of the proposed statute.

§215. Conciliation court, purpose and function. A part shall be established in the supreme court in each judicial district and be known as the conciliation court. Each conciliation court shall provide marriage counseling and conciliation services to husbands and wives in actions brought under articles 10 or 11 of the domestic relations law.

The Committee has proposed the creation of a conciliation program on a state wide basis. The attachment of the conciliation apparatus to Supreme Court was made essential by the present provisions of the state constitution which limit actions concerning matrimonial status to the Supreme Court. The use of judicial districts as a unit for appointment and functioning is designed to make the personnel of the conciliation court aides to the trial courts, thus avoiding the pitfalls that befell previous conciliation programs in other states:

§215-a. Procedure. In any action pursuant to article 10 or 11 of the domestic relations law, a justice of the supreme court, on his own motion, or on motion of either party, may direct the husband and wife to appear at a conference with the conciliation court. The conciliation court shall investigate and interview both husband and wife and shall determine whether marriage counselling or conciliation services should be provided to the parties. Those services, however, shall be provided to a party only upon his consent and are to be provided for a period of not more than one hundred twenty days. When deemed advisable by the conciliation court or the parties, such marriage counselling and conciliation services shall be provided by public, private or religious agencies who are, in the opinion of the conciliation court, qualified to render the services required.

The Committee's proposal gives the court power to compel parties to an action for divorce or separation to confer with conciliation court personnel. The purpose of this conference would be to determine whether matrimonial counseling or conciliation services should be rendered to the couple. The experts in this area of social science have testified to the Committee that in many instances, both husband and wife, though outwardly reluctant to "lose face" before the other, would inwardly feel grateful to be "compelled" to appear at such a conference. It should be noted that the Committee's proposal in no way permits "compulsory counseling", that is to say, that either or both of the parties be compelled to submit to conciliation techniques. Such a requirement would not only be a serious enough invasion of the right to privacy to raise constitutional questions; but, also would be inconsistent with the concept of reconciliation as a voluntary renewal of marital life.

The proposed provision also does not require that the parties in every divorce or separation action go before the conciliation court. The pattern of the highly successful Los Angeles Conciliation Court seems more useful for New York for a number of reasons.

There is danger that if this conciliation program begins burdened with the requirement that it examine every case, it will be over extended at the outset before adequate procedures can be established and sufficient numbers of qualified personnel appointed. Conciliation in a court setting on this scale has never been attempted in New York, and it is important that its promising beginning not be ruined by demanding too much of it.¹²

Interesting information was obtained from the two marriage counselors presently conducting a pilot program of conciliation work as an incident to matrimonial actions brought in the First Judicial Department. The two counselors found their maximum workload to be on hundred cases a year. It is obvious that subjecting all divorce or separation cases to conference would increase the workload of the counselors enormously and would sacrifice quality to quantity, reducing the performance of the conciliation court to assembly line methods. If this proposed program proves successful there will be time enough at a later date to add to its responsibilities.

The reference of cases to the conciliation court by the justices follows the practice used in the pilot program conducted in the First Department. It is hoped that the counselors will assist the courts in making the determination of which cases should be so referred to the conciliation court.

Counseling is limited to a maximum period of one hundred twenty days. In other words, any services rendered in the conciliation court will be of a short term variety, with more extensive counseling being conducted by public and private agencies. The Committee recognized the remarkable work presently being done by the public, private and religious conciliation and counseling agencies and has provided for their utilization when deemed advisable by the conciliation court. Of particular importance is that where the parties themselves prefer the utilization of another agency's services, whether that agency be religious or otherwise, they may obtain such counseling from that agency.

§215-b. Supervision and staff. Each conciliation court shall be supervised by a justice of the supreme court in that judicial district and shall be staffed by persons qualified to render marriage counseling and conciliation services who shall be known as conciliation court counselors. Each conciliation court counselor shall be a certified social worker, registered with the department of education of the state pursuant to article one hundred fifty-four of the education law, or a certified psychologist registered with the department of education of the state pursuant to article one hundred fifty-three of the education law, or a physician

licensed to practice in this state. The conciliation court counselor shall be appointed and removed by the Presiding Justice of the appellate division of each judicial department.

The number of conciliation court counselors shall be as follows:

- First district, four;
- Second district, two;
- Third district, one;
- Fourth district, one;
- Fifth district, one;
- Sixth district, one;
- Seventh district, one;
- Eighth district, one;
- Ninth district, one;
- Tenth district, three;
- Eleventh district, one.

It was deemed important by the Committee to have a justice of the supreme court supervising the work of each conciliation court and thus to keep the judiciary in direct charge of the staff. The question of the qualifications of the personnel is of great importance, since in the last analysis, New York's success in court oriented conciliation will depend on the quality of these counselors. The Committee thought it wise to rely upon the existing standards of certification for the trained staff.

Methods of appointment of the counselors were discussed by the Committee's staff with the office of the Administrative Board of the Judicial Conference and the methods provided comply with the suggestions of the Judicial Conference.

The number of counselors assigned to each district was based on the experience of the two counselors working in the First Department. It was their judgment that the increase in workload for them under the proposed statute would double and require four counselors to be employed. Having established the number of counselors needed in the First Judicial District, it was believed that the number of counselors compared to the number of justices assigned to that district would provide a proportion that could be used for every judicial district in the state. This then is the basis for the assignment. In no event did a district receive less than one counselor.

Of course, this state wide conciliation procedure is so new that it will be necessary to evaluate the experience in each district, and probably increase the number of assignments. This cannot be done until the program is undertaken and experience evaluated.

§215-c. Powers of supervising justice. The justice supervising the conciliation court, in order to assist and aid the marriage counseling and conciliation services being provided to a husband and wife, may direct the appearance of any person before him or before a conciliation counselor. During the period marriage counseling and conciliation services are being provided, the justice supervising the conciliation court, on his own motion, or on motion of either party, may grant a stay of proceedings in the action or make any other order required by the circumstances, provided, any such stay shall remain in effect only during the period that marriage counseling and conciliation services are being provided to the parties.

Judge Pfaff of the Los Angeles Conciliation Court pointed out the usefulness of empowering the court to direct third persons to appear before it or the counselors in connection with counseling. (Judge Pfaff referred to it as the

"mother-in-law problem"). This power to compel appearance by order has been given to the supervising justice in addition to the power to stay proceedings in the action or enter other appropriate orders while the counseling is under way.

§215-d. Rights of husbands and wives. All statements made in connection with the provision of such marriage counseling and conciliation services shall be confidential and inadmissible as evidence unless the party concerned waives that privilege. Consent to or participation in marriage counseling and conciliation services shall not constitute willing forgiveness of any ground for divorce or separation.

Conciliation in court can only be successful if the individual members of the bar and their clients cooperate and are made to feel that they cannot be prejudiced by their participation. These provisions preserving the confidentiality of statements made in connection with conciliation proceedings and barring possible use of the participation as the defense of "willing forgiveness" is designed to so establish confidence.

§215-e. Salaries of conciliation court counselors. The salary of each conciliation court counselor shall be fixed by the presiding justice of the appellate division for each respective judicial department within the amount appropriated and made available therefor, and such salaries shall be payable on the audit and warrant of the state comptroller on vouchers certified or approved by the presiding justice of the appellate division for each respective judicial department in the manner provided by law.

§215-f. Rules. The justices of the appellate division in each judicial department shall promulgate rules not inconsistent with the above for the functioning of the conciliation court within each respective judicial district.

These provisions are proposed after consultation with the Judicial Conference. It is expected that the rules for each department will make appropriate adjustments for local considerations within the framework of the statute.

§216. Law Guardians. In any action commenced under articles ten or eleven of the domestic relations law, or in any proceeding for the determination of child custody or visitation rights, the court, on its own motion or on motion of a conciliation counselor, on notice to the plaintiff and defendant, at any time after commencement of the action, may appoint a law guardian to represent any minor child of the parties to protect the interests of the child in the action. The law guardian shall be designated, compensated and supervised in accordance with the provisions of article two, part four, of the family court act. The costs of such law guardians shall be included in the budget for each appellate division and shall be payable by the state of New York, within the amounts appropriated therefor.

This proposed section attempts to add to those matrimonial matters litigated in the Supreme Court, the same safeguards of the rights of children that are present in article two, part four of the Family Court Act.

It is assumed such appointments will be rare and that the law guardian appointed will concentrate on the protection of the child's interest insofar as support, visitation and custody rights are concerned.

§230. Required residence. An action to annul a marriage, or to declare the nullity of a void marriage, or for divorce, or separation may be amended only when:

1. The parties were married in the state and either party is a resident thereof when the action is commenced and has been a resident for a continuous period of one year immediately preceding, or

2. The parties have resided in this state as husband and wife and either party is a resident thereof when the action is commenced and has been a resident for a continuous period of one year immediately preceding, or

3. The cause occurred in the state and either party has been a resident thereof for a continuous period of at least one year immediately preceding the commencement of the action, or

4. Either party has been a resident of the state for a continuous period of at least two years immediately preceding the commencement of the action, or

5. The cause occurred in the state and both parties are residents thereof at the time of the commencement of the action.

New York as long as it retains the dubious distinction of being the only state in this nation which has but one ground for divorce, needs no protection against its becoming attractive to citizens from sister-states as a place where divorce can be obtained. The Committee's proposals do not add grounds for divorce which will make New York an "easy" divorce state. However, at the suggestion of the Special Committees on Matrimonial Law of the New York County Lawyers' Association and the Association of the Bar of the City of New York, the Committee has proposed the above residence requirements to ensure against the use of our courts in matrimonial proceedings by outsiders.

Each of the five alternative provisions guards against "forum shopping" by non-New Yorkers, in our courts.

§235. Information as to details of matrimonial actions or proceedings. An officer of the court with whom the proceedings in an action to annul a marriage or to declare the nullity of a void marriage or for divorce or separation or an action or proceedings for custody, visitation or maintenance of a child are filed, or before whom the testimony is taken, or his clerk, either before or after the termination of the suit, shall not permit a copy of any of the pleadings or testimony, or any examination or perusal thereof, to be taken by any other person than a party, or the attorney or counsel of a party who had appeared in the cause, except by order of the court.

If the evidence on the trial of such an action or proceeding be such that public interest requires that the examination of the witnesses should not be public, the court or referee may exclude all persons from the room except the parties to the action and their counsel and the witnesses, and in such case may order the evidence, when filed with the clerk, sealed up, to be exhibited only to the parties to the action or proceedings or some one interested, on order of the court.

The proposed expansion of §235 to include proceedings to declare the nullity of a void marriage, or for custody, visitation or maintenance of a child, is the direct result of the concern that the bar feels for publicity in these most delicate kinds of matrimonial proceedings. There does in fact seem to be no reason why the sealing provisions previously only applicable to annulments, divorces and separations should not apply to proceedings which determine the fitness of parents or other matters of similar personal nature.

§8. Marriage after divorce. Whenever a marriage has been dissolved by divorce, either party may marry again.

This proposed amendment does away with the punitive provision that a defendant who has been found guilty of adultery in a divorce action may not remarry again for three years and then only with the permission of the court.

Aside from its punitive aspects, the provision was really never more than a snare for the ignorant since anyone who married outside the state of New York in a sister state could not be reached by its provisions. *Moore v. Hegeman*, 92 N.Y. 521; *Fisher v. Fisher*, 250 N.Y. 313.

Proposed Changes in the General Obligations Law

§5-311. Certain agreements between husband and wife void. A husband and wife cannot contract to alter or dissolve the marriage or to relieve the husband from his liability to support his wife or to relieve the wife of liability to support her husband provided that she is possessed of sufficient means and he is incapable of supporting himself and is or is likely to become a public charge.

An agreement, heretofore or hereafter made between a husband and wife, shall not be considered a contract to alter or dissolve the marriage unless it contains an express provision requiring the dissolution of the marriage or provides for the procurement of grounds for divorce in violation of section two hundred twelve of the domestic relations law.

This proposed amendment is designed to remove any doubts as to the validity of proper separation agreements which arose by reason of the recent decision in *Viles v. Viles*, 14 N.Y. 2d 365, 251 N.Y.S. 2d 672.

As was pointed out by a number of witnesses, it has long been the state's public policy to encourage parties to settle their disputes over property by agreement.

"From the earliest days in New York, separation agreements have been a standard practice. Even before the 'female emancipation statutes,' giving women the right to enter into contracts, it was quite usual for a husband and wife to contract as to support and division of property, the wife acting through a trustee, who signed the contract in her behalf. In our modern era, separation agreements in situations where a marriage no longer exists in fact, are encouraged by all reputable lawyers in order to avoid painful and necessary litigation, harmful to both the spouses and their children".¹³

In *Butler v. Marcus*, 264 N.Y. 519, and *Matter of Rhinelander*, 290 N.Y. 31, the New York Court of Appeals recognized the validity of such separation agreements. The *Viles* decision, as a matter of statutory construction, by a divided court, held that a separation agreement between a husband and wife was subject to attack if made in contemplation of divorce or in furtherance of the obtaining of a divorce.¹⁴

To remove all doubts on this question of statutory construction of §5-311, and having been greatly impressed with the usefulness and necessity for separation agreements, the Committee proposes the foregoing amendment of the statute. The Committee emphasizes that the proposal of this amendment should in no way be construed as legislative approval of the *Viles* decision.

Family Court or Supreme Court.

Considerable conflict among the witnesses' testimony before the Committee developed in connection with the question of whether jurisdiction over matrimonial actions should be in Supreme Court or the Family Court. The arguments as to this issue are many and varied. Probably they should be considered by the forthcoming constitutional convention at least insofar as the constitutional bar to the Family Court's jurisdiction over matters of matrimonial status is concerned.

The Committee strongly urges the legislature to take steps to initiate a thorough analysis of the present problems of the Family Court with a view toward solving many of the problems that face that court. That analysis might

well be conducted by this Committee in 1966 or by a temporary commission established exclusively for that purpose.

The Family Court may indeed point the way for a court in this state with integrated jurisdiction over all family problems, including actions affecting matrimonial status.¹⁵ However, that moment is not yet at hand.¹⁶

There was considerable sentiment on the part of many to have all marital conciliation and counseling services provided under the auspices of the Family Court, with the Supreme Court referring cases over. This was rejected by the Committee in favor of the proposed conciliation court system because of the experience of other states to the effect that there must be close cooperation between the judges trying the matrimonial cases and the marriage counselors to make for effective conciliation programs. Of even more importance was the recognition by the members of the Committee that the individual seeking such counseling, would, in many instances, feel themselves shuttled around from court to agency and this would, in the long run, justifiably militate public opinion against the program.

Future Action.

New York's present law is hopelessly inadequate to deal with the family problems presently facing all our citizens. Adoption of the Committee's proposals are only a first step in what must be a total war against the growing instability of family life.

Broadening the grounds for divorce is essential, for it will, by inducing New Yorkers to return to their own courts to undertake divorces, enable us to identify families in trouble and also ensure the application of this state's rules to the care and protection of the children and the financial arrangements of the parties. Adoption of the Committee's proposals as to conciliation will be an important step in the rationalization of our family laws and will reflect the state's real interest in these problems.

The following aspects of our inadequate family law must be examined in the near future:

- (1) The existing litigative procedures currently used in matrimonial practice;
- (2) The efficacy of the state's present alimony laws;
- (3) Child custody and new methods designed to solve the problems of the child in a disrupted family, and protection of his interests;
- (4) In collaboration with the State Department of Education, the feasibility of establishing adequate pre-marital educational programs; with an emphasis on preventive measures to combat marital instability;
- (5) The encouragement and development of a reservoir of qualified marriage counselors in the State.

Lastly, we strongly urge the legislature to renew the mandate of the Joint Legislative Committee on Matrimonial and Family Laws as presently defined as to area of inquiry.

FOOTNOTES

1. Penal Law, §511; Domestic Relations Law, §58.
2. Connecticut, Delaware, Hawaii, Massachusetts, Michigan, New Hampshire, Nebraska, Pennsylvania, Vermont, Wisconsin and District of Columbia.
3. Conviction of a "felony" or "felony or infamous crime" (Alaska, Arkansas, California, Colorado, Idaho, Illinois, Iowa, Kentucky, Missouri, North Dakota, Oregon, South Dakota (Utah); or an "infamous crime involving a violation of conjugal duty" (Connecticut), or a felony involving "moral

- turpitude" (District of Columbia). Some states like Alabama and Georgia require both certain types of crimes and a specified sentence of imprisonment.
4. Under the *Penal Law* revision, effective September 1, 1967, such a sentence would mean that there could be no parole prior to that five year period, §70.00.
 5. *Maloney v. Maloney*, 183 A. 2d 172 (Del.); *Rolph v. Rolph*, 1 Storey 552, 149 A. 2d 744 (Del. Super); *Helfgott v. Helfgott*, 179 F. 2d 39 (D.C. Cir.); *Parks v. Parks*, 116 F. 2d 556 (D. C. Cir).
 6. The following states presently have such a provision: Alabama, Recompiled Code, Title 34. Sec. 22 (1); Colorado Rev. Stat. Ann. Sec. 46-1-1 (j); Connecticut Ann. Gen. Stat., Sec. 46-30; District of Columbia Code Ann., Sec. 16-904; Louisiana Stat. Ann. Art. 139; Minnesota Stat. Ann. Sec. 518.06 (8); North Dakota Century Code Ann., Sec. 14-06-05; Tennessee Code Ann. Sec. 36-802; Utah Code Ann. Sec. 30-3-1 (9); Virginia Code Ann., Sec. 20-121; Wisconsin Stat. Ann. Sec. 247.07(7).
 7. *Domestic Relations Law*, Section 200 (2).
 8. §202 *Defence of Justification*—The defendant in an action for separation from bed and board may set up, in justification, the misconduct of the plaintiff, and if that defense is established to the satisfaction of the court, the defendant is entitled to judgment. This section is ultimately derived from Section 13 of Chapter 102, Laws 1813. *Deisler v. Deisler*, 59 App. Div. 207.69. N.Y.S. 326.
 9. Proposed Marriage and Divorce Codes for Pennsylvania, June 1961, p. 103; General Assembly of the Commonwealth of Pennsylvania, Joint State Government Commission.
 10. *Ibid.*
 11. The Committee has, as previously discussed, recommended retention of §202 of the *Domestic Relations Law*, relating to the misconduct of a plaintiff as a defense in actions for separation.
 12. Over 5000 divorce and separation actions were brought in New York State in 1964, and there was undoubtedly a similar figure in 1965; Report of Administrative Board of Judicial Conference, 1965, p. 379. With grounds broadened as the Committee proposes, it is to be expected that this figure would increase substantially by at least the number of migratory divorces now undertaken by New Yorkers as well as those who are victims of abandonment.
 13. Statement by Howard Hilton Spellman, Chairman of the Special Committee on Matrimonial Law of the Association of the Bar of the City of New York on November 29, 1965, before the New York State Joint Legislative Committee on Matrimonial and Family Law p. 18.
 14. The problems raised by the *Viles* case are reflected in the extensive law review commentary already appearing in connection with the decision. For example, see 31 Brooklyn Rev. 404; 14 Buffalo L. Rev. 318; 51 Cornell L.Q. 135; 33 Fordham L. Rev. 519; 63 Mich. L. Rev. 735; 10 Villanova L. Rev. 171; 50 Virginia L. Rev. 1448.
 15. See Alexander "Social Science: The Family Court" 21 Missouri L. Rev. 105; Gellhorn, *Children and Families in the Courts of New York City* (New York, 1954).
 16. It is noteworthy that article 9 of the Family Court Act establishes a procedure by which the Family Court is to exercise its constitutional jurisdiction in matrimonial conciliation; while the Family Court in certain locales has been most successful in this work, evidence was that in many other places, the workload of the staff severely restricted the effectiveness of the court in conciliation efforts.

APPENDIX "47"

DIVORCE AND THE FAMILY IN AMERICA

by

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(MARRIAGE AND DIVORCE)

The statistics are confusing, but it takes no sociologist to know that the failure of marriage in America is a growing phenomenon, especially among the young, and that the Sargasso Sea of divorce, separation, and child-custody procedures more often compounds misery, encourages deceit, and burnishes guilt. In three articles and a selection from Philip Roth's new novel, the *Atlantic* here essays a study of the causes of, the attitudes toward, and some of the possible antidotes to this unhappy trend. Christopher Lasch is professor of history at Northwestern University and has taught at Williams College, Roosevelt University, and the University of Iowa. He is the author of two books ("The American Liberals and the Russian Revolution" and "The New Radicalism in America"), is married and the father of four.

All ages imagine themselves more enlightened—and at the same time, no doubt, more depraved—than their predecessors. Accordingly, we tend to exaggerate the moral distance between ourselves and the Victorians. The nineteenth century seems particularly remote to us in matters relating to sex. Since the turn of the century, the Western world is supposed to have undergone a "sexual revolution" which, for better or worse, irreversibly altered the way in which the relations between men and women were perceived. The "puritanism" of our ancestors, we suppose, gave way to sexual freedom—depravity, if you like—and the evidence for this proposition seemingly lies all about us: bikinis on the beach and skirts above the knee; obscenity on stage and screen; increasing license among adolescents; and, inevitably, in such a list, the "rising tide of divorce," as it used to be called. The fact that divorce is no longer novel or shocking merely testifies further, presumably, to the decay of the old order, the attitudes and institutions of an earlier time, which now evoke mingled nostalgia and contempt.

Divorce no longer shocks, but it is still a public issue, largely because the recent liberalization of the New York law (which previously limited grounds of divorce to adultery but which now makes a two-year separation additional grounds for divorce), together with the agitation preceding this change, focused attention once again on the absurdity of the divorce laws not only of New York but of most of the other states. But if divorce remains a political and a legal issue, it has not yet become an issue for sustained historical reflection. Studies abound, but practically all of them take for granted that the growing divorce trend is part of the "sexual revolution"; a symptom, therefore, of the decay of the family and of the whole complex of assumptions with which the old-fashioned family was bound up. It is precisely this premise, however, that needs to be re-examined if we are to understand not only divorce and marriage but a whole series of related questions, which although they are not public questions in the conventional sense have an important bearing on the collective as well as the

private lives of Americans. It is quite possible that easier divorce, far from threatening the family, has actually helped to preserve it as a dominant institution of modern society.

Only alarmists would argue that the family is literally becoming extinct. The question is whether or not it has radically changed its nature, partly as a result of the ease and frequency of divorce and partly as a result of other developments of which the frequency of divorce is a consequence. It is on this point that both scholars and laymen almost universally agree. The Victorian family, they believe, was patriarchal, based on a double standard of sexual morality according to which fidelity was demanded of the wife while the husband pursued his extramarital career of sexual escapades among prostitutes or expensive mistresses, depending on his social class. People did not marry for love so much as for the convenience of the families concerned; all marriages were in this sense "arranged." Divorce or annulment, when they rarely occurred, took place at the pleasure of the husband, the wife having no recourse in the face of her husband's indifference, infidelity, or brutality except the solace of religion and the sewing-circle society of women, fellow victims of a system which consigned them, it seemed, to perpetual subordination. Such is the picture of Victorian marriage to which the modern family is held up in striking contrast. Nowadays, even a President's daughter marries for love, a fact of which it is one of the functions of journalism ritually to remind us. The affectional basis of marriage presumably works to make the partners equals. The growing divorce trend, whether one attributes it to romantic illusions surrounding marriage or to sexual difficulties or to any number of other explanations, must therefore reflect, in one way or another, the new equality of the sexes. The fact that most divorce proceedings are now instituted by women would seem to confirm the suspicion that the relaxation of old taboos against divorce represents still another victory for women's rights.

Given these assumptions, the principal objection to the present laws is that they are an anachronism, a last refuge of Victorian prudery and superstition. The authors of a recent study of American divorce complain that "while a real social revolution has been going on affecting in a thousand ways the importance and relative permanence of marriage, the divorce laws have remained the same with only few minor exceptions." The law of divorce, in short, is seen as a notable instance of "cultural lag," and the most impressive argument for reform, accordingly, is that law should not be allowed to diverge so far from practice. Most Americans apparently believe that an unhappy marriage is worse than no marriage at all and that the best way of ending an unhappy marriage is divorce by mutual consent. Yet the laws compel them to undergo the distress and humiliation of an adversary proceeding in which one party has to file charges against the other, even to fabricate them, with disastrous moral and emotional consequences for everyone concerned.

Behind all this speculation lies an understandable concern about a set of laws which degrade what they purport to dignify: the ties of marriage. But there also lies a certain amount of confusion about the history of the family, the nature of the sexual revolution, and the relation to these developments of feminism and the "emancipation" of women. In the first place, the history of the family needs to be seen in much broader perspective than we are accustomed to see it. There are good reasons to believe that the decisive moment in the history of the Western family came not at the beginning of the twentieth century but at the end of the eighteenth, and that the Victorian family, therefore, which we imagine as the antithesis of our own, should be seen instead as the beginning of something new—the prototype, in many ways, of the modern household.

If we forget for a moment the picture of the Victorian patriarch surrounded by his submissive wife, his dutiful children, and his household of servants—images

that have come to be automatically associated with the subject—we can see that the nineteenth-century conception of the family departed in critical respects from earlier conceptions. Over a period of several centuries, the family had gradually come to be seen as preeminently a private place, a sanctuary from the rough world outside. If we find it difficult to appreciate the novelty of this idea, it is because we ourselves take the privacy of family life for granted. Yet as recently as the eighteenth century, before the new ideas of domesticity were widely accepted, families were more likely to be seen “not as refuges from the invasion of the world,” in the words of the French historian Philippe Ariès, “but as the centers of a populous society, the focal points of a crowded social life.” Ariès has shown how closely the modern family is bound up with the idea of privacy and with the idea of childhood. Before these ideas were securely established, masters, servants, and children mingled indiscriminately, without regard for distinction of age or rank.

The absence of a clearly distinguishable concept of childhood is particularly important. The family by its very nature is a means of raising children, but this fact should not blind us to the important change that occurred when child-rearing ceased to be simply one of many activities and became the central concern—one is tempted to say the central obsession—of family life. This development had to wait for the recognition of the child as a distinctive kind of person, more impressionable and hence more vulnerable than adults, to be treated in a special manner befitting his peculiar requirements. Again, we take these things for granted and find it hard to imagine anything else. Earlier, children had been clothed, fed, spoken to and educated as little adults; more specifically, as servants, the difference between childhood and servitude having been remarkably obscure throughout much of Western history (and servitude retaining, until fairly recently, an honorific character which it subsequently lost). It was only in the seventeenth century in certain classes—and in society as a whole, only in the nineteenth century—that childhood came to be seen as a special category of experience. When that happened, people recognized the enormous formative influence of family life, and the family became above all an agency for building character, for consciously and deliberately forming the child from birth to adulthood.

These changes dictated not merely a new regard for children but, what is more to the point here, a new regard for women: if children were in some sense sacred, then motherhood was nothing short of a holy office. The sentimentalization of women later became an effective means of arguing against their equality, but the first appearance of this attitude seems to have been associated with a new sense of the dignity of women; even of their equality, in a limited sense, as partners in the work of bringing up the young. The recognition of “women’s rights” initially sprang not from a revulsion against domestic life but from the cult of domesticity itself; and the first “rights” won by modern women were the rights of married women to control their own property, to retain their own earnings, and, not least, to divorce their husbands.

Until the middle of the nineteenth century in England and the United States, grounds for divorce were pretty much confined to adultery and cruelty. Divorces, moreover, had to be granted by legislative enactment. These provisions, making money and political influence requisite to divorce, effectively limited divorce to members of the upper classes; and except in rare cases, to upper-class men, eager for one reason or another to get rid of their wives. The new laws, still in effect today in most places, substituted judicial for legislative divorce and broadened grounds of divorce to include desertion. Both of these provisions, particularly the second, show that women were intended to be the principal beneficiaries of the change. That was certainly the result. Ever since the liberalization of the laws in the mid-nineteenth century, divorces have been

easier and easier to obtain, and more and more of them have been granted to women.

But those who see in these statistics a general dissolution of morals and a threat to the family misunderstand the dynamics of the process. The movement for earlier divorce owed its success to the very idea which it is supposed to have undermined, the idea of the sanctity of the family. Indeed, it is somewhat misleading to see divorce-law reform as a triumph even for women's rights, for the feminists could hardly have carried the day if their attack on the arbitrary authority of husbands had not coincided with current conceptions of the family—conceptions of the family which, in the long run, tended to subvert the movement for sexual equality. It was not the image of women as equals that inspired the reform of the divorce laws, but the image of women as victims. The Victorians associated the disruption of domesticity, especially when they thought of the "lower classes," with the victimization of women and children: the wife and mother abused by her drunken husband, deserted and left with children to raise and support, or forced to submit to sexual demands which no man had a right to impose on virtuous women. These images of oppression wrung ready tears from our ancestors. The rhetoric survives, somewhat diluted, in the form of patriotic appeals to home and motherhood, and notably in the divorce courts, where it is perfectly attuned, in fact, to the adversary proceeding.

Judicial divorce, as we have seen—a civil suit brought by one partner against the other—was itself a nineteenth-century innovation, a fact which suggests that the idea of marriage as a combat made a natural counterpoint to the idea of marriage as a partnership. The combat, however, like the partnership itself, has never firmly established itself, either in legal practice or in the household itself, as an affair of equals, because the achievement of legal equality for the married woman depended on a sentimentalization of womanhood which eroded the idea of equality as easily as it promoted it. In divorce suits, sensitivity of judges to the appeal of suffering womanhood, particularly in fixing alimony payments, points to ambiguity of women's "emancipation." Sexual equality, in divorce as in other matters, does not rest on a growing sense of the irrelevance, for many purposes, of culturally defined sexual distinctions. It represents, if anything, a heightened awareness of these distinctions, an insistence that women, as the weaker sex, be given special protection in law.

From this point of view, our present divorce laws can be seen as faithfully reflecting ideas about women which, having persisted into the mid-twentieth century, have shown themselves to be not "Victorian" so much as simply modern, ideas which are dependent, in turn, on the modern obsession with the sanctity of the home, and beyond that, with the sanctity of privacy. Indeed, one can argue that easier divorce, far from threatening the home, is one of the measures—given the obsession with domesticity—that has been necessary to preserve it. Easy divorce is a form of social insurance that has to be paid by a culture which holds up domesticity as a universally desirable condition; the cost of failure in the pursuit of domestic bliss—especially for women, who are discouraged in the first place from other pursuits—must not be permitted to become too outrageously high.

We get a better perspective on modern marriage and divorce, and on the way in which these institutions have been affected by the "emancipation" of women and by the "sexual revolution", if we remember that nineteenth-century feminism, as its most radical passed beyond a demand for "women's rights" to a critique of marriage itself. The most original and striking—and for most people the least acceptable—of the feminists' assertions was that marriage itself, in Western society, could be considered a higher form of prostitution, in which respectable women sold their sexual favors not for immediate financial rewards but for long-term economic security. There was "no sharp, clear, sudden-drawn

line," they insisted, between the "kept wife," living "by the exercise of her sex functions alone," in Olive Schreiner's words, and the prostitute. The difference between prostitution and respectability reduced itself to a question not of motive but of money. The virtuous woman's fee was incomparably higher, but the process itself was essentially the same; that is, the virtuous woman of the leisure class had come to be valued, like the prostitute, chiefly as a sexual object beautiful, expensive, and useless—in Veblen's phrase, a means of vicarious display. She was trained from girlhood to bring all her energies to the intricate art of pleasing men: showing off her person to best advantage, mastering the accomplishments and refinements appropriate to the drawing room, perfecting the art of discreet flirtation, all the while withholding the ultimate prize until the time should come when she might bestow it, with the impressive sanction of state and church, on the most eligible bidder of her "hand". Even then, the prize remained more promise than fact. It could be repeatedly withdrawn or withheld as the occasion arose, and became, therefore, the means by which women learned to manage their husbands. If, in the end, it drove husbands to seek satisfactions elsewhere, that merely testified to the degree to which women had come to be valued, not simply as sexual objects, but precisely in proportion to their success in withholding the sexual favors which, nevertheless, all of their activities were intended to proclaim.

The defenders of the conventional types of prostitution, meanwhile, did not fail to see the connection between prostitution and respectability; in the words of William Lecky, the historian of European morals, the prostitute was "ultimately the most efficient guardian of virtue" because she enabled virtuous women to remain virtuous. "But for her the unchallenged purity of countless happy homes would be polluted, and not a few who with the pride of their untempted chastity think of her with an indignant shudder, would have known the agony of remorse and despair." The same reasoning, as we have seen, led to the nineteenth-century reform of the divorce laws. The purity of the home demanded just such outlets as prostitution and divorce if it was to survive intact and "untempted."

The central features of this system of sexual relationships persist into the twentieth century essentially unchanged. Courtship is more than ever a "sex tease," in Albert Ellis' words, and marriage remains something to be managed—among other ways, by the simultaneous blandishment and withdrawal, on the part of the wife, of her sexual favors. Let anyone who doubts the continuing vigor of this morality consult the columns of advice which daily litter the newspapers. "Dear Abby" urges her readers, before marriage, to learn the difficult art of going far enough to meet the demands of "popularity" without "cheapening" themselves (a revealing phrase); while her advice to married women takes for granted that husbands have to be kept in their place, sexually and otherwise, by the full use of what used to be called "feminine wiles." These are prescriptions, of course, which are not invariably acted upon; and part of the "sexual revolution" of the twentieth century lies in the increased publicity which violations of the official morality receive, a condition which is then taken as evidence that they are necessarily more frequent than before. Another development, widely mistaken for a "revolution in morals," is a growing literal-mindedness about sex, an inability to recognize as sexual anything other than gross display of the genitals. The sexual advances of the respectable woman, accordingly, have come to be more blatant than they used to be, a fact predictably deplored by alarmists, themselves victims of the progressive impoverishment of the sexual imagination, who erroneously confuse respectability with the concealment, rather than the withholding, of sexuality. We should not allow ourselves to be misled by the openness of sexual display in contemporary society. The

important thing is the use to which sexuality is put. For the woman, it remains, as it was in the nineteenth century, principally a means of domination; for the man, a means of vicarious display.

Current concern about divorce springs from two different kinds of considerations. On the one hand, the prevalence of divorce seems to reflect a "breakdown" of marriage. Traditionalists demand, in the face of this condition, a tightening of the divorce laws; reformers, a more "mature" approach to marriage. On the other hand, a second group of reformers is alarmed not by the breakdown of marriage but by the hypocrisy surrounding divorce. They would make marriage a completely private matter, terminable, in effect, by mutual consent—a change which might or might not accelerate the "decline of the family," but which, they argue, would better accord with our pretensions to humanity than the present laws.

The plea for more stringent legislation encounters the objection that laws governing morals tend to break down in the face of large-scale noncompliance. In New York, the old divorce law did not prevent people from getting divorces elsewhere or from obtaining annulments on the slightest suspicion of "fraud." The argument that there would be fewer divorces if there were fewer romantic illusions about marriage expresses an undoubted truth; but it is not clear, as the argument seems to assume, that there is something intrinsically undesirable about a high rate of divorce. Most reformers, when confronted with particular cases, admit that divorce is better than trying to save a bad marriage. Yet many of them shy away from the conclusion toward which these sentiments seem to point, that one way of promoting more mature marriages might be to make marriage as voluntary an arrangement, both as to its inception and as to its termination, as possible. The definition of marriage as a contract, enforceable at law, probably helps to promote the conception of marriage as a combat, a tangle of debts and obligations which figures so prominently in American folklore. Revision of the law, particularly the divorce law, would not by itself change popular ideas of marriage, but it would at least deprive them of legal sanction.

Even now, living apart is grounds for divorce in eighteen states and in Puerto Rico and the District of Columbia, the period of time varying from eighteen months in Maryland to ten years in Rhode Island. Barring a general wave of reaction, a possibility which should not by any means be discounted, other states can be expected to follow their example. In every case, reform will be accompanied by dire predictions of the disintegration of domestic values, but the family has outlived such predictions before. Far from being a survival of some earlier historical period, the idea of the family as sacred and inviolate, the cornerstone of society and the seat of virtue, is a characteristically modern idea bound up with the "privatization" of experience and with the tendency of the middle class, in Ariès's words, "to organize itself separately, in a homogeneous environment, among its families, in homes designed for privacy, in new districts kept free from all lower-class contamination." This self-segregation of the middle class may have been, in the long run, a disaster; on the other hand, it may turn out to have been, precisely because it fostered a new respect for the family, an important countervailing influence to the growth of the state. In either case, the family, desirable or deplorable, is hardly threatened by the increase in divorce.

APPENDIX "48"

AS GROUNDS FOR DIVORCE
LET'S ABOLISH MATRIMONIAL OFFENCES

by

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The winds of change are beginning to blow hard upon Canada's dusty canons of divorce. Alone among the western nations of mixed religious persuasion, Canada's divorce laws have remained unchanged for decades.

In eight provinces, they are based upon a literalist interpretation of the Gospel according to St. Matthew, and divorces through the courts are granted almost exclusively on the basis of adultery.

"And I say to you: whoever divorces his wife, except for unchastity, and marries another, commits adultery." (Matthew 19:9—RSV)

In two provinces, they are based upon a literalist interpretation of the Gospel according to St. Mark, and no divorces are granted by the courts, although a private bill of divorce may be granted by parliament at Ottawa.

"And he said to them, Whoever divorces his wife and marries another, commits adultery against her;" (Mark 10:11—RSV)

Churchmen generally known as "liberal" who support "broader" divorce laws contend that neither quotation shows an intention by Jesus to lay down a code of divorce law; the liberals would say that His remark to His disciples, whatever may have been His exact words, was intended as a protest against the divorce law of a society in which the man could, without cause other than the desire of his own heart, divorce his wife and take another.¹

Among secular Canadians, and I think it fair to say the term includes the majority of Canadians at least six days a week, a Biblical injunction of whatever interpretation is not the deciding factor.

Regardless of the basis of the present law which makes adultery the only important ground upon which divorce in Canada is granted, the winds of change are blowing, and it is high time we looked whither they might take us. But first let us look at some straws in the wind.

In March, 1965, a Roman Catholic Canadian of French origin spoke as a member of the Manitoba legislature in favour of a resolution to widen the grounds for divorce:

"My own church does not recognize divorce for people of our faith. But when I'm making laws for all people it's different than when I'm making them for people of my own church."²

In June, 1965, the moderator of the United Church of Canada said that our divorce laws are

"bringing all our laws, and even law itself, into disrepute."³

In July, 1965, the *Star Weekly Magazine*, one of the voices of secular Canada, carried an article entitled "The Respectable Canadians Who Live in Sin." The article quoted a social work agency director as saying that

"Many common-law couples are more stable, have a higher standard of morality, are doing a better job in raising their children, and are steadier bread winners than legally married couples."

The article warns that

"we have to change the divorce laws, or we have to accept common-law marriages."⁴

In July, 1965, the Gallup Poll reported that two-thirds of Canadians favour desertion as a grounds of divorce.⁵

In September, 1965, a radio blurb jointly produced by the Anglican and United Churches stated

"it's time to treat divorce with the sympathy a great tragedy deserves."⁶

In September, 1965, the Anglican church overwhelmingly approved in principle the church remarriage of some divorced persons.⁷ Celerity is apparently not a Christian virtue, so the matter must be resubmitted for final approval two years hence, but there seems little doubt that it will then become Anglican church law, assuming the Anglican church still then exists.

In September, 1965, the chairman of the committee on Christian unity for the Vancouver archdiocese wrote in the *B.C. Catholic*.

"The Orthodox Church permits divorce and remarriage, relying on the authority of Matthew XIX, 9, that is, in cases of 'unchastity'.

As we Roman Catholics are reminded by the Second Vatican Council of the 'special place' of Anglicanism and of the verability of the Orthodox and Eastern Churches, we do well to examine this present issue in such an ecumenical light. This will more certainly lead us to the full truth of the matter."⁸

Not agreement, but neither is it condemnation.

In January, 1966, no less than seven private bills for divorce reform were placed on the Commons Order Paper.⁹

If these straws in the wind are truly indicative and the winds of change tear out the dusty leaf of our present divorce law, what will replace it?

Let me point out two things:

First, I wish to dispel any assumption that I intend to make a plea for "easy divorce". I am opposed to "easy divorce". I believe that the institution of marriage is one of the most important to our society, and I oppose any change that will weaken it. My plea is that we *rationalize*, not *liberalize*, our divorce law. And if my proposal would reduce the number of divorces I would not for that reason be unhappy. If the number of people who *get divorced* and *shouldn't* were balanced against the number of persons who *don't get divorced but should*, it might well mean the overall divorce rate would be reduced, and the purpose of my proposal is to bring the rate closer to what it should be.

Second, there is much common ground among the various religious and non-religious points of view on this subject. It is commonly overlooked that a "divorce", as we know it, has not one but two branches. The first branch frees the parties from an existing marriage which one or both consider intolerable; the second branch permits the parties to enter into a new marriage.

Yet it is commonly forgotten that canon law (and therefore the civil law of almost all of the western world) grants "divorces" containing the first branch.¹⁰ In Canada this kind of divorce is called a "judicial separation".¹¹ In England it used to be called by the more accurate name "divorce from bed and board".¹² What is the importance of this fact? It means that no country, under any religious persuasion, denies the right of a spouse to be freed from an intolerable

marriage. It is only the second branch, the right to remarry *after* the first marriage has ended, that causes the difficulty. And if we confine our attention to this troublesome second branch, I am hopeful that the rightness of the change I will propose becomes more apparent.

Let us look then at the alternatives to the present law.

First, the present law could be restricted: two-branch divorces might be abolished. I venture you will agree with me the possibility is slight. I will go further and suggest that every country in the world either has divorce in substance if not in form, or else a form of polygamy. A Quebec lawyer tells me that the number of decrees of nullity granted and the existence of such bases as "error as to form" and "error as to person" indicate it is little more than a fiction to say Quebec has no divorce except through private bill in parliament. And is not a society which refuses a divorce to the spouse of the man with a regular mistress creating a form of polygamy?

Second, we could grant two-branch divorces by consent. The late W. Kent Power, Q.C., was one who took view that marriage is a contract like any other that should be dissoluble upon the agreement of the parties.¹³

Sir Jocelyn Simon has recently advocated such a law for couples without infant children—and no divorce where infants are involved.¹⁴ But should a wife who, is, in words of John Dryden

"A soil ungrateful to the tiller's care."¹⁵

be subject to coercion for consent to a divorce so that the tiller may lawfully farm elsewhere in search of the fleeting immortality of children? Should society side with Napoleon, or Josephine?¹⁶

May I state unequivocally that I believe society has a vital stake in maximizing the number of life-long happy unions among its members, and that divorce by consent seriously impedes such an objective, by its effect upon both those contemplating marriage and those already married, childless or otherwise. In the statement of his views in the 1966 *Report of the United Kingdom Royal Commission on Marriage and Divorce*, Lord Walker stated,

"I agree with those who think that to permit divorce by consent would be to destroy the concept of marriage as a life-long union."¹⁷

I respectfully agree, and I would suggest that countries like the United States, where one-quarter to one-third of marriages end in divorce, have already destroyed the concept of marriage as a life-long union, and their easy divorce laws are among the culprits.

There is a tendency among those who reject a sacramental view of marriage to go to the opposite extreme and favor easy divorce. Strong reasons in terms of human welfare can be advanced for moderate reforms.

The third and by far the most commonly advocated change is the widening of the list of "grounds" for divorce. Desertion, cruelty, insanity of the spouse for a period of years are among those most commonly mentioned. But consider the following among the more than 40 grounds which have received the approbation of legislators in various United States:

1. Unnatural behaviour.
2. Violent temper or behaviour.
3. Public defamation of the other.
4. "Indignities".
5. Husband's vagrancy.
6. Wife pregnant at time of marriage. (I trust they limit that to pregnancies by other than the groom.)
7. Joining a religious sect believing cohabitation unlawful.

8. Gross marital misbehaviour.

9. Refusal by wife to move to new residence.

(This list is taken from a book with the quaint title "The Law of Marriage and Divorce—Simplified.")¹⁸

If divorce law in Canada is to be changed, must we open this Pandora's Box of "grounds" or "marital offences"? Must we debase this vital institution by permitting the instant dissolution of one marriage and the contracting of another by all but the most lacking in imagination? I say no, and my reason is this. Some "grounds", adultery, cruelty and desertion for example, are solid reasons for a "branch one divorce", for relief from an intolerable marriage. And they are recognized as such in almost all countries and under all religious systems. Indeed, cruelty and desertion are often stronger reasons for relief from an existing marriage than adultery. Hear the words of Lord Chancellor Birkenhead in 1920, when the House of Lords passed a Divorce Reform similar to the one that finally made its way through the House of Commons some seventeen years later:

"I, my Lords, can only express my amazement that men of saintly lives, men of affairs, men whose opinions and experience we respect, should have concentrated upon adultery as the one circumstance which ought to afford relief from the marriage tie.

Adultery is a breach of the carnal obligations of marriage. Insistence upon the duties of continence and chastity is important; it is vital to society. But I have always taken the view that that aspect of marriage was exaggerated, and somewhat crudely exaggerated, in the Marriage Service. I am concerned today to make this point, by which I will stand or fall, that the moral and spiritual sides of marriage are incomparably more important than the physical side..."¹⁹

Or as Sir A. P. Herbert once said,

"Is ten minutes of adultery worse than three years of desertion or a lifetime of cruelty?"²⁰

But adultery, cruelty and desertion are already recognized for "branch one divorces", judicial separations, in most provinces. And those laws need no change. Others I have mentioned are ridiculous for any purpose whatsoever. But the important point is this: none of these grounds, good or bad, has anything to do with "branch two" of a divorce, the right to remarry. The complaint of the one spouse against the other, and their mutual complaints against each other, are relevant to the terms on which the previous marriage breaks up, or whether it breaks up.

The "grounds" affect the right of alimony, the right to custody of the children, the settlement of the matrimonial property. But once the existing marriage has been dissolved, either party is free to contract a new marriage, regardless of his rights or wrongs in the first.

What then is my proposal "for two-branch divorces"? It is simply this: that adultery as "grounds" for a "two-branch divorce" be abolished; that no new "grounds" be added, and that no person should have the right to remarry until the lapse of a reasonable length of time, say three to five years, after the breakdown of the previous marriage. (In other words, at the time of the separation, a branch-one divorce would be granted if necessary and relative "fault" of each party would settle alimony, custody and property. After the lapse of three to five years, the branch-one divorce could be widened to two-branches to permit remarriage, or a separate proceedings could be taken if one previously had been necessary.)

The second-branch would simply declare that the marriage had broken down some years previously, and the parties were now free to marry again. The relevant section of the Australian *Matrimonial Causes Act, 1959* reads as follows:

"28 (m) that the parties to the marriage have separated and thereafter have lived separately and apart for a continuous period of not less than five years immediately preceding the date of the petition, and there is no reasonable likelihood of cohabitation being resumed."

Note that the "guilty spouse" when that can be determined, would not "go free". He or she would "pay" in terms of alimony or loss of alimony, right to custody, and in the division of the matrimonial property. But the "innocent spouse", who is never completely innocent, would not be able to prevent the other's remarriage indefinitely.

Note also that "marriage breakdown" is NOT divorce by consent. It is the direct opposite of divorce by consent. Within the three to five year period, the parties could not get a divorce by consent even if adultery could be proven by the guilty party's admission or otherwise. After the three to five year period, either party could get the decree, without the consent of the other spouse. In "divorce by consent" the dissolution of the marriage is entirely in the hands of the parties and the state has no say about the matter. In "marriage breakdown" the state in effect says "no divorce until we are quite certain the marriage has permanently broken down and after the lapse of years the state permits either party to obtain the divorce, which is in reality simply a declaration that the marriage, which retrospectively can be seen to have been broken for years is now broken in law, and each party is now free to marry again. It is analogous to a nullity decree which is also declaratory and can be obtained by either spouse.

This idea that the right to remarry should be granted whenever the prior marriage had broken down for some years is not new. In addition to Australia, "Marriage Breakdown" is listed as a "grounds" for divorce in about fifteen American states, in New Zealand, and in the Scandinavian countries.²¹ It is one of the bases on which church divorces are granted in some Episcopal dioceses in the United States, where it is referred to as "the spiritual death" of the marriage.²² The 1959 Alberta Conference of the United Church of Canada advocated "marriage breakdown" as an additional *new* "grounds" for divorce.²³

But unfortunately in all these cases "marriage breakdown" is treated as just another "grounds" for divorce. It is not. The traditional "grounds" or "matrimonial offences" as they are sometimes called, such as adultery, imply "fault" on the part of one spouse for which relief is granted to the other. "Marriage breakdown" simply recognizes things as they are, that the marriage has broken down, and some of the "fault" belongs to each side. That "marriage breakdown" is not just an additional "grounds" for divorce, but an entirely different basis on which to grant "two-branch" divorces and the right to remarry is clearly indicated in the book *Law in a Changing Society* by Wolfgang Friedmann, a professor of law at Columbia University.²⁴ The authors of the essay on Family Law in *Law Reform Now*,²⁵ edited by Lord Chancellor Gardiner, makes the distinction, and so do the writers in the *Encyclopedia Britannica*²⁶ and several other encyclopedias. Lord Walker makes the case very persuasively in his opinion in the Report of the United Kingdom Royal Commission mentioned earlier.²⁷ A total of 10 of the 19 members of the Commission advocated or gave qualified approval of "marriage breakdown" as a basis for granting divorces, although 9 of those 10 wished to retain some of the traditional grounds.²⁸

What are the advantages of abolishing *all* "grounds" or "matrimonial offences" and replacing them with "marriage breakdown" as the basis for "two-branch divorces" and the right to remarry only after a lapse of some years from the time the parties separated permanently? Here are thirteen.

First the "quickie divorce" for the purpose of instant re-marriage is eliminated. No one who said, "I want out of this marriage because I have a better one to take its place," could do so, at least for a period of years longer than the matrimonial pre-planning of most people. Persons contemplating relief from an existing marriage should always be faced with the choice between "this marriage" and "no marriage" for some time. For the conduct of one's spouse, no matter how reprehensible, is reason to be relieved of that marriage, but no reason to run out and contract a new marriage the next day.

And as every marriage counsellor and divorce lawyer knows, it is the thought that one can "do better elsewhere" that is the moving force behind most divorces, not the adulterous conduct of the spouse which is the nominal complaint on which the divorce suit is based. If no other marriage could be available for some years, I believe many people could and would make their present marriage succeed.

The "quickie divorce" attracts one of the sharpest criticisms of the law and lawyers from priests, ministers, rabbis, social workers and others engaged in marriage counselling. Under our system of "instant divorce" following proof of one isolated act of adultery, the parties in an undefended action can be divorced before the counsellor has time to try to save the marriage.

Second, "divorce by consent", of which we already have a form, is eliminated. Lawyers know that the offence proven in court is seldom the real reason the plaintiff wants the divorce. It is merely the key that unlocks the door to freedom. Both parties want the divorce, so the key is turned.

In Alberta we have broadened "divorce by consent" even more. Most Alberta judges do not require corroboration of the evidence of adultery, and in most undefended cases the proof of adultery is the voluntary admission in court of the defendant husband or wife. It is the opinion of many Alberta lawyers that in the vast majority of cases, "the guilty spouse" does in fact commit adultery "for its own sake", and quite apart from any thought of a divorce action. For that reason the popular belief that most divorces are "rigged" is poppycock so far as Alberta is concerned. They don't need to be. Alberta judges deserve much credit for ameliorating an intolerable law so far as they are able to do, but the result is that on the one hand the Alberta divorce rate is more than twice the national average and divorces are often granted within a week of the filing of the statement of claim, yet on the other hand no relief is available to the hard cases, to the deserted wives, to the spouses to the alcoholic and the incurably insane. "Marriage breakdown" would grant eventual relief in all the hard cases, but the knowledge that there could be no second marriage for several years, even if both parties wanted to consent to one, would strengthen the institution by encouraging the parties to keep trying, and by deterring some of those who would otherwise take on its obligations lightly, and some of those tempted to adultery in the hope that divorce would quickly follow.

Third, eventual relief is given to those persons whose marriages have broken down but who do not engage in extra-marital relations. It is ironic that under the present law, most of the persons who break the mores of our society and commit adultery are quickly divorced, yet those who commit neither adultery nor perjury are permanently denied relief.

Fourth, the fiction of the "guilty party" is eliminated. As every marriage counsellor and divorce lawyer knows, there are no domestic situations in which the fault is all on one side. Too many plaintiffs leave divorce court under the illusion their virtue and their spouse's vice have been proven, whereas the "fault" in fact may be more or less equal.

Fifth, the right to alimony in particular and matrimonial property in general are properly litigated. If one were to sit through an average sitting of an Alberta divorce court, one would wonder at the number of women who want no alimony

from their "guilty husband", if it did not become apparent that the voluntary admission of the "guilty husband" is the only proof of adultery the woman has obtained.

Sixth, vindictive spouses are prevented from permanently preventing the remarriage of the "guilty spouse". How often does the cruelty of one spouse aid in driving the other into the arms of another man or woman? Our present law leaves to the person in some ways the least capable of judging, the permanent fate of the other

"Vengeance is mine, I will repay, says the Lord."
(Rom. 12:19 RSV)

So should it be.

Seventh, people are encouraged to work at making their marriage succeed. The wife who in the security of marriage "lets her cargo shift", and the husband whose career is first, his marriage a poor second, are not figments of the imagination of the cartoonist and the novelist. "Marriage breakdown" would give persons the security of knowing that a momentary lapse, adulterous or not, would not spell a sudden end, but that continuing inattention to marital duties could mean an ultimate break. Would this not be a good thing? Is not the strength of some common-law marriages mentioned by the social worker quoted earlier, the knowledge by both parties that the marriage must be kept in fact, in faith, and in attitude, since it is not in law?

Eighth, the present means test for divorce is eliminated. It is rare for the rich with resources for private investigators and property settlements to fail to obtain a divorce. For the poor, common-law is too often the solution.

Ninth, second ill-advised marriages by teen-agers are virtually eliminated.

Tenth, spouses are no longer encouraged to commit adultery to provide "grounds". As Lord Walker states,

"It is not, I think, doubtful that people do commit adultery. . . solely in the expectation that divorce will follow . . ."²⁹

Eleventh, the confusion and disorientation which can happen to the children of divorce when "Daddy" is too quickly replaced by "New Daddy" would be alleviated. If there is a substantial interval between the departure of "Daddy" and the appearance of "New Daddy", "New Daddy" will to some extent fill the void left in the children's life when "Daddy" departed. "New Daddy" will replace "Daddy", not displace him, as is the case under the present system of instant divorce and instant remarriage.

Twelfth, unnecessary divorce proceedings could be eliminated. Our present law actually encourages people to ask for a divorce before they may be certain that that is what they need and want, for three reasons. Firstly, "delay" in bringing the action raises a discretionary bar which can result in the divorce being refused. Secondly, the longer the delay, the more likely that the witnesses necessary to prove the matrimonial offence will become unavailable. Thirdly, if the spouse disappears, under the present law the action cannot proceed. Under "marriage breakdown" there would in effect be no defence to the claim for dissolution, and no reason to refuse to grant the divorce in the absence of the spouse who was "long gone".

Thirteenth, the present pressures on persons with religious convictions against divorce would be relieved. It is not uncommon for a person with such convictions to eventually give in to the pressures by the spouse with no such conviction and eventually "give" a divorce. In "marriage breakdown" the spouse without such convictions, or in disregard of such convictions, would take the legal proceedings, which of course would not be recognized by the spouse who

would not remarry even though legally entitled to do so. The legal position would reflect the realities of the situation.

If these are the advantages, what are the possible disadvantages?

Would it increase the overall divorce rate? Probably, but not even time could really tell. If one examines the statistics for the divorce rate in the various states of the United States and countries of the world, some of which accept the principle of "marriage breakdown" and some of which do not, it is impossible to correlate divorce rates solely with the grounds accepted in each jurisdiction.³⁰ There are too many other variables such as the mobility of the society, its age and traditions, the presence and absence of stress factors such as war and depression. But the divorce rate would more accurately reflect the number of permanently broken homes. No one pretends that countries without divorce have no broken marriages, but their number is hidden behind the anonymity of common-law unions and homes which are no more than a base for extra-marital operations. Indeed, an Italian sociologist has found that one great pocket of resistance to divorce in that country comes from men with long-established mistresses.³¹

On the other hand, at a recent Calgary sitting of the divorce court, of the 45 cases tried, in 80 per cent the parties had been separated less than three years, in 58 per cent less than *one* year, in 24 per cent less than three months, and in 11 per cent of the cases, a month or less. All these cases would be delayed for time, counselling and sober second thoughts to intervene.

Would it encourage people to marry lightly, knowing they could eventually be free to marry again, whether or not their spouse wanted them "to go free"? Possibly. But this factor could be controlled by the length of time between the marriage breakdown and the right to remarry. Would many more enter marriage lightly than the number that do now, simply because they knew that three or five years after its end, a new marriage could be contracted without the consent of one's previous spouse? I doubt it.

In the sub-culture within our society in which "common-law" is the accepted way of life, it is doubtful if the divorce law has much effect one way or the other. But it might serve the useful purpose of flushing from cover the phenomenon known to the divorce lawyer, the common-law husband who moves on so soon as his mate is free to marry him, and who camps indefinitely with the poor woman who has an insoluble prior marriage problem.

Would the new basis for the right to remarry encourage persons "waiting out the time" to engage in adultery and enter common-law unions? If the length of time involved in the wait were excessive, it undoubtedly would. Only experience could judge the right period. Perhaps three to five years is about right.

But what of those who *could not* or *would not* wait for any length of time, the kind who under the present law leave one marriage to enter another in a matter of months? Well, is the institution of marriage well served by putting masks of respectability on unions that one United Church minister has called "serial polygamy"? Which debases the institution of marriage more, common-law unions, or the games of "musical bedrooms" played under the guise of marriage in Hollywood and other places not so distant?

An Alberta Appellate Division judge one day roundly condemned a young lawyer for calling an illicit union a "common-law marriage". Common-law marriage as we know was once a respectable form of marriage under Scots law, not the euphemism it is today. Under "marriage breakdown" all persons could eventually remarry lawfully, and the persons who want to run from bed to bed, who now get a quickie divorce to make it look respectable, would either have to wait or openly break the positive law as well as the moral law. Then we could call a spade a spade, and a shack-up a shack-up.

Would the new basis be workable? How could you measure the three or five years, what with short-lived reconciliations and near-conciliations? The answer is that the same problems arise with respect to divorces based on "desertion", and 40% of all divorces in the United States are based on desertion.³² The New Zealand Legislation has very sensible provisions for dealing with these mechanics which time does not permit us to discuss here.³³ They are problems which can be overcome.

If there is to be divorce reform along these lines, who should lead?

The first group that comes to mind is the Bar Association. But the Bar Association, unlike the Medical Association which is organized to achieve specific medical and political purposes, is more a collection of individuals than an organization of like-minded persons. On balance I think it is a good thing for society that the Bar has this diversity of opinion within it that prevents its collective action on most major issues, but it does mean that we must look elsewhere for leadership in this area. In any event, it is the history of the law to tinker with existing laws and seldom throw them out holus-bolus and start anew with a fresh concept. That is the reason most calls for "divorce reform" from Bar Associations and individual lawyers speak in terms of adding new grounds. The Nova Scotia Bar in December, 1965, are among the latest to do so. Their list contains seven besides adultery including "separation for three years" as just another grounds".³⁴ Mr. Eldon Woolliams, M.P. (Bow River) once advocated adding six grounds,³⁵ only one of which, "wilful refusal to consummate the marriage" corresponds exactly with the grounds put forward in Nova Scotia. (I don't suppose that one will help too many people.)

The next group that come to mind is The Press. As long ago as July 26, 1945, and again on January 28, 1953, the *Calgary Herald* editorialized approvingly concerning the idea of "marriage breakdown". A nation-wide press campaign could be a weighty factor.

Third, the other provincial legislatures could follow Manitoba's lead (which incidentally was on a non-party basis) and pass resolutions requesting the Dominion parliament to act.

Fourth, Canada needs a Parliamentary Committee or a Royal Commission to enquire into the whole of our marriage and divorce law. The basis of granting divorce is just one problem that needs attention. The lack of judicial machinery to protect the children of divorce, to make all-inclusive settlements of the property acquired during the marriage, to provide adequately for maintenance enforcement, and the need for a common Canadian domicile are among others.³⁶ (Since this article was written the appointment of such a Parliamentary Committee has been announced—Ed.)

But the institution most suited to give leadership is The Church, or more correctly in the context, The Churches. The winds of change are blowing, and it behooves The Churches to see that they blow good, not ill. And I submit that my proposal should be more acceptable to all churches than the present law or the other proposals to open the Pandora's Box of additional "grounds". In the "Brief to the Bishops" presented by Canadian Catholic laymen to their bishops just prior to the recent ecumenical council, a prominent Toronto Catholic lawyer, discussing the Church's attitudes to divorce, expressed the view that the Church should not impose its views on divorce on a pluralistic society.³⁷

"Marriage breakdown" accepts the canon law principle that the misconduct of the spouse is never a reason for a permit to remarry but only for relief from the existing marriage. True, the right to remarry is to be given after the lapse of a significant length of time, but surely that is more acceptable to the churches in a pluralistic society than on the one hand the present law with its provision for quicky divorce, quicky remarriage, and divorce by consent, or on the other hand the Pandora's Box proposals for listing additional grounds.

For the churches which do recognize the right to remarry under some circumstances, I sincerely suggest that "marriage breakdown" as the new basis for divorce is a means of granting eventual relief to all those whose marriages have failed, and at the same time strengthen the institution of marriage, not weaken it.

But most important of all, the Church must give positive leadership in this area. The winds of change that are blowing cannot be permitted to wear away one of our most important institutions. In the battles that lie ahead, The Church must be a field-post for reformers, not a citadel of reactionaries.

EPILOGUE

Since the foregoing was originally given as a talk to a Calgary speakers' club, I have had the benefit of comments from many persons and in particular members of the Bar and the ministry. There have been two very frequent comments. First, the three or five year fixed period is too artificial and rigid to apply in all cases. Second, three years rather than five is a sufficient time from which to create a rebuttable presumption that the marriage has permanently broken down.

Time Magazine of February 11, 1966, page 22, advocates "marriage breakdown" with proof to be given by "skilled clinicians" with no particular period of separation required, but unfortunately no such recognized species as "skilled clinician" exists.

While the matrimonial offence proven in court as the "grounds" for a divorce is seldom the chief cause of the breakdown of a marriage and should therefore by itself not be the basis for granting a divorce, nevertheless it has some probative value as tending to show that a marriage is broken down.

The following draft section is intended to enable the court to grant divorces within the three year period, and still eliminate the present abuses that arise in Canada from divorces being granted upon proof of a single isolated act of adultery, and in the United States from divorces being granted upon proof of a single isolated act of cruelty.

Draft Section for Matrimonial Causes Act

1. (1) "Extreme cruelty" means a course of conduct towards the petitioner, or the petitioner and one or more children of the petitioner or of the defendant, of such a character as to endanger life, limb or health, bodily or mental, or to create a reasonable apprehension thereof.

(2) A court having jurisdiction to grant a divorce shall, upon a petition by one of the parties to the marriage, decree dissolution whenever the marriage has permanently broken down.

(3) Permanent breakdown of the marriage shall be proven by evidence that either:

(a) the petitioner and defendant have separated and thereafter have live separately and apart for a continuous period (except for a period of cohabitation of not more than two months that has reconciliation as a prime purpose) of not less than three years immediately preceding the date of the granting of the decree, and there are no reasonable grounds for believing that there will be a reconciliation, or

(b)(i) the petitioner and the defendant have separated and thereafter have lived separately and apart for a continuous period of not less than one year immediately preceding the date of the granting of the decree, and there are no reasonable grounds for believing that there will be a reconciliation, and

(ii) the defendant has committed adultery or has, during a period of not less than one year, habitually been guilty of extreme cruelty.³⁸

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33. Canadian Bar Review, September, 1965.
34. Vancouver Sun, December 6, 1965.
35. Calgary Herald, July 29, 1953.
36. An analysis of the United States census indicates 90% of all divorced people stay married the second time around. Perhaps divorce should be granted more easily to persons who have not been divorced before, or are we then advocating a form of trial marriage? Wattenberg & Scammon, *This U.S.A.* Doubleday & Co. Inc., New York, 1966. Reported in *Look Magazine*, February 8, 1966.
37. O'Driscoll in Brief to the Bishops. Longmans Canada Limited, Don Mills, Ontario, 1965.
38. Section 28(d) of the Australian Matrimonial Causes Act 1959 reads as follows: "28(d) that, since the marriage, the other party to the marriage has, during a period of not less than one year, habitually been guilty of cruelty to the petitioner." The expression "extreme cruelty" is used to distinguish the degree of cruelty from the wide definition of cruelty for purposes of judicial separation used in the Alberta Domestic Relations Act R.S.A. 1955, ch. 89, sec. 7, and the Saskatchewan Queen's Bench Act 1960, ch. 35, sec. 25(3). It is submitted that the one year period of cruelty is necessary to deter imaginative petitioners in uncontested actions before "liberal" judges from abusing "cruelty" as is commonly done in the United States. See also Power, *supra*, p. 475, for definition of cruelty.

APPENDIX "49"

THE RIGHT OF DIVORCE

by

DONALD J. CANTOR

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A desire to reform procedures that result in harmful child-custody settlements and encourage widespread perjury and deceit inspired this article by Mr. Cantor, a Hartford attorney who has contributed articles on narcotics and homosexuality to legal publications. The cases cited are composites and do not represent the experiences of actual clients.

Over 800,000 Americans have their marriages dissolved each year. For every four marriages made per year there is one broken. When one realizes that these 400,000 divorces per year involve not only the parties themselves, but witnesses, children, two sets of family, and others incidentally involved, it is clear that our divorce procedures affect to varying degrees a very large segment of our population.

Yet in few areas of American law does there exist a body of precepts less logical, less reflective of actual mores, and less respected and observed than our divorce laws. This is partially because divorce involves the broad question of human sexuality, and we have not learned how to discuss sexuality, let alone deal with it intelligently. And it also can be explained by the fact that divorce and marriage are matters of concern to religious pressure groups. The recent debate in the New York State legislature has illustrated, for example, the opposition of the Roman Catholic Church to liberalization of divorce laws, even in the state with the least liberal legislation.

To grasp the farcical nature of modern divorce, one must understand how marriage is regarded by the law. Marriage is not only a legal contract between spouses, but also the mutual adoption by both parties of a status which is defined, not by the partners, but by the state, because of the importance of marriage to society. Therefore persons may divorce only for certain prescribed reasons which the legislatures in their wisdom consider adequate. These reasons are called "grounds." Though many different grounds have been enacted in our fifty states, only one of these, adultery, is universally applicable. The others most commonly found are desertion (forty-nine states), cruelty, either physical or mental (forty-four states), conviction of crime or imprisonment (forty-three states), alcoholism (forty-three states), impotence (thirty-two states), nonsupport (twenty-eight states), and insanity (twenty-eight states). Curiously, less than one third of our states allow divorces on all of these grounds.

The grounds have one characteristic in common. They provide a basis for establishing that a spouse has transgressed against traditional marital ethics, but they bear no necessary relation to the success or failure of a marriage. Adultery, for instance, may exist without breaking a marriage apart. There is so much adultery in our society that it would be naïve to suppose spouses cannot live with it. The case of Mrs. T is illustrative in this regard. Her husband, in his early fifties, had a position with a large corporation which required him to travel

extensively. She knew he had been having affairs for at least ten years during these jaunts, but she had no thought of divorce until her husband actually began housekeeping with a paramour and lived more with her than with his family. Only after she felt she had ceased to be the primary woman in her husband's life did she seek divorce. The simple truth is that many marriages are maintained successfully with knowledge of a partner's adultery, and even with mutual knowledge of mutual adultery.

Despite our romantic propaganda about the nature of true love and marriages made in heaven, no one can really prescribe the elements of a good marriage in a formula all will accept. Some marry for money, some for position, and some to have babies and to stay out of uniform. A few choose marriage as a means of masking homosexual proclivity and are often happiest when they have very little to do with their legal spouses. To some, desertion perfects a marriage; to others, impotence is nirvana. Still others find that an afflicted spouse satisfies a need to be protective.

The point is that the assertion of grounds for divorce is simply a manifestation of incompatibility between the partners. The sources of the incompatibility that lead to adultery, cruelty, or any of the other legally sanctioned grounds are varied and numerous. It may be a loss of respect, unclean personal habits, a great intellectual gulf, sexual maladjustment, an unbridgeable gap of interest. Not infrequently the difficulty may be at least partially ascribable to financial disagreements and in-laws. Many persons marry before their essential attitudes and values are formed, and when they eventually do mature, they find their standards unshared by their spouses. (The median age for brides is 19.9; for grooms 22.9 in first marriages.) Inevitably they are then attracted by more suitable personalities.

The simple but apparently unappreciated fact that marriages succeed or fail on the question of compatibility should make it clear that incompatibility is the only logical legal ground for divorce. Why should adulterous, cruel, or other types of presently required acts be proved in court in order to establish sufficient legal incompatibility? The fact that a spouse may not have committed adultery, or been cruel to his mate, does not mean that his marriage is viable and should not be dissolved. The only real judge of that is the individual, who knows whether or not he can bear living with his spouse any longer. If he says he cannot, that in itself is better proof that the marriage has outlived its usefulness than any "evidence"—genuine or manufactured—such as adultery or cruel behavior. For no list of virtues can make A love or even like B, if B, for whatever reason, irritates A. And if the law forces A to stay married to B, certainly their marriage is a marriage only by legal definition. None of the usual amenities of marriage are present.

In short, it only takes one person's dislike to break up a marriage. If one spouse wishes to divorce another, how can the marriage possibly be compatible? How can it be maintained in rebuttal that the claimant is wrong, that a person really enjoys a marriage he or she is trying to dissolve?

To state the question is to illustrate the answer. And the answer leads to the further question, why should it be necessary to prove a foregone conclusion in a court of law? The trial procedure over the question of the divorce itself is superfluous. This does not mean that all legal process can be eliminated in a divorce case. Naturally, hearings over custody, alimony, and so forth would still be necessary. But the divorce trial itself serves no purpose as a means of determining whether or not the spouse who initiates the divorce proceeding has a substantial claim, because no one can judge the substantial quality of another person's subjective reactions.

The implications of the above reasoning point quite firmly to four proposals that would overhaul our outmoded procedures and put divorce on a sensible legal basis:

1. Divorce should be made a right to be granted automatically after a fixed period of time by a court, upon the filing of a notice of intention to procure a divorce by a person who wishes to obtain one. No explanation for why the divorce is desired should be required by this notice.

2. Allied matters concerning the custody and support of children should be determined, as is now done, by a hearing, the welfare of the children being the prime consideration.

3. Questions of alimony and the division of estate should be determined, as now, by a hearing. Here acts during the marriage which were contrary to the marriage contract could be used as evidence in determining the amount of any award.

4. Allied questions such as custody and alimony should be decided after the decree of divorce has been granted.

Certain objections to this change of procedure can be immediately anticipated. First, it would be claimed that marriage should not be easily dissolved because of resulting social instability. To disagree with this point of view is not to question the proposition that marriage is a basic social institution or to deny that divorce causes instability. It is to argue, however, that forcing two antagonistic people to stay together, if even only in legal terms, produces more instability than to allow them freedom from each other. Few human relationships are more corrosive to the persons directly and indirectly affected than a marriage of acrimonious partners. The social order can derive no benefit from the perpetuation of such relationships.

Second, what of the rights of those partners who are divorced against their wills? Should they not be able to seek to preserve their marriage? The answer to these questions must be simply that no one should have the right to deny another person the opportunity either to marry or to divorce. The party who wishes to maintain a marriage that his partner wants to dissolve is acting either from spite, self-interest, or delusion. Even if the legal form is preserved, the spouse cannot force his or her partner to stay under the same roof. In fact, the legally successful spouse gains little more in victory than the perpetuation of his or her own unhappiness; certainly the chance to hurt oneself and another person does not qualify as a right worthy of legal protection.

But, it would be argued, such an easy method of divorce would increase the divorce rate, encourage frivolous marriage, and thus should be opposed.

This is an objection with a large degree of surface plausibility, but it cannot withstand careful scrutiny. It grossly misassesses the mood in which the great majority of people approach divorce. What is truly amazing about divorce is how much people will undergo before they will seek it. The victimized spouse often exhibits a most surprising capacity for self-delusion in trying to convince himself that things will change for the better. Mr. F did not consult me until eighteen months after his wife, he thought, tried to burn him to death; Mrs. M did not consider a divorce when her husband, during her ninth month of pregnancy, locked her in a closet and left their apartment with no one else home. Only when he deserted her did she seek to divorce him. Mr. D for years lived with the hope of saving his marriage despite constant fights and his wife's refusal to sleep with him, and did so even after finding out that she had had continuous extramarital relations during this period. Only when he discovered that these affairs had involved eight other men, including the milkman and the laundryman, did he seek divorce. These are but a few examples. I have never

seen, nor have I ever heard of, a spouse who seriously sought and eventually obtained a divorce without first enduring a lengthy period of tribulation.

This general hesitancy to seek divorce is not hard to understand. Some social stigma still attaches to it, though admittedly not much. More important, it is the disruption of one's life, both emotionally and physically. It means living alone; it means dating again with thicker waist or balding head; it means separation from children for at least one parent; it means large financial expense; it means many forms of great and small inconvenience. It is not a very attractive prospect and it is little wonder that people do not generally rush into it.

Of course, some people would, and do, take marriage frivolously. But these people are not deterred from doing so by our present laws. For now, if they have money, they simply establish residence in a state like Nevada, where it is easy to get a divorce, or go to Mexico and obtain quick divorces. If the divorce is not contested, they generally encounter little difficulty in their own states, though they will wait longer. The only people who are really inhibited at all by our present divorce laws are those who lack funds and those whose spouses will not agree to a divorce; for if agreement exists, divorce is presently always available if it can be financed. Sometimes this may require staged raids for "catching" a husband with a paramour, or a little perjury, but where the need is great the means are usually found.

Finally, frivolous marriages entered into with the thought of easy divorce can be deterred at least as well as present statutes deter them by not making divorce effective for a period of time after the decree is entered, or by not entering a decree until a fixed period has elapsed.

The primary objection to granting divorce as a right would be voiced by those concerned with the effects of divorce upon children. Undoubtedly, the worst effects of divorces are visited upon the innocent offspring, not only because they are deprived of growing up under the same roof with both natural parents, but also because too often the parents fight over and through their children. Any alteration in our divorce laws which would complicate or burden the lives of the children would properly stand condemned for that reason alone. But children have no stake worth protecting in a bad marriage. Nothing is worse for children than the atmosphere of a home without love, for such a home invariably is filled with rancor and tension.

Allowing divorce as a right would benefit the children in a number of important ways. By eliminating the need for a trial in order to get a divorce, the terrible spectacle of a child being called as a witness against a parent would be eliminated in most cases. Also, with no trail necessary, no ground for divorce would have to be revealed, and children could thus be spared in many instances the knowledge they now acquire of the misdeeds of one or both parents.

But more important, the questions of support payments, custody, and visitation rights which directly relate to children can be better dealt with if divorce is available as a right. Under our present procedures approximately 90 percent of divorce decrees are granted in uncontested cases, and these decrees usually are merely ratifications of agreements between the spouses. But these agreements are the product of bargaining, and it is the rule rather than the exception that the spouse who most wants the divorce will somewhere have to make concessions. These concessions, unfortunately, are usually made with regard to those matters which affect the children and which should be determined solely on the basis of what is best for the welfare of the children.

Sometimes, where a spouse is desperate enough, custody of the children will be surrendered to the other spouse as the price of the divorce. The case of Mrs. W illustrates this. Mrs. W was extremely intelligent and capable, not only as a wife and mother but also as a professional artist. Her earning potential and her

intellectual capacities far outstripped her husbands's. She married young, and as the years elapsed, her husband, once a hero, came into true focus as a man of limited abilities who had chosen the easy path into a family business he detested but lacked the courage to leave. The marriage deteriorated but lasted until she fell genuinely in love with an engineer who was her intellectual peer. Her husband refused to allow her to divorce him unless she agreed to give him custody of their child. She could not have divorced him if he had contested it, and consequently she surrendered custody. She did this partly because she felt the worst thing for the child would be to grow up in such an obviously unhappy atmosphere and partly because she would not pass up the chance to marry the man she loved. The morality of her behavior and decision is irrelevant here; what is relevant is that the child is being reared by a combination of an inept, neurotic father and an unloving housekeeper instead of by its clearly more competent and loving mother. Without question, the court would have granted custody to the mother had custody been heard on its merits.

These extorted concessions also arise in the context of property settlements and alimony and support payments. Mr. X, for example, agreed to give Mrs. X the following to purchase his freedom: their \$30,000 house; one-half interest in their \$80,000 investment properties; his \$100,000 life insurance policy; a \$25,000 lump sum alimony payment; his automobile; weekly support payments for each minor child of \$35.00. Mr. X also agreed to remain solely responsible for paying the mortgages on the real estate he conveyed, to maintain the hospitalization and medical insurance for the benefit of his children, to pay all college expenses the children might incur, and sell without unreasonable delay his valuable stamp collection to apply toward his wife's attorney's fee. The net result was to ensure his future impoverishment and her comfort to an utterly inequitable extent. But since the parties "agreed" to these terms, they were accepted by the court and this became the judgment of the court. Making divorce a matter of right would eliminate these pressures and blackmail tactics and raise the probability that decisions concerning custody, support, and so forth would be made free of extraneous considerations.

It must be conceded, however, that the elimination of the divorce trial will not abolish all of the objectionable features which now accompany such trials. This is unfortunately true because hearings regarding child custody, support payments, division of assets, and alimony will still provide opportunities for the parties to vilify each other, punish their children, and embarrass third parties. But the elimination of the divorce trial would sharply reduce such bitter encounters since they would then occur only when hearings on these ancillary matters were held. No longer would a spouse's fault have to be established in each case to satisfy the requirements of a ground for divorce. A party's misconduct would become relevant only, for example, as it might bear on that party's capacity to be a suitable parent, and not for the purpose of establishing misconduct *per se*. In such a context, misconduct would be but one factor pertaining to the determination of the best interest of the children. In determining who should have custody of the children, a court will seldom give conclusive weight to adultery, unless it is so flagrant or censurable that incompetence may be inferred.

Since at least 90 percent of all divorces in the United States are uncontested, it seems reasonable to suppose that the withdrawal of the divorce itself from the area of contention would lead to agreement in an even larger percentage of cases.

With elimination of the divorce trial it would no longer always be necessary to expend large sums for attorney's fees, and, so often, fees for private investigators to gather evidence of spousal misconduct. No longer would persons always

be required to endure embarrassment and occasionally the trauma of testifying publicly about their marriage and its failure, and, in effect their failure.

Moreover, if divorce were granted as a right, the law would be freed from the farce of uncontested divorce "trials" where the defendants don't appear, the testimony falls into patterns, the outcome is known before the show begins, and court personnel, however conscientious, have to struggle to stay awake.

The injury done to the law by this silly yet cruel charade is no less great because impossible to measure, and is all the more injurious because it corrupts not only the law but all the participants. Collusion and perjury are presumed and condoned.

Two ironic inconsistencies pervade present divorce procedure. The first is that our law attempts to regulate divorce, yet imposes almost no controls over marriage. If marriage is such a crucial concern of the state, should not a law regulate not only its dissolution but its birth? The answer, of course, is that we would not stand for such regulation. It would be an intolerable invasion of personal freedom. The second inconsistency is that while men debate whether grounds for divorce should be liberalized, whether parties should be allowed to plan their divorce ahead of time under grounds such as the two-year voluntary separation recently passed by the New York legislature, divorce has already largely become a matter of planning and collusion where uncontested. Practically every uncontested divorce is already a joint venture of the parties. So the real question is, why maintain the divorce trial procedure when it is clearly a sham not a trial, when its only real use is by spouses who fight legal dissolution of broken marriages for their own selfish purposes, and when the only other persons it affects are those too poor to gain access to easy jurisdictions?

The divorce trial is not a socially useful instrument but a repressive obstacle course inflicted as a punishment. In a political entity founded upon belief in the worth and judgment of man this is intolerable.

84 Per Cent of Poor Who Get Legal Aid in Wisconsin File Divorce Suits

Madison, Wis. Early experience with a Federal experiment in legal aid shows that poor people want divorces far more than protection from loansharks and landlords

Under Judicare, a new program that allows poor people in 26 Northern Wisconsin counties to litigate civil cases at the Government's expense, 84 per cent of the cases so far have involved divorce actions

The one-year experiment [Judicare] is financed by a \$240,000 grant from the Office of Economic Opportunity, under a program initiated last year by the poverty agency to give the poor legal protection against unfair housing, welfare, credit and consumer practices.

But the first six weeks of Judicare have brought instead a rush to the divorce courts, where the poor are suing each other at a furious rate, while largely ignoring the legal issues that moved the poverty agency to enter the legal aid field.

According to statistics released today by the Judicare office here, the first 86 cases include 72 divorce matters—63 divorce suits and nine custody and support actions growing out of earlier divorces. Of the 63 suits, 58 were brought by wives with Judicare cards and involved husbands who needed representation as defendants...

According to Joseph F. Preluznik, the Judicare director, many people who have wanted divorces for years, but who could not afford them, are now filing suits.

He said in an interview today that in Britain, where a Judicare-type system was instituted in 1950, 80 per cent of the Government-subsidized cases in the first year were suits for divorce.

—From the *New York Times*, September 2, 1966.

APPENDIX "50"

DIVORCE REFORM IN NEW ZEALAND

by

B. D. INGLIS

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Divorce Reform in New Zealand.—One of the fields in which the New Zealand legislature has always been conspicuously progressive is that of family law. New Zealand was the first Commonwealth country to introduce adoption legislation; it pioneered testator's family maintenance, and it has always been in the forefront of divorce reform. In these circumstances the final passing of the Matrimonial Proceedings Act by the New Zealand legislature in 1963¹ was awaited both in New Zealand and abroad with a great deal of interest, and although it is too early yet accurately to assess its impact on New Zealand practice (it came into force on January 1st 1965), it is nevertheless a useful exercise to contemplate some of the changes it has brought about.

It is first necessary to take some preliminary matters into account. On paper New Zealand has about the most liberal grounds for divorce in the world. The types of situation in which a divorce can be obtained number something in excess of twenty: there is something for everyone. But this is not as a result of the new Act. Although the previous grounds for divorce have, in some cases, been subjected to a few changes in ways which are not sufficiently important to mention, the only new ground is one which is hardly likely to be unduly popular: the artificial insemination of the wife without the husband's consent.²

Furthermore, in spite of the numerous grounds for divorce, in practice only four are ever frequently made use of. The first is that a separation agreement between the parties has been in full force and effect for three years. The second is that a separation order has been in full force and effect for a similar period. Third and fourth on the list are adultery, and desertion for three years. A fifth ground which is now being used with increasing frequency is that the parties have been living separate for seven years, and are unlikely to be reconciled.

These practical considerations must set the atmosphere for any discussion of New Zealand's divorce law. Other grounds, such as the respondent's habitual inebriety and cruelty for three years or more, or the respondent's conviction of murder since the solemnization of the marriage; are so rarely called into operation that, by comparison with the others mentioned, they can be classed as positively esoteric. To a certain extent, therefore, the multiplicity of grounds for divorce available in New Zealand represent what is perhaps a somewhat fashionable present trend in New Zealand legislation: a tendency to legislate for every conceivable type of hard case which the imagination can devise.

To a certain extent also what has been said about the grounds for divorce characterises the new Act as a whole. Many who were familiar with the former Act may have considered that there was much that could have been tidied up, or dropped altogether. In fact, surveying the new Act in general terms, little has been dropped, there have been few real attempts to tidy up some of the more

¹ N.Z.S., 1963, No. 71.

² *Ibid.*, s. 21(1)(b). This resolves the conflict between *Orford v. Orford* (1921), 49 O.L.R. 15 and *MacLennan v. MacLennan*, 1958 S.C. 105, and follows the recommendation of the Royal Commission on Marriage and Divorce on this point: Cmd. 9678, para. 90 (1956).

disgracefully confused aspects of the previous legislation—the grounds for divorce being a leading example³—but a number of important additions have been made. It is these which we must now consider.

For the first time in New Zealand provision for conciliation has been introduced into divorce proceedings.⁴ In this innovation, New Zealand has followed Australia.⁵ The court is expressly directed to consider, throughout a divorce hearing, the possibility of the parties' reconciliation, and for this purpose the proceedings may from time to time be adjourned and a conciliator nominated.

This is of course a most useful innovation, although a similar provision has applied to summary proceedings only for some years. As far as divorce is concerned, however, it remains to be seen how frequently the new provision will be invoked in practice. It would be a pity indeed if a valuable provision of this sort were relegated to the exceptional class of cases, but bearing in mind the popular grounds for divorce in New Zealand this is what could well happen. Nevertheless it is a step in the right direction, and at least provides a suitable climate for broadening the conciliation procedure at a later stage.

As far as jurisdiction in divorce is concerned, there has been little practical change. New Zealand legislation has always shown a good deal of concern for the wife who has been deserted, or otherwise left by her husband, in New Zealand, with a ground for divorce but obvious difficulties over the question of domicile. Provisions to meet this type of case have now been greatly simplified: it is provided that for the purposes of the new Act, first that a married woman's domicile is to be determined as if she were unmarried,⁶ and secondly that a divorce petition may be founded upon the domicile of *either* the husband or the wife in New Zealand.⁷

Adultery has now taken on a new look: the third party, of whichever sex he or she may be, has now become a co-respondent⁸ and liable for damages.⁹ This represents a recognition of the equality of the sexes in perhaps a rather unexpected way.

A somewhat more important reform, however, is the introduction of a trial period of cohabitation for the purpose of reconciliation which will not provide a bar to a subsequent petition for divorce. The period is restricted to "one occasion for a continuous period of not more than two months".¹⁰ This applies more dramatically to cases of desertion,¹¹ but similar relaxation has taken place in the rules as to condonation.¹² This is the sort of reform which is very greatly to be welcomed, although, of course, there are bound to be factual difficulties in almost every case where the issue is disputed.

The provisions as to maintenance¹³ remain reasonably orthodox, apart from the introduction of maintenance for a husband. In the emotional climate of New Zealand this is a dramatic change indeed (although a husband has for some years past been able to claim maintenance in summary proceedings), but the

³ It is only too obvious that the list of grounds has been added to from time to time with little or no attempt at coherence or consistency. Adultery, for example, has always been a ground; cruelty (which can often amount to a far worse matrimonial offence) has never been a ground in itself, although there is the extraordinary provision that it can constitute a ground if coupled with habitual inebriety for a period of three years or more. For further discussion see Inglis, *Family Law* (1960), p. 118 *et seq.*, and Supplement (1964), pp. 83-84.

⁴ Matrimonial Proceedings Act, 1963, *supra*, footnote 1, s. 4.

⁵ Matrimonial Causes Act, 1959, No. 104, of 1959, s. 14.

⁶ *Supra*, footnote 1, s. 3.

⁷ *Ibid.*, s. 20.

⁸ *Ibid.*, s. 22.

⁹ *Ibid.*, s. 36.

¹⁰ *Ibid.*, ss. 26, 27, 29(4), (5).

¹¹ *Ibid.*, s. 26.

¹² *Ibid.*, s. 29(4), (5).

¹³ *Ibid.*, Part VI.

number of husbands who are likely to qualify will hardly be large in view of the fact that it is a prerequisite that the husband should by his own means or labour be unable to support himself. The attractive possibility of an indigent, though healthy, husband obtaining support from his millionairess wife is therefore, in New Zealand, non-existent. One consolation is that there are not many millionairess wives in New Zealand.

As far as custody of children is concerned, the New Zealand legislature has followed England¹⁴ and Australia¹⁵ in requiring, as a prerequisite to the granting of a decree absolute, that the court should be satisfied that proper arrangements have been made for the custody and welfare of all "children of the marriage".¹⁶ The last phrase has been defined extremely widely¹⁷ to include "any child of the husband and wife...[and] any other child (whether or not a child of the husband or of the wife) who was a member of the family of the husband and the wife at the time when they ceased to live together or at the time immediately preceding the institution of proceedings, whichever first occurred; and, for the purposes of this definition, the parties to a purported marriage that is void shall be deemed to be husband and wife".

This new provision relating to children does not, however, mark a very great change in New Zealand practice. Over the last few years the courts had been showing a growing concern that proper arrangements should be made for the children of a marriage in respect of which a decree nisi had been made and had been very hesitant about granting decrees absolute in the absence of some assurance that the children's interests were being fully protected. But in any event the new provision now makes it clear that the parties cannot make any arrangements about their children simply to suit themselves, and it is quite proper that the court should now have express statutory power to delay a decree absolute while the parties sort out the question of the children's custody and welfare on a responsible basis.

A completely new feature of the Act concerns matrimonial property, and incorporates into divorce jurisdiction power to dispose of and deal with any assets the parties may have over which there is any dispute.¹⁸ These provisions apply also to cases of nullity, and other proceedings under the Act where matrimonial relief is sought.

This particular part of the new Act follows broadly the familiar pattern of matrimonial property legislation; but in regard to the "matrimonial home" two significant departures have been made. In the first place, it is not necessary for either spouse to show that he or she has a legal or equitable interest in the property. Secondly, what is required to be taken into account is whether a "substantial contribution" has been made to the matrimonial home, "whether in the form of money payments, or services, or prudent management, or otherwise howsoever".¹⁹

There are two things to be said about these provisions. For one thing they enable the court, for the first time in New Zealand in the one set of proceedings, to dispose of questions of property. This is, of course, of great practical benefit. The second point is that they enable the court to deal with property questions quite apart from any question of title, and the court is no longer tied to any effort to assess proportional contributions in an exact way.²⁰ It needs to be

¹⁴ Matrimonial Proceedings (Children) Act, 1958, 6 & 7 Eliz. 2, c. 40.

¹⁵ Matrimonial Causes Act, 1959, *supra*, footnote 5.

¹⁶ Matrimonial Proceedings Act, 1963, *supra*, footnote 1, s. 49 *et seq.*

¹⁷ *Ibid.*, s.2.

¹⁸ *Ibid.*, Part VIII.

¹⁹ *Ibid.*, ss. 58(1). 59(1). See also the Matrimonial Property Act, 1963, N.Z.S., 1963, No. 72.

²⁰ In this respect New Zealand has deviated somewhat from the English courts in their approach to the problem: see Inglis, *op. cit.*, footnote 3, pp. 532-551.

added that whether an order is made under this part of the Act does not depend on the success of the petition for divorce or other remedy.²¹

The earlier Act, as amended,²² contained quite extensive provisions regulating the recognition of overseas divorce and nullity decrees. There have been some changes in the new Act,²³ and an overseas divorce decree will be recognized, apart from any common law rules, which the Act does not exclude, if:

(a) One or both of the parties were domiciled in the foreign country at the time the decree was made. (This is domicile in the New Zealand sense, and the effect of this provision is therefore to enable recognition of a divorce obtained in a country where the wife would have been domiciled had she been a *feme sole*.²⁴).

(b) The court granting the decree has exercised jurisdiction on the basis of residence, if in fact the party concerned had been resident in that country for a continuous period of not less than two years at the time of granting the decree, or on the basis that one or both of the parties are citizens or nationals of that country, or on the basis that the wife was deserted or legally separated from her husband, and that the husband was immediately before the desertion or at the time of the separation domiciled in that country.

(c) The decree is recognized as valid in the courts of a country in which at least one of the parties to the marriage is domiciled (in the New Zealand sense).

A nullity decree will be recognized on similar grounds, with the additional alternative ground that the decree was made on any ground existing at the time of the marriage, on the basis of the celebration of the marriage in the foreign country.

In 1953 the common law as to nullity of marriage was replaced in New Zealand by statutory provisions enacted as an amendment to the earlier Act.²⁵ These provisions were, at least from the point of view of conflict of laws, sadly defective, the more so as they purported to exclude the common law. The provisions which now appear in the new Act²⁶ are a marked improvement in this respect, but there have been some additional reforms which should be noted.

First, a child of a void marriage is now regarded "for all the purposes of the law of New Zealand" as legitimate from birth, subject to the qualification that, at the time of his conception or at the time of his parents' marriage (whichever was later) his parents must not have known that the marriage was void.²⁷ Although this seems to lay a rather harsh disability on a child who can himself hardly be blamed for his parents' knowledge of the defects in their marriage, the provision goes further than some of the corresponding legislation elsewhere.

Jurisdiction in nullity, in relation to all cases of void marriages, has been exclusively set out. It depends upon either the domicile in New Zealand of the petitioner or respondent at the time of filing the petition, or the fact of the solemnization of the marriage in New Zealand.²⁸ The grounds upon which a void marriage can be nullified have been, as before, set out exhaustively; but it is made clear that these grounds apply only to "marriages governed by New Zealand law".²⁹ This revives the common law considerations in regard to

²¹ *Supra*, footnote 1, s. 77.

²² Divorce and Matrimonial Causes Act, 1928, N.Z.S., 1928, No. 16, s. 12A.

²³ *Supra*, footnote 1, s. 82.

²⁴ *Ibid.*, s. 3.

²⁵ Divorce and Matrimonial Causes Act, 1928, *supra*, footnote 22, s. 10B.

²⁶ *Supra*, footnote 1, ss. 6-8, 18.

²⁷ *Ibid.*, s. 8.

²⁸ *Ibid.*, s. 6.

²⁹ *Ibid.*, s. 7.

marriages which were not connected, either as to form or as to capacity, with New Zealand.

As far as voidable marriages are concerned, it was for some reason thought desirable to describe the remedy in regard to these as a "decree of dissolution of voidable marriage".³⁰ Jurisdiction depends solely on the domicile of the petitioner or the respondent in New Zealand, and the grounds are exhaustively set out, the common law being entirely excluded. The four grounds (with one exception) are unchanged: they are (1) incapacity to consummate or wilful refusal to consummate; (2) the mental defectiveness of one of the parties at the time of the marriage, even though that party was capable of consenting to the marriage; (3) that the respondent was, at the time of the marriage, suffering from venereal disease in a communicable form; and (4) that the respondent was, at the time of the marriage, pregnant by some man other than the petitioner. The change which has taken place is an addition to the last of these grounds: that some woman other than the petitioner was, at the time of the marriage, pregnant by the respondent. This is perhaps one of the more extravagant ways by which the equality of the sexes has been increased by the new Act, and it was inserted, apparently, for no better reason than to remove what might have been thought to be an unjust distinction between male and female petitioners. There are, of course, real grounds for the distinction, and it is hoped that no other country will be naive enough to copy this stupid provision.

A "decree of dissolution of voidable marriage" on any ground except non-consummation is available only (a) when the petitioner was at the time of the marriage ignorant of the relevant facts, and (b) if intercourse has not taken place with the petitioner's consent since the discovery of the existence of grounds for a decree.³¹ There was originally a third bar to a decree: that proceedings had not been instituted within a year from the date of the marriage;³² but this has now disappeared, to be replaced by a general provision enabling the court to refuse to grant a decree if such would be "unjust or contrary to public policy".³³

In the space available it is not possible to give any more than an outline of the changes brought about by the new Act. One feature of it, however, is characteristic. One cannot read the Act without feeling that it is, fundamentally, legislation to relieve hard cases. It seems to start from the footing: here is a marriage which has broken up—what can be done to relieve the parties from future hardship? The next step comes after the divorce: how can the interests of children best be protected, and how can questions of matrimonial property be resolved? There is no doubt that, in the New Zealand scene, these are problems which had to be dealt with, and in regard to which the new Act goes much further than any prior legislation in finding a solution.

But this should not be the sole approach. It is axiomatic that, if liberal grounds for divorce are provided, more people will seek divorces. New Zealand has had for some years a comparatively high divorce rate. There is some doubt whether it can be said, in all good conscience, that many of those who have obtained a divorce really needed it or deserved it. New Zealand lawyers experienced in this field come across a number of cases where the parties, had they not known that divorce was reasonably easy, would have made the small effort required to make their marriage work. Liberal grounds for divorce tend to make people divorce-minded: when some difficulty arises in their marriage their first thought tends to be, not what they might do to save their marriage, but how easily they can get a divorce.

³⁰ *Ibid.*, s 18.

³¹ *Ibid.*, s. 18(4).

³² Divorce and Matrimonial Causes Act, 1928, *supra*, footnote 22, s. 10B (3). Cf. *Chaplin v. Chaplin*, [1949] P. 72 (C.A.).

³³ Matrimonial Proceedings Act, 1963, *supra*, footnote 1, s. 18(3).

It is frequently said that one of the principal interests of society lies in the preservation of the family structure. If this be so, then it is certainly not in the interests of society that parties should be given too great a freedom to reorganize their marital affairs, without undue effort or inconvenience, any time the whim takes them. New Zealand is, in some ways, tending to foster such freedom. It is all very well to say that a marriage should not be continued if the parties have reached such a state of disagreement that their marriage is one only in name. This attitude recognizes the effect, but not the cause. In many such cases the parties might never have reached that stage if they had not had it impressed on them that divorce is now a comparatively trouble-free remedy.

Divorce reform always raises controversy. In the context of New Zealand's new Act it may be necessary to ask whether New Zealand has not gone too far, or whether other Commonwealth jurisdictions, with comparatively more difficult divorce procedures, do not show greater social maturity.

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APPENDIX "51"

MARRIAGE BREAKDOWN

by

R. T. OERTON AND A. R. GREEN

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*An' they talks a lot o' lovin',
 but wot do they understand?*

THE ROAD TO MANDALAY¹

Faced by a client who says he wants a divorce, many solicitors embark, with hardly a second thought, upon the task of obtaining one for him. Sometimes, admittedly, this is the only course to adopt. But it is our purpose here to suggest that a solicitor may often discharge his duty to his client more effectively by putting forward the suggestion that he postpone his divorce for the time being and seek instead, with professional help, to resolve the problems which led him to desire it.

Some solicitors would disagree with this contention. They might argue that it is not the function of the lawyer to question a client's decision to divorce his wife. Yet we claim to be a learned and an honourable profession, and it is to be hoped that our learning is not confined to the law, nor our honour to matters of professional etiquette. Do we substantiate this claim by parcelling out divorces across the counter like so many packets of tea?

There is a little more force in another argument, to the effect that divorce is the last resort of the parties to a marriage and is not sought unless the marriage itself has already broken down beyond hope of repair. But this is only partly true. True it certainly is that the present doctrine of the matrimonial offence,² coupled with the "adversary" system to which it gives rise, makes reconciliation virtually impossible once proceedings have begun, and this without doubt is a blot on our legal system (a blot which perhaps owes its continued existence to the protective cover afforded by the numerous other blots which surround it). But few solicitors with practical experience would doubt that many of the clients who come to them, ostensibly in search of divorce, are really seeking desperately a means to avoid it.

The argument has nevertheless an element of truth, and it is this which prompts us to make what is perhaps an even less orthodox suggestion. The solicitor has ample opportunity in the course of his ordinary dealings with clients in matters quite unrelated to matrimonial problems to observe the presence of marital discord and unhappiness and its devastating effect upon the children of

¹ This article deals with a subject that is to be discussed during the Society's National Conference which is to take place in Harrogate at the end of this month. It is the outcome of a correspondence between the authors which followed the publication of Mr. Green's letter on the subject (*GAZETTE*, April 1963, p. 227). They wish to express their gratitude to Dr. John F. Dunn, a consultant psychiatrist, and one who is independent of all the organisations referred to below, for reading the manuscript before publication and suggesting amendments where these seemed to him appropriate.

² Two cases both reported in *The Times* on June 298, 1963, *Williams v. Williams* [1963] 2 All E.R. 994 and *Gollins v. Gollins* [1963] 2 All E.R. 966, represent a slight judicial movement away from this doctrine, but it remains the unassailable foundation of our statute law of divorce.

the marriage. If he can find or take an opportunity tactfully³ to suggest professional help at this stage, then the suggestion may be better received, and may more often lead to a successful outcome, than a suggestion made after the parties have built so strong a wall between them that they can contemplate no other action than to end their marriage finally.

But why it is so important to save a marriage? It is not our purpose to rest the case for reconciliation upon religious dogma, still less to assert that divorce is in all circumstances to be condemned. Nor do we seek to imply that any useful purpose would be served by making divorce itself more difficult than it is at present. On the contrary, we feel that, in cases where a marriage has broken down completely and for a long period ceased to exist in all but name, there is a strong case for allowing divorce by consent. This, in truth, would not make divorce substantially easier, but it would certainly make it more compatible with human dignity. For the ritual of the contrived adultery, followed by an undefended suit disposed of by a judge in a couple of minutes, is probably more debasing than troublesome. We are in favour not of marriage but of happy marriages, and no one in his senses supposes that people can be made happy by law.

What we do wish to assert is that the client is frequently mistaken in his belief that divorce will solve the problem with which he is contending, and that his mistake generally arises from the fact that he does not fully understand the nature of the problem itself. Because he is unhappy in his present alliance, he often assumes too readily that he will be happier alone or with some other woman.⁴ There are a number of factors which militate against the validity of this assumption. It may be that he does not intend to remarry. But man is a social creature and can extend his personality fully only in a relationship with another person.⁵ Exceptional people, it is true, prefer not to enter matrimony, but the fact that the client has married once would indicate that he is not one of these. What, then, are the prospects of a happy second marriage?

The first point to make is one often overlooked. Of whatever religious persuasion the client may be, and even if he be of none at all, he is endowed with the capacity to feel guilt, remorse and a sense of failure, and these capacities may well be awakened if he brings to a summary end a relationship which was one must suppose, originally created in love and illuminated by some degree of trust and understanding. Paradoxically, he may have a better chance of future happiness if he accepts these unpleasant emotions for what they are than if he repudiates them and thrusts them from consciousness. For in the latter case they may fester, and so lead to neurotic behaviour which may of itself go far to impair, or even destroy, a second marriage. He may, for instance, project his own guilt on to his second wife and direct at her the hatred which he cannot bear to feel for himself. When there are children of the first marriage, its dissolution will involve them in great suffering and the feeling of guilty remorse will thus be much magnified. Emotional problems precipitated in this way may also give rise in certain circumstances to one or other of the psychosomatic illnesses such as peptic ulcer.

Another point is even more important; but to appreciate its significance it is necessary to understand something of the emotional factors which underlie marital disharmony. So vast and complicated is this subject that no more than

³ In his letter (GAZETTE, July 1963, p. 468), Mr. Jonathan C. V. Hunt suggests that to tell a client to see a psychiatrist is to risk assault. He is, of course, quite right, and any solicitor so lacking in tact as to phrase such a suggestion in that way must expect to be assaulted. We hope that this article will deal with some of the other points made by Mr. Hunt.

⁴ We shall speak of the client as male for the sake of convenience, but it goes without saying that the problems are much the same, *mutatis mutandis*, for a wife as for a husband.

⁵ Those in search of convincing and well-written confirmation of this can find it, together with a simple, lucid and non-partisan exposition of analytical psychotherapy, in Dr. Anthony Storr's *The Integrity of the Personality* (Heinemann, 1960; paperback edition by Pelican 1963).

the merest sketch of some of its aspects can be here attempted. It is necessary first to dispose of a number of fallacies. Many people, judges among them, seem to think that unhappiness in marriage is usually due to the wilful refusal of one or both of the parties to behave decently and that it could be dispelled without difficulty if only he or she would make an effort at self-improvement. This fallacy both underlies and is fostered by the doctrine of matrimonial offence upon which our law of divorce is unfortunately founded. It is true, of course, that many spouses behave badly and some (but not so many) may be quite well aware that they behave badly. But not unless they are also aware of their underlying reasons for behaving badly and are fully capable of altering their behaviour can they be accused of bad behaviour for its own sake; and none, it may safely be said, will be found to have this awareness and capacity.

This brings us to a second fallacy; the supposed existence of a clear dividing line between sanity and insanity and the corollary that, provided a person is not a raving lunatic, he does not stand in need of treatment. Reliance upon this fallacy may be the defensive reaction of a husband and wife to the suggestion that they need professional help to overcome their difficulties, and were it not pathetic and touching it might seem laughable. Their lives are in ruins, their children are suffering more distress than any human being should be called upon to bear, they themselves are familiar with most of the many facets of hell...but it couldn't be, could it, that there is anything *wrong* with them?

There is a third fallacy, closely linked to both the others: that the sources of human action are fully conscious. This misconception, never one which would withstand detached examination, is hardly tenable now that analytical psychiatrists of various persuasions have explained the powerful influence in adult life of the forgotten events and emotions of childhood.

We suggest with diffidence (although some may perhaps agree) that legal training and the practice of the law render a lawyer particularly prone to all these fallacies. To some extent, indeed, they are enshrined within the law itself. What is to be put in their place? There is no single road by which to approach an understanding of human emotions: this is one reason why the subject seems so obscure. But it may be helpful at this stage to indicate very briefly some of the angles from which the causes of marital disharmony may be viewed.

No school will teach us how to form and sustain a relationship with another person, nor is this art to be learned from books. The only preparation we have for adult family life is the family life of our own childhood, and often without realising it we construct our adult family in that image of our childhood family which we carry unconsciously in our minds. To the extent that this image is a good, a free and a happy one, to that extent may we succeed ourselves in creating a good, free and happy family. To the extent that it is a dark, depressing or hateful image, to that extent may we fail. These statements are necessarily too simple to be absolutely true, but they contain more truth than most generalisations. It should be emphasised, however, that this early influence is largely an unconscious one, and is all the more powerful, all the more impervious to change, for being inaccessible to the clear light of conscious experience. A distorted unconscious attitude is seldom corrected by experience: on the contrary, experience itself is often distorted so as to conform with the unconscious attitude. To a man whose childhood has left him with the unconscious conviction that sexual love is wicked, aggressive or disgusting, his every experience of sexuality will necessarily seem wicked, aggressive or disgusting, and so it will go to reinforce the pre-existing conviction.

A secure and happy childhood is important as a preparation for matrimony, not only because it is secure and happy, but because it is only within an atmosphere of happiness and security that a child can pass satisfactorily through all the stages of development which lie along the way to emotional maturity.

At any of these stages a distortion or an arrest of development may take place in adverse circumstances, so that the child reaches adult life with its emotions stunted or twisted by unresolved conflicts. Although it is technically correct to describe these stages as being, in the widest sense, phases of sexual development, no one should be misled by this description into supposing that their influence is confined to the sphere of overt sexuality. To be sure, overt sexual love is of immense importance in marriage, and any practitioner will confirm that obvious sexual difficulties lie at the root of many petitions for divorce (and nullity).

The desire to commit sodomy and other perversions,⁶ and unduly brutal approach to sex on the one hand, and on the other (although the two have a close underlying affinity) and excessive fear of sexuality; scoptophilia, which may find expression in the desire of one spouse to spy on the other, even impotence and frigidity—all these are examples of sexual problems which arise from just such a stoppage or distortion of development as we have described. For it is natural for children at different ages to be preoccupied with their excretory functions and to develop a, basically, sexual interest in them, to fear sexuality (or, more accurately, the strength of their own sexual impulses), or to feel intense curiosity about the human body and its sexual functions such as may give rise to an impulsive desire to spy; and there is always the danger, too, that if these and other characteristics are met by rejection rather than understanding, the sexual impulse may become so fused with fear, aggression and hostility that normal sexual intercourse becomes quite impossible. (this latter event may give rise in later life to violent sexual crime, in which impulses denied a normal outlet burst forth uncontrollably.)

To pass successfully through all the succeeding stages of development is to attain emotional maturity; but few of us ever reach this goal. And here the point must be made that emotional problems which occur within marriage have very little to distinguish them from emotional problems which occur in any other setting, for it is precisely this failure of parents to accept their children with unprejudiced love, neither too dominating on the one hand nor too permissive on the other, and to treat them from the start as individuals with a dignity commensurate with their status as human beings, which is responsible for more anti-social conduct, more neurosis and more general mental suffering, as well as more marital disharmony, than any other single cause. Nor should it escape our attention that one of the main causes of a person's emotional problems (marital or otherwise) is the emotional problems of his parents, so that to bring happiness into a marriage is vastly to improve the lives not only of the parties to the marriage itself, but of their children and perhaps even of their grandchildren and great-grand-children.

But the attainment of emotional maturity involves the possession of many capacities essential not only to marital happiness but to happiness in general: the ability to love consistently and profoundly, to accept and cope with life as it really is, to compromise, to share affection without feeling jealousy, to admit divergences amongst one's family from one's own ideas and beliefs. All these things are denied in greater or lesser degree to one whose childhood has been insecure and riven by conflict. Such a person may well reach adult life with his natural capacity for love swamped by a kind of passionate hatred—hatred which is really love gone sour, not so much love's opposite as a perversion of love itself. The hatred which he feels is for his parents or other childhood figures, the people whom he needed so desperately to love, and yet those for whom he could so often feel nothing but hostility, or (and this is only to put the same point in

⁶ Perversion, however, except in so far as they reflect a more general immaturity, do not impair a marriage, unless one party objects to them. This is a point courageously made by John Osborne in *Under Plain Cover* (published with another play as *Plays for England* by Faber & Faber, 1963). Thus it has been estimated that as many as 15 per cent. of even heterosexual couples commit sodomy: Dr. Edward Glover, *The Roots of Crime* (Imago, 1960), p. 209.

another way) for repudiated parts of his own personality. But since the source of these feelings seems too dangerous to be admitted to consciousness, he goes through life seeking other targets at which they may be directed. Often he will meet and marry a person who is also in search of such a target, and in these circumstances the marriage will be sustained not by love but by hate.⁷ The advent of children provides another outlet for such feelings, and it is an open question whether some marriages are sustained more by the parties common hatred of their offspring or by their mutual hatred of one another. Basically unhappy as such people are, their marriages rarely end in divorce, for they have too great a need of one another and find too great a satisfaction in their destructive relationship.

What we have said above applies most forcibly to that phase of development which occurs at the age of between three and five, when the child begins to form a real and deeply emotional bond with the parent of the opposite sex. Upon the nature of this relationship more than upon anything else depends the child's future ability to create a satisfactory relationship in marriage. If a boy's relationship with his mother was a free and a loving one, and if they have both succeeded in progressing beyond it, his future wife will stand a good chance of obtaining a husband in whom maturity is combined with emotional harmony and the capacity for deep and lasting affection. But if the childhood relationship was tense, inhibited, depressing, frightening or unsatisfying then it will inevitably cast a shadow over the future marriage relationship.⁸ Without knowing it the boy may in later life seek out a woman who is like his mother, or one whom he can force into her unsatisfactory mould. He may then blame his wife for the faults of his mother and spend his time pursuing other women in a vain attempt to capture that perfect relationship of which he feels himself to have been deprived. The mature man can accept the fact that every wife has faults and that none is perfect, and he can control his urges to anger or adultery in the cause of preserving unimpaired a relationship which will provide a secure basis for the lives of his children, a rock to which he himself can cling throughout his life and a shelter from the cold of old age. Such a person as we have been describing is incapable of this.

Here, then, is another reason why divorce may not bring the happiness which a client expects, for it will not change his personality and if this has led him to fail in his first attempt to establish a stable relationship it is not unlikely that it will continue to bedevil his attempts in the future. Thus he may find himself driven to disaster again and again by his own unsolved problems, like a moth drawn into the flame of the same candle. Quite apart from moral considerations, it is bad in terms of practical policy to try to solve a problem by running away from it. It would, however, be foolish to suggest that a second marriage can never be more happy than a first, for in some cases the failure of the first marriage may have been predominantly (though never entirely) due to the other spouse. Alternatively, an admittedly immature or neurotic spouse may be more successful at the second attempt in finding a partner who will tolerate these characteristics. And if the choice were only between divorce and the continuing unhappiness of a loveless marriage then it would be hard unhesitatingly to advocate the preservation of the marriage. Divorce leaves a scar, but even a scar may be preferable to an open wound. Fortunately, however, there is now a third alternative.

⁷ A detailed exposition of this, together with a particularly good explanation of the significance of the stages of infantile development, is to be found in Dr. Karin Stephen's *The Wish to Fall Ill* (paperback edition by The Cambridge University Press, 1960).

⁸ Cf. Stephen, *op. cit.*, p. 188: "The ... situation is important because it is the child's first experience of love and sets the pattern for the loves of later life. According to the way in which the child succeeds in dealing with the difficulties inherent in this first love situation it learns how to love and is able to go onto healthy sexual maturity, or else its power of loving becomes impaired by entanglement with hostility, and it attempts to give up sexuality, fails to mature, and remains emotionally crippled and fixated to its early love disaster".

This is the sustained attempt of the parties with skilled help to transform their marriage relationship by gaining insight into, and thus resolving, the underlying conflicts which have jeopardised its happiness. For reasons which we shall give, we believe the help to which we have referred to be most effective when it is given in the form of analytical psychotherapy. People who have recourse to treatment of this kind are often accused of seeking an easy solution to the problems of life. In reality they seek the most difficult of all solutions—the most difficult but the most satisfying: self-knowledge. And the attempt should not be made by those lacking to any considerable degree in courage, seriousness of purpose and the will to achieve. Nor should it be concealed that this course may involve for an initial period suffering still more intense than that which the parties have already undergone. But to those who can accept its challenge, it may bring rewards which range from (at one end of the scale) the ability to bear what was previously an unbearable situation to (at the other) emotional rebirth and the attainment of such happiness as they had not known to exist.

But why is psychotherapy necessary? Surely advice and encouragement may often be enough? In attributing married unhappiness largely to the images of childhood which the parties carry at the back of their minds and to the effects of certain types of upbringing, we do not seek to belittle the harm which may be done to a marriage by outside events and present-day adversity. The need to live with the parents of the husband or wife, physical illness or disablement, inability to find work, ignorance about contraception; these things and many more may place a strain upon the most harmonious of marriages. And it is in cases such as these that more superficial help may be sufficient. Nevertheless, the ability of the marriage to survive difficulties even of this kind will ultimately depend upon what (for want of a better general phrase) we have called the emotional maturity of the parties and their insight into their own behaviour and its motives. A spouse who destroys the happiness of a marriage is seldom aware of what he is doing and (it is safe to say) never aware of his real reasons for doing it. These are always in some degree unconscious and therefore beyond voluntary control.

This is why mere advice is often useless. Suppose we were to suggest that our profession should stop treating its office staff like skivvies. Denial and rationalisations—never admissions—would come thick and fast: “But I don’t...how dare you? ... why, only last week...the wages they demand...in any case, some of them ask for it...” Although no doubt the vast majority of us are considerate employers some of us are not; and yet it is precisely these who would protest the most loudly.⁹ They might well realise that there was something radically wrong with the way their firms were running, but as for blaming themselves—the very idea! And so it is with marriage: you cannot, even impliedly, tell a man that he is a bad husband and should mend his ways without encountering the strongest possible resistance and running the risk of making matters worse instead of better.¹⁰ But the bad employer might be willing to call in a business efficiency expert, if only to have the satisfaction of showing him the inefficiencies of his staff. And so it is with marriage: many a husband has gone to a therapist with the sole intent of telling him that his wife is hateful,

⁹ Cf. Dr. J. A. C. Brown, *Techniques of Persuasion* (A Pelican Original, 1963, p. 67: “... to try to alter a person’s attitudes by direct instruction is to imply that he is wrong and this is interpreted, consciously or unconsciously, as an attack...” “It is an axiom that people cannot be taught who feel that they are at the same time being attacked.” But contrast Dr. Storr’s description of the analytical psychotherapist’s approach (Storr, *op cit.*, p 131): “... (it) constantly demands of the patient that he should himself solve his own problems, and does not require that he should agree with the doctor or take over his ideas. The function of the analyst is to make clear what the problems are, not to provide ready-made solutions; and the avoidance of didacticism is designed to encourage the patient’s independence”.

¹⁰ Brown, *op. cit.*, p. 78: “Nobody likes to have been proved wrong over some deeply-felt issue, and the result is increased aggression rather than the resolution of a social conflict”.

intolerant and crazy, and many a wife has supported the venture simply in order to blacken the character of her husband. But many a husband and wife have emerged from a course of therapy which had so unpromising a beginning with the sober realisation that some of the faults (and use the word here without moral overtones) lay within themselves and not their spouses.

Analytical psychotherapy is a phrase embracing a variety of techniques which have in common the aim to improve an individual's adjustment to life and to resolve his emotional problems (whether or not they fall within a narrow definition of neurosis) by giving him insight into their origin. Treatment is by word of mouth alone, and of drugs are used at all they are employed only to assist the patient to gain insight, or to reduce the anxiety or depression which he may feel at some stages of the treatment. Psychotherapy varies in depth. At one end of the scale is classical psychoanalysis which may last for several years and extend to every aspect of the personality. At the other is superficial psychotherapy which may last only a few weeks. Which of these is employed will depend on a variety of factors, among them the seriousness of the patient's difficulty, his intelligence and his moral courage (and, it is unfortunately necessary to add, the training and even the availability of a suitable therapist, and thus the area in which he lives and his financial resources). Psychiatry and psychotherapy are by no means synonymous, although a growing number of practitioners combine both skills. Psychiatrists are traditionally doctors who treat the grosser forms of mental illness by means which are principally physical. Psychotherapists are seldom able to relieve these, though they may relieve problems which would otherwise lead to them; they do not (except as mentioned) employ physical methods, and they need not be (though they often are) medically qualified.

How can treatment of this kind be obtained? Here we have no ready answer. The client's doctor may know of a suitable agency; but he may equally well have little knowledge of the treatment or even (for general medical training has not in the past devoted much time to it) be prejudiced against its use. Similarly, the nearest psychiatrist may be the answer; but he may equally well lack either the training or the time to assist. But what of the Marriage Guidance Councils? These Councils, each in some degree autonomous but all affiliated to the National Council,¹¹ are established throughout the country and exist in more than a hundred towns in England and Wales. In 1959 the help of their counsellors, whose services are free, was sought in 12,000 marriages.¹² In spite of these impressive facts we confess that we approach the work of the Councils with mixed feelings. Counsellors give their services on a part-time basis, and being unpaid must inevitably spend most of their time earning their living in other ways. Their basic training, admirable though it may be, is short in the extreme and does not of itself qualify them to practise any form of psychotherapy.

This poses an initial problem, for although we recognise that it is not practicable in every case to trace marital problems to their childhood origins, we doubt whether any deep and lasting improvements can be brought about by counselling which does not attempt even superficially to deal with the unconscious problems involved in a marriage. The situation in London is comparatively good, because in-training of counsellors is continued for many years so as to give them insight into unconscious motives and the capacity to deal with them.

¹¹ Its address, from which information may be obtained, is 58 Queen Anne Street, London, W.1.

¹² These facts are taken from Mr. J. H. Wallis' *Someone to Turn to* (Routledge & Kegan Paul, 1961), p. 96. The book is obtainable from the address just given at 7s. 6d. + 8d. postage. The Councils were strongly supported in a letter from Mr. Louis Gabe (GAZETTE, December 1961, p. 739).

The same is true to some extent in other large cities, but in the smaller Councils the help given to clients may be supportive only, or of a limited nature.¹³

Mr. J. H. Wallis¹⁴ records the growing dissatisfaction felt by many counsellors when faced with psychological problems with which they know themselves to be unfitted to deal. In this connection, however, mention should be made of the fact that the Councils can in some cases refer their clients to psychiatric consultants; but this advantage seems greater in theory than in practice for, to quote Mr. Wallis, "the need far outstrips the facilities"¹⁵ and counsellors are often reduced to discussing their clients' problems with the consultant at second hand in order to make an "economical use of [his] time".¹⁶ In truth the Councils do not seek to disguise the fact that in the best of all possible worlds their work would be carried out by highly trained paid therapists working full-time to meet need which is undoubtedly desperate. But they reasonably point out that at present such therapists exist only in the imagination and that until the government of the day sees fit to clothe them in flesh the work of the Marriage Guidance Counsellors will continue to be much better than nothing. And so, most certainly, it will.

The enquiries which we have made for the purpose of this article have revealed a very bright spot in a landscape which seems in many respects a little overcast. We have discovered one agency in particular which seems to possess all the requirements for dealing in depth with marriage problems. This is the Family Discussion Bureau, attached to the Tavistock Institute of Human Relations in London.¹⁷ The casework staff are fully qualified to undertake the deepest forms of psychotherapy when these are indicated and regard it as part of their function to investigate the dynamic interaction of personality which takes place at an unconscious level. The Bureau appears (and indeed is recognised by the Marriage Guidance Councils) to be a model for other organisations of its kind, and we venture to think that any husband and wife fortunate enough to obtain its help would receive treatment which could hardly be bettered. Unfortunately, however, its very quality seems to be such that it cannot at present be extended or duplicated in other parts of the country.

Any solicitor who obtains help for a marriage, whether from the Family Discussion Bureau, privately, from the Marriage Guidance Councils or otherwise, has the privilege of setting the parties on a road which may eventually lead them to what is perhaps the greatest satisfaction known to mankind: a happy and stable family life. As his reward, he may obtain their lasting allegiance and, more important, their gratitude.¹⁸

¹³ The last two sentences are copied almost verbatim from a letter written to us by Dr. Philip M. Bloom, a consultant psychiatrist attached to the London Marriage Guidance Council, to whom we are greatly indebted for his kindness in giving us most helpful information about the precise facilities provided by the Councils and by other agencies. With regard to these other agencies, he says that "apart from the Family Discussion Bureau and one or two hospital psychiatric departments which have appreciated the need ... the Family Planning Association has, here and there, set up departments where therapy can be given in sexual and marital problems. These last are in short supply ... I think you have to enquire personally of the various hospitals in your neighbourhood whether any of them take a particular interest in long term therapy of an analytical nature but most probably you will be disappointed". He concludes by suggesting that "Marriage Guidance Centres, especially in the bigger cities, have generally the most to offer".

¹⁴ *Op. cit.*, p. 80.

¹⁵ *Loc. cit.*

¹⁶ Pages 77-78.

¹⁷ The address, from which information may be obtained, is 2 Beaumont Street, London W.1. The Bureau point out in a letter that although they believe themselves to be "the only specialist agency dealing with marital problems staffed by professionally trained workers" they consider that "overt marriage problems ... are in a minority even though there are many of them", and that "the bulk of marriage problems present themselves in disguised ways, for example when the presenting symptom is a disturbed or delinquent child, physical or other symptom of ill health, it often proves ... to be a derivative of stress in the marital relationship". This serves to re-emphasise a point made earlier in this article. They add: "These disguised problems of course present themselves to many other agencies who are non-specialist from the point of view of marital work and it is for this reason that all our efforts in the training field have gone into extending the skills of professional workers in other settings". One such setting may well be that of the Probation Service.

¹⁸ Such at least has been the personal experience of one of us.

APPENDIX "52"

DIVORCE REFORM IN CANADA

by

G. R. B. WHITEHEAD

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The Author is a graduate of Oxford University where he obtained a Law Degree. He was called to the English Bar and practised in London, England. During the last war he became the Assistant Director General of the Legal Branch of the Department of Munitions and Supply in Ottawa, and was awarded the M.B.E. for his services. In 1944 he was called to the Quebec Bar and joined War Assets Corporation in Montreal.

It is not surprising that in the course of the far-reaching social changes of this century public opinion on the subject of divorce should have moved a long way from the views which were generally accepted in the time of our grandfathers: but there are few departments of the law in which changes are more difficult to accomplish than this one, and at present it is probably true to say that the great majority of Canadians are not satisfied with the law as it stands.

The rule which in most provinces treats adultery as virtually the only ground for divorce, and requires proof of only a single act of adultery, is the principal ground of dissatisfaction. In Nova Scotia cruelty is an additional ground, and in each of the three old Maritime Provinces the distinction between nullity and divorce is less clearly drawn than it usually is elsewhere, so that impotence and consanguinity are treated in the relevant statutes on the same footing as matrimonial offences. In Ontario and the Western Provinces, where the divorce law is based on the (Imperial) Divorce and Matrimonial Causes Act of 1857, rape, sodomy and bestiality are additional grounds; but the last two fortunately are rare, and rape committed by a married man necessarily constitutes adultery, unless it is rape on his wife, which can be only if they were legally separated: see *R. v. Miller* L.R. 1954 2 Q.B. 282.

It is only since the (Canadian) Marriage and Divorce Act of 1925 (RSC 1952 c. 176) that a wife can claim a divorce on the ground of her husband's adultery alone. This change in the law, which followed on the enfranchisement of women, has, in practice, opened the door very wide and has led in some cases to unduly hasty divorces and in others to collusion which it is almost impossible to prove. No one will dispute that even a single act of adultery by a married man is a grave moral offence: but to regard it as fundamentally destructive of a marriage, without regard to the circumstances, is to impose a penalty which may in many cases be out of proportion to the wrong which has been done. Those of us who, in one or other of the two World Wars of this century, have served for three or four years in the Army overseas and remember the conditions which prevailed in the theatres of war at the time, are not likely to consider a comrade whom we knew to be a happily married man as deserving of losing his marriage merely on account of occasional lapses occurring when he had not seen his wife for a year or more; and nearly all of us would have viewed with great disfavour any busybody who made it his business to tell our comrade's wife about them.

The same might be said, in many cases, of the well-meaning or perhaps merely officious person who "thought the husband ought to know" about what his wife was doing during his absence. There are, of course, many degrees of gravity in sins of this kind; and even in Canada in peace time there is a great difference between the man who goes out of town on a convention and succumbs to temptation at a stag party and the man who seduces his wife's best friend in their home town. Yet each of these cases is equally a ground for divorce, and, if proved, entitles the Plaintiff to a divorce *ex debito justitiae*.

It is a truism to say that, in many of the cases where the claim for divorce is based on a single act of adultery by the husband, the adultery, even if genuine, has not been the real cause of the breakdown of the marriage. One or other of the causes discussed below may have led to the wife wanting a divorce, and the adultery is alleged merely because, under the present law, it is a ground for divorce whereas the real cause of the trouble is not a ground for divorce. Under these conditions the temptation to fake evidence of adultery is obviously strong in cases where both parties want a divorce. Of course, no lawyer should accept a case which he knows to be collusive but it is often almost impossible to distinguish between those which in reality are collusive and those where the parties have merely collaborated in finding the evidence after the adultery has been committed.

When divorce for the husband's adultery, without any other matrimonial offence, was first introduced in England after World War I, there was a flood of cases where the husband had sent his wife an hotel bill purporting to show that he had spent a night at an hotel with a woman, signing the register as Mr. and Mrs., and the wife then petitioned for divorce on the ground of his adultery. This system became so well established that the letter enclosing the bill became known in certain circles as "the usual letter", and sometimes in London on Mondays, when there were always three or four divorce courts sitting to hear undefended cases (at the rate of 30 cases per court per day) counsel might have anxious moments while waiting for his case to come on, because he knew that his witnesses were engaged in giving evidence in a similar case before another judge, and it was going to be very embarrassing if he had to ask for his case to be taken a little later in the list for that reason. Moreover, the chambermaid who was going to prove the adultery by describing how she took early morning tea in to such and such a room and found the Respondent (Defendant) and a woman who was not the Petitioner (Plaintiff) in a compromising situation would certainly have received a good tip for remembering the occasion; but often when the same chambermaid appeared as a witness in a number of such cases over a short period one began to wonder whether she really always was sure that the woman whom she had seen on one occasion only, in bed, was not the Petitioner, whom, of course, she did not know and had seen only in court that morning. Eventually Lord Merrivale, the President of the Admiralty, Probate and Divorce Division of the High Court (a judge of great experience, who commanded universal respect) determined to try to check what he could see had become an abuse; and in *Aylward v. Aylward* (1928) 44 TLR 456, a case in which he suspected that the Respondent (Defendant) was really committing adultery with a woman who was not the one he had taken to the hotel, he refused to make a decree. Some years later, however, in *Woolf v. Woolf*, L.R. 1931 P. 134, he refused a decree because the evidence established only that the husband, who was quite as desirous of obtaining a divorce as the wife was, had spent two nights at an hotel with a woman whose name he refused to give, and Lord Merrivale refused to draw the inference that adultery had been committed. The Court of Appeal would not support him in this, and granted a decree, and of course, after that, hotel divorces proceeded on the same lines as before. By this time the situation had become widely known, even outside the legal profession,

and there was strong pressure for an amendment to the law which would allow divorce on widely extended grounds. By the Matrimonial Causes Act, 1937, passed on the initiative of the well-known author and Independent M.P., Mr. A. P. Herbert, the following new grounds for divorce were created in England:—

- (1) desertion for three years
- (2) cruelty
- (3) incurable unsoundness of mind
- (4) presumption of death of the other spouse.

It is not intended to suggest that in any part of Canada hotel divorces have ever become an abuse on anything like the same scale as in England during the 1920's and 1930's (or as they are said still to be in New York): but the Court of Appeal in Nova Scotia, in the case of *Durrant v. Durrant* (1944) 3 DLR 30 followed the English case of *Woolf v. Woolf* mentioned above, and (overruling the Court of first instance) found adultery proved because a man and a woman had been found together in a hotel room at night, partly clothed, without any evidence of previous inclination to commit adultery; and this does leave a loophole which couples who want a divorce for reasons which the law in this country does not regard as sufficient can use for obtaining a divorce on the ground of adultery which never really took place. In such circumstances collusion is almost impossible to prove, and in any case it is not collusion if the wife knows nothing about the matter till the husband sends her the hotel bill.

The English Act of 1937 was a relief not only to litigants but to lawyers who had shared Lord Merrival's misgivings as to the system of hotel divorces; but it has certainly increased the difficulty of the judges' task in many cases where there may be a doubt as to whether the Respondent's (Defendant's) leaving the Petitioner (Plaintiff) was desertion or a justifiable withdrawal from an intolerable situation, and similarly where there is a doubt as to whether or not the Respondent's conduct was sufficiently inconsiderate to qualify as cruelty. Nevertheless, if there are to be changes in Canada, the English Act of 1937 may well be a suitable basis on which to start work.

Among the possible additional grounds on which divorce might be granted in Canada are:—

Desertion

This, under the present law in England, has to be for a continuous period of not less than three years immediately before the date of commencement of the divorce proceedings. There will probably be some who will feel that, even if desertion is to be allowed as a ground at all, the period ought to be longer than three years; and it is submitted that in any case the period ought not to be shorter than three years, because some desertions are due to temporary causes such as mother-in-law trouble, and if the deserted party has to wait till the cause of the trouble can be seen in perspective before anything irreparable is done, the cause may by then have disappeared or become manageable. In recent years proposals have been made in England to allow the deserting spouse to take proceedings for divorce after being in desertion for a term of years, thus taking advantage of his or her own wrong: but this idea has found no favour in the British Parliament, and it seems unlikely that it would do so in the Canadian Parliament if it were brought forward here.

If desertion were to be allowed here as a ground for divorce, the standards as to what constitutes desertion would presumably be the same as those which are now applied where desertion is pleaded by the Defendant as a defence to proceedings against him for a divorce on the ground of adultery. These are, in effect, the same as the standards now applied in England in proceedings for divorce for desertion. Probably as good a definition of desertion as can be made

is that which is found in the Report of the Royal Commission on Marriage and Divorce (Cmd. 9678, H.M.S.O., London, 1956) and runs as follows:

“A separation of the spouses which is against the will of one spouse and which is accompanied by an intention on the part of the other spouse without just cause permanently to end the married life together.”

It would be very difficult, and, (it is submitted) not advisable to attempt to lay down in statutory form a definition of desertion which would be a ground for divorce, because circumstances vary so greatly; and it would not be desirable to make too rigid a rule as to temporary resumption of cohabitation terminating a period of desertion, because that would greatly hamper attempts at reconciliation. The judges, both in Canada and in England, have had to deal with many difficult cases and have been well able to apply the general principle embodied in the Royal Commission's definition quoted above to the facts of each case as it came before them.

In cases where desertion is the ground on which divorce is being sought, it would be necessary to allow the Defendant to plead that the Plaintiff's conduct had made it impossible for him or her to remain in the matrimonial home, even though such conduct did not qualify as cruelty in the legal sense. If the Court were satisfied that such conduct on the part of the spouse who had remained in the matrimonial home was intended to drive out the other spouse, this would probably, following the rule in force in England, be treated as sufficient to enable the spouse who had left the matrimonial home to claim, after the prescribed period, a divorce against the spouse who had remained in the home on the ground of constructive desertion. Here again it would have to be left to the Court to determine in each case whether or not one spouse's shortcomings had been sufficiently serious to justify the other in leaving home. Numerous cases have been reported in England on this subject, in one of which the wife, who had remained in the matrimonial home, was found guilty of constructive desertion because she insisted (contrary to her husband's wishes) on keeping a large number of cats in the house, and told her husband that she preferred the cats to him. On this ground he was granted a divorce.

If the spouses originally parted by mutual consent, much will depend on the terms on which they parted. It would hardly be possible to treat as being in desertion a husband who had parted from his wife on the terms of a separation deed and had always punctually performed his obligations under the deed: but where the spouses parted by mutual consent but without any deed and without any express agreement as to the duration of the separation either spouse would probably have to be allowed to put an end to the agreement to separate and to treat the other as being in desertion from that time onwards, so that the three years would begin to run from the same time. This is the rule in England, and it does not present much difficulty in practical application.

If the deserting spouse repents during the three-year period and makes an offer to return which the Court regards as genuine, it should probably be treated as ending the desertion: but if he delays until the three-year period has run, and even more if he delays till divorce proceedings have been commenced against him, it might well be considered that the deserted spouse had acquired a right to a divorce, of which she was now entitled to avail herself.

Cruelty

Any extension of the grounds for divorce would presumably make cruelty a ground, as it already is in Nova Scotia. If there is to be a statutory definition of cruelty it would have to be a wide one, such as already exists in Quebec, Saskatchewan and Alberta. Article 189 of the Quebec Civil Code provides that husband and wife may respectively demand separation on the ground of outrage,

ill-usage or grievous insult committed by one towards the other, and Article 90 provides that the grievous nature and sufficiency of such outrage, ill-usage and insult are left to the discretion of the Court, which, in appreciating them, must take into consideration the rank, condition and other circumstances of the parties. In Saskatchewan and Alberta cruelty is defined as not being confined in its meaning to conduct that creates a danger to life, limb or health, but as including any course of conduct that, in the opinion of the Court, is grossly insulting or intolerable, or is of such a character that the person seeking the separation could not reasonably be expected to be willing to live with the other after he or she has been guilty of such conduct. In England and in the Canadian Provinces where English authorities are usually followed, cruelty is held to include only conduct which creates a danger to the other spouse's physical or mental health: see *Russell v. Russel* L.R. 1897 A.C. 395. Until recently it was considered that conduct, however inconsiderate, was not cruelty unless it was "aimed at", or intended to injure, the other spouse: see, e.g. *Kaslefsky v. Kaslefsky* L.R. 1951 P. 38: but in *Gollins v. Gollins* L.R. 1964 A.C. 644 and *Williams v. Williams* L.R. 1964 698 the House of Lords held that in cases of cruelty it was not necessary to show an intention to injure or inflict misery, or a guilty mind. The two essential elements were injury or apprehended injury to health and that the conduct must be grave and weighty. It is submitted that, if cruelty is to be made a ground for divorce generally in Canada, it would be preferable to judge cruelty by the standard now applied in Quebec, Saskatchewan and Alberta, and not to confine it to cases of injury or apprehended injury to the other spouse's health. The evaluation of evidence as to the injury or danger of injury to a spouse's health may be very difficult, especially if the doctor by whose evidence the danger of injury is to be proved has known the family only a short time. In some cases there may be in the Plaintiff's condition an element resembling what in suits for damages for personal injuries is known as "compensationitis", and in others there may well be a doubt as to whether the Plaintiff's nervous condition is due to the Defendant's conduct or the Defendant's conduct is due to the Plaintiff's nervous condition. In any case, a very wide discretion should be left to the Court in determining what conduct is intolerable and what is not. It may perhaps be doubted whether the large number of cases on cruelty now reported in law reports and cited in textbooks really give the Courts very much assistance, since it by no means follows that conduct which qualified as cruelty in one case ought so to qualify in another, where different personalities were involved: and, even among people of the same background the ideas of the present generation are not always the same as those of their parents, e.g. as regards the use of contraceptives.

Sentence of Life Imprisonment

In New York this involves civil death, and if the prisoner is married his or her spouse is entitled to re-marry, thus putting an end to the prisoner's marriage. In England it may enable the innocent spouse to divorce the prisoner for cruelty, if it can be shown that the shock arising from the conviction has caused a breakdown in the health of the innocent spouse. If the grounds for divorce are to be extended in Canada, many people may wish to see life imprisonment included among them, especially now that murderers, most of whom used formerly to be hanged, now nearly always have their sentences commuted. An argument to the contrary is that the divorce may make the prisoner's rehabilitation more difficult; but it cannot be assumed that his wife will be willing to live with him again if and when he gets out of prison; and, considering the scandal and misery which a husband's trial and sentence to life imprisonment must bring on his wife, it seems illogical that she should be tied to him while another woman (who may be her neighbour) has been able to divorce her husband for a single act of adultery committed in an unguarded moment.

Incurable Unsoundness of Mind

This is a ground for divorce in England under the Act of 1937, if the patient has been continuously under the care and treatment for a period of at least five years immediately preceding the presentation of the divorce petition. The period of five years is not considered to be broken if the patient is lawfully on leave of absence from the mental hospital on trial. It seems probable that a proposal to make this a ground for divorce in Canada would meet with a good deal of opposition, because, except in rare cases, the patient is in no way to blame for the disaster which has overtaken him, and if he is sufficiently lucid to understand that his wife is divorcing him, it may tend to make his mental condition worse. In addition, there are some cases where a mental patient recovers even after five years. On the other hand, the patient's detention in a mental hospital leaves his or her spouse in a most unsatisfactory position, and cases of this kind are apt to lead to the formation of irregular unions, which are deplored both by lawyers and by moralists.

Presumption of Death of the Other Spouse

This is a ground for divorce in England under the Act of 1937. The Petitioner has to prove that for a period of seven years or upwards the other party to the marriage has been continually absent from the Petitioner and that the Petitioner has no reason to believe that the other party has been living within that time. There are Rules of Court which prescribe the steps which the Petitioner must take to try to trace the missing spouse. It is for the Court to decide whether or not to draw the inference that the missing spouse is dead. If the parties are legally separated, the mere fact that the Petitioner has not heard of the missing spouse for seven years may quite probably be found insufficient.

In New York there is an "Enoch Arden Law" providing that if a husband or wife disappears for more than five years and is not known to be living despite efforts by publication to find him or her, the other spouse may sue for dissolution of the marriage.

Cases of this sort are fairly common in Canada even in peace time, and during both World Wars there were a number of cases where soldiers were reported "missing" or "missing, believed killed" and were never heard of again. In such a case the wife could, no doubt, re-marry without risking a criminal prosecution for bigamy at any time after the government had started paying her a widow's pension, because even if it was afterwards shown that the first husband was living at the time of the second marriage she could plead the receipt of the pension as evidence that she had reasonable cause to believe that he was dead: but, of course, that would not make the second marriage valid, and she might find herself divorced by her first husband for adultery and be sued by the second husband for nullity of the second marriage on the ground of bigamy. A reform on the lines either of the English or of the New York law would eliminate that possibility. Such a reform might possibly lend itself to abuse by a couple who wanted to get rid of each other; but it seems unlikely that it would, because there are easier and quicker ways of getting a collusive divorce than by disappearing for five or seven years.

Conclusion

Since under the British North America Act only the Federal Parliament can amend the divorce law, it is evident that any reform is going to need the active or passive assent of many who on principle disapprove of divorce a vinculo matrimonii altogether and believe that marriage ought to be indissoluble during the lifetime of the parties. A campaign by enthusiasts for reform who would regard an extension of the grounds for divorce as a victory over the forces

opposing them would probably be foredoomed to failure. There would be a much better chance of success if those who are interested in an extension of the grounds could make contact in advance with the other side with a view to seeing if some common ground could be found. Those of us who disapprove of all divorce a vinculo are well aware that the climate of public opinion in most parts of Canada renders restriction of the present grounds quite impossible, and probably most of us are aware that the present system of requiring evidence of adultery as an essential condition for a divorce is an incentive to collusion or to the commission of adultery which otherwise would never have been committed. Moreover, once the possibility of divorce is accepted as inevitable, some of the things discussed above may well be felt to be at least as valid grounds for divorce. Moreover, once the possibility of divorce is accepted as inevitable, some of the people on both sides of the controversy would regard as an improvement on the present position might be worked out on the basis that the grounds for divorce should be enlarged by adding some or all of the things discussed above, but that (as in England under the Act of 1937) no one should be allowed to commence proceedings for a divorce within the first three years after the marriage, unless the Petitioner obtained special leave from the court to do so, which would be granted only if the Petitioner could show exceptional hardship suffered or exceptional depravity on the part of his or her spouse. It might also be thought worthwhile to set up "conciliation courts" such as are now functioning in Los Angeles and other places in the United States, to which couples who are contemplating divorce can be referred, if they are willing. Not much seems to be known about these courts in Canada, but it is said that in quite a large proportion of cases they are successful in reconciling couples whose marriage was breaking up. Resort to these conciliation courts does not bar either party from taking divorce proceedings in the ordinary courts if no reconciliation can be arrived at. Either or both of these suggestions might help considerably in reducing the number of divorces among couples whose primary mistake was that they got married when they were too young and immature to assume the responsibility of the married state.

It would not be necessary that the grounds for divorce should be the same in all Provinces of Canada; and, indeed, they never have been. For instance, Nova Scotia has had its divorces for cruelty since before Confederation. If, for example, it became apparent that the Western Provinces wanted to introduce some ground for divorce which was not favourably regarded in Ontario or in the Maritimes, Parliament could make a distinction between the Provinces accordingly. It is assumed that in any case divorces in Quebec and Newfoundland would continue to be Parliamentary, and the Divorce Committee of the Senate would inform the Commissioner, who now hears the evidence, of the grounds on which they would probably be prepared to recommend a Parliamentary divorce if and when that ground was established by evidence before them.

None of us would expect either of the two principal political parties to commit itself to divorce reform. It would have to be done, as it was in England in 1937, by some private member or group of private members consulting with those interested, including religious leaders, social workers and members of the Bench and Bar, and then drafting a Bill which would embody the greatest common measure of agreement and would, at the same time, be capable of practical application in Court. Members of our profession in active practice and with the necessary experience who could make time to help in preparing such a reform would be performing a very real public service.

APPENDIX "53"

CRUELTY WITHOUT CULPABILITY OR DIVORCE WITHOUT FAULT

by

NEVILLE L. BROWN

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On June 21, 1963, the Lords Spiritual and Temporal rejected¹ an amendment to the Matrimonial Causes and Reconciliation Bill which would have permitted a divorce after seven years' separation.² On June 27 the House of Lords, sitting as the ultimate appellate tribunal, delivered itself, on one and the same day, of two decisions which, as this article hopes to show, have so greatly expanded the concept of matrimonial cruelty that the basis of our divorce law has been tilted away from the traditional doctrine of the matrimonial offence and moved nearer to the principle of breakdown of marriage or "divorce without fault."

The two cases of *Gollins*³ and *Williams*⁴ must rank together as the most important judicial survey of the concept of cruelty since 1897 when the same tribunal laid down that injury to health was the essential hallmark of cruelty as a matrimonial offence.⁵ The composition of the court was the same in both cases (Lord Reid, Lord Evershed, Lord Morris, Lord Hodson and Lord Pearce) and in both cases Lord Morris and Lord Hodson gave strong dissenting judgments. All of their lordships delivered separate judgments,⁶ their reasoning in the one case usually being closely related to their reasoning in the other. Indeed, the two cases must be read together as a pair, and although they fill sixty-three pages of the *All England Law Reports*, their length is relieved by the sharp clash of judicial opinion which they reveal. Moreover, not only is there the exhaustive and authoritative review of the previous case-law which one would expect from the House of Lords, but one finds also (which may surprise some) a realistic appraisal of the practical social considerations involved in their conclusions.

Gollins, a case originating in a separation order made by the Ludlow magistrates, decided that an intention to injure one spouse is not an essential ingredient of cruelty. *Williams*, which was a wife's petition for divorce, decided that insanity was not necessarily a defence to a charge of cruelty. Both decisions were reached by a majority of three law lords to two; *Williams* reversed majority decision of the Court of Appeal. The dissentients, Lord Morris and Lord Hodson, like Willmer and Davies L.JJ. in the court below, take the view that a certain state of mind is required before cruelty can be made out and, as a logical corollary, that a person who did not know what he was doing cannot be guilty of

¹ By 52 votes to 31.

² Subject to various safeguards. The rump of the Bill has now been enacted as the Matrimonial Causes Act, 1963, and came into effect on July 31. For useful commentaries on the Act, see p. 675 below (Miss O. M. Stone) and the two articles by Mr. Samuels in (1963) 107 S.J. 623 and 639.

³ *Gollins v. Gollins* [1963] 3 W.L.R. 176; [1963] 2 All E.R. 966.

⁴ *Williams v. Williams* [1963] 3 W.L.R. 215; [1963] 2 All E.R. 994.

⁵ In *Russell v. Russell* [1897] A.C. 395.

⁶ Busy divorce practitioners may well lament that our highest tribunal does not restrict itself to an agreed majority (and dissenting) judgment. In the United States the current fashion within the Supreme Court for the separate opinion, whether in concurrence or dissent, has aroused severe criticism (see, e.g., Kauper, *Frontiers of Constitutional Liberty* (1956), p. 16).

cruelty. The majority (Lord Reid, Lord Evershed and Lord Pearce), having adopted the view in *Gollins* that an intention to injure is not a necessary element of cruelty, proceeded in *Williams* to the conclusion that insanity did not of itself constitute a defence to a suit for divorce on the ground of cruelty.

It is proposed to state the facts and to summarise, as shortly as their importance permits, the several judgments in each case in turn, and afterwards to examine the effect of the two decisions, first upon the concept of matrimonial cruelty, and secondly, upon the related ground of constructive desertion.

GOLLINS: THE CASE OF THE LAY-ABOUT HUSBAND

In *Gollins* the husband, who was variously described as bone idle and a lay-about who did nothing except hang up his hat in the hall,⁷ was content to let his wife run the home in Church Stretton as a guest-house in order to meet the financial burdens of the household, including staving off the husband's creditors. Although he was incorrigibly lazy, the evidence did not show any wish on his part to harm his wife nor was there any actual physical violence towards her.

In 1960 the wife warned him that she could not stand the strain of his debts any longer and that if he did not get work and clear himself of debt she would take proceedings; she also asked him to stay away from the guest-house. This warning was contained in a letter written to the husband whilst he was temporarily away from home. As her warning had no effect, she obtained from the Ludlow magistrates a maintenance order for him to pay her £3 a week, together with £1 a week for each of their two children, the ground for the order being his wilful neglect to maintain herself and them. Cruelty was not alleged on this occasion nor was any non-cohabitation clause inserted in the order, but the husband began to occupy a separate bedroom and had little contact with his wife. The maintenance order was made in January 1961, but the husband never paid more than a fraction of the amounts ordered. In October of that year the wife applied to the magistrates for a variation of the original order by the insertion of a non-cohabitation clause on the ground of his persistent cruelty. No doubt she was advised that without proof of cruelty or the like such a clause was not normally inserted.⁸ In asking for the clause her whole object was to get the husband out of the house. She relied on her doctor's evidence that she was suffering from a moderately severe anxiety state, which he attributed to her financial and marital difficulties.

The magistrates found persistent cruelty proved⁹ and inserted the desired clause. The husband had meanwhile taken out a cross-summons to revoke the order on the ground that the wife was in desertion or, alternatively, that he was no longer guilty of wilful neglect to maintain because he was not and never had been in a position to pay the amount ordered. On this cross-summons the justices deleted the maintenance for the children and reduced the wife's maintenance to £1 a week; they also remitted the accrued arrears under the original order. Not content with this but smarting under the finding of cruelty, the husband appealed to the Divisional Court. The court found in his favour,¹⁰ but on the wife's appeal to the Court of Appeal, Wilmer and Davies L.JJ. (Harman L.J. dissenting) restored the justice's order.¹¹

⁷ Harman L.J.'s telling phrase (at [1962] 3 All E.R. 903, letter I).

⁸ See *Jolliffe v. Jolliffe* (1963) 107 S.J. 78; *Vaughan v. Vaughan* [1963] 2 All E.R. 742 (noted (1963) 26 M.L.R. 581 *supra*). These cases cast doubt upon certain observations of Wilmer and Davies L.JJ. in *Gollins* in the Court of Appeal.

⁹ In their reasons the justices nowhere expressly mention cruelty, but a finding of persistent cruelty is clearly implied from their tenor; see, to this effect, Lord Hodson at [1963] 2 All E.R. 983, letter C.

¹⁰ [1962] 2 All E.R. 366.

¹¹ [1962] 3 All E.R. 897.

In the view of the Divisional Court (Sir Jocelyn Simon P. and Cairns J.) the final question which the court should ask itself is "whether the conduct in issue plainly satisfied the meaning of the word 'cruelty' in its ordinary acceptation," and by this test the husband's conduct, however reprehensible, could not properly be stigmatised by the word "cruelty". With this straightforward approach Harman L.J. agreed in his dissenting judgment in the Court of Appeal: to him this seemed to be the beginning and the end of the matter. Davies L.J., however, found "dangerous" the test of asking whether the conduct amounted to cruelty in the ordinary sense of the word¹² and expressed entire agreement with Willmer L.J. who, in a carefully reasoned judgment, emphasised that the question of cruelty resolved itself into one of fact. Hence the answer could not be found by looking at law reports and seeing how other cases in other circumstances had been decided, because the question (to quote Mr. Justice Pearce) was "whether *this* conduct by *this* man to *this* woman or vice-versa is cruelty."¹³ Hence too, as was pointed out by the House of Lords in *Jamieson*,¹⁴ the undesirability of creating, by judicial pronouncement, certain categories of acts or conduct having the nature or quality of cruelty, or of attempting a comprehensive definition of cruelty. Nevertheless, he believed that there did exist principles of law to serve as a guide in answering this question of fact. These "propositions of law" he summarised under four heads: (1) there was the basic requirement laid down by the House of Lords in *Russell*¹⁵ that the conduct must cause danger to health; (2) the conduct of the offending spouse must be in some sense aimed at or directed against the complaining spouse, this requirement being laid down by the Court of Appeal in *Kaslefsky*,¹⁶ which decision, "so far as I am aware, has never been overruled and is therefore binding on us"; (3) in the absence of elements (1) and (2) the charge of cruelty must as a matter of law be dismissed; (4) given that requirements (1) and (2) were satisfied, it was a question of fact and degree whether or not the conduct complained of amounted to cruelty. In approaching this last question, Willmer L.J. thought the relevant considerations to be: first, that a spouse should not lightly be held guilty of the serious charge of cruelty, but rather to constitute cruelty the conduct must be of a grave and weighty character or at least it must not come within what Asquith L.J. described as "the ordinary wear and tear of married life"¹⁷; and secondly, one must always consider the personalities of the two spouses and especially the susceptibilities of the innocent spouse.

INTENTION NOT ESSENTIAL IN CRUELTY

Pausing here, it will be seen that his lordship stipulates the conjunction of three elements to constitute cruelty: injury to health, a certain mental element on the part of the offending spouse, and conduct which is grave and weighty.

All five members of the House of Lords endorsed the general comments of Willmer L.J. about cruelty being a question of fact and degree and the undesirability of attempting a comprehensive definition. But the majority held, and this is now the law immutable save by statute, that the second element, a certain mental state on the part of the offender, is not an essential ingredient, although a desire to hurt may be a relevant factor in assessing whether the conduct is sufficiently grave and weighty to amount to cruelty. Or, to put it another way,

¹² Likewise Lord Herschell in *Russell* [1897] A.C. 395: "it is beyond controversy that it is not every act of cruelty in the ordinary and popular sense of the word which amounted to *saevitia*, entitling the party aggrieved to a divorce." Hence, of course, the constant use of a qualifying epithet by judges and legal writers, e.g., "legal cruelty," "matrimonial cruelty," etc.

¹³ *Lauder v. Lauder* [1949] 1 All E.R. 76 at p. 90.

¹⁴ [1952] A.C. 525.

¹⁵ [1897] A.C. 395.

¹⁶ [1951] P 38.

¹⁷ *Buchler v. Buchler* [1947] P. 25 at p. 45.

the attitude of mind of the offender goes to the gravity and weight of his conduct but no particular attitude is essential. As Lord Reid said: "Often the conduct must take its colour from the state of mind which lay behind it."¹⁸ The new view is put succinctly by him at the end of his judgment: "If the conduct complained of and its consequences are so bad that the petitioner must have a remedy, then it does not matter what was the state of the respondent's mind."¹⁹ Such a case, he felt, was *Williams*. He goes on: "In other cases, the state of his mind is material and may be crucial." Into this second category he groups, on the one hand, cases of a deliberate intention to cause suffering, such as *Jamieson*,²⁰ and on the other, a case like *Gollins* where the respondent knew that he was injuring his wife's health, although he had no desire nor intent to injure her. He points out that the present is not one of those complicated and difficult cases where the petitioner is partly at fault (such as *King*²¹) or where from illness or temperament the petitioner is unduly demanding or unusually sensitive or where the respondent suffers from some mental abnormality (such as *Williams*). Rather,

"I am dealing with a spouse normal in mind and health who has been reduced to ill-health by inexcusable conduct of the other spouse persisted in although he knew the damage which he was doing."²²

As these facts had been clearly proved and went well beyond the ordinary wear and tear of married life, persistent cruelty was established so as to permit the wife to live apart pursuant to the justices' order.

Earlier in his judgment Lord Reid had abjured the attempt to define cruelty comprehensively²³:

"Much must depend on the knowledge and intention of the respondent, on the nature of his (or her) character, and on the character and physical or mental weaknesses of the spouses, and probably no general statement is equally applicable in all cases except the requirement that the party seeking relief must show actual or probable injury to life, limb or health."

Nevertheless, he recognised that the matter could not be left simply at large for the trial judge,²⁴ as this would lead to a multitude of appeals. But his lordship would reduce tests, rules and presumptions to a minimum. "In matrimonial cases we are not concerned with the reasonable man, as we are in cases of negligence. We are dealing with this man and this woman and the fewer *a priori* assumptions we make about them the better."²⁵

His lordship proceeded to examine the test of conduct "aimed at" the petitioner as propounded by Denning L.J. in *Kaslefsky*, the case by which Willmer and Davies L.JJ. had felt themselves bound. He thought the phrase "more picturesque than of easy practical application." If the "aimed at" test had been limited to cases of an actual deliberate intention to injure no difficulty would have arisen through it. But cruelty had been extended to situations where no actual intention was proved; instead, an intention to injure had been assumed by resort to the presumption that a man intends the natural and probable consequences of his acts. His lordship illustrates from his own national game that

¹⁸ [1963] 2 All E.R. 966 at p. 969, letter I.

¹⁹ *Ibid.* at p. 974, letter B.

²⁰ [1952] A.C. 525.

²¹ [1953] A.C. 124; in this case the husband's health was affected by his wife's nagging and accusations, but his petition alleging cruelty failed because his own adulterous conduct had provoked her behaviour.

²² [1963] 2 All E.R. 966 at p. 974, letter D.

²³ *Ibid.* at p. 969, letter C.

²⁴ As the Divisional Court was prepared to do, with its reliance on the "ordinary acceptance" of the word cruelty.

²⁵ [1963] 2 All E.R. 966 at p. 970, letter B.

such a presumed intention is really no intention at all²⁶:

"If I say that I intend to reach the green, people will believe me although we all know that the odds are ten to one against my succeeding; and no one but a lawyer would say that I must be presumed to have intended to put my ball in the bunker, because that was the natural and probable result of my shot."²⁷

His lordship considered that such an irrebuttable presumption, laying down, as it must, an objective standard of behaviour, had no place in a matrimonial offence where one is dealing with *this* man and *this* woman. On the other hand, if the presumption is rebuttable, then the onus of proof is transferred, so that the respondent must prove that he did not intend the natural and probable consequences that in fact resulted from his conduct.

Perhaps a more cogent objection to such presumptions²⁸ is to be found in the judgment of Lord Pearce where he points out that not infrequently acts which any reasonable person would regard as cruel, or which any reasonable person would have known to be injuring the health of the victim, are done by a respondent "who is so bigoted, or obtuse, or insensitive, or self-centred that he or she did not realise that these acts were cruel or injurious or intend that they should be."²⁹ Now, to avoid giving a free hand to, say, bigots to be as cruel as seems reasonable to their bigotry, "a court may, as a piece of prima facie reasoning, presume that a person intends the probable consequences of his acts. But if that presumption is rebuttable and the court insists on proof of intention, then in many cases of cruelty it cannot honestly give relief against the bigot, the obtuse, the insensitive, the self-centred."³⁰ To avoid this absurdity, the tendency has been, as both Lord Reid and Lord Pearce observe, for the courts to pay lip service to its insistence on intention but to regard the presumption in question as irrebuttable, or, in other words, to adopt an objective test of intention. By way of example Lord Reid points to the judgment of Willmer L.J. in the present case.

Not being bound by the authority of *Kaslefsky* Lord Reid was of opinion that the time had come to reject intention as a necessary element in cruelty. In cases like *Gollins*, "If he knew, or the evidence shows that he must have known, the effect of his conduct, . . . why does intention matter?"³¹ He finds support for this proposition in *Lang*, where the husband deliberately ill-treated his wife, knowing that this was likely to cause her to leave him but desiring, or hoping, that she would not leave. Lord Reid's analysis of the Privy Council's agreed single judgment (a type of judgment which he acknowledges to be "not infrequently obscure"³²) deserves citation:

"He (the husband) did not act with the intention of driving her out, but he acted with the knowledge that that was what would probably happen. There are references to what a reasonable man would have known; but it is said that this man must have known, which I take to mean that it was proper to hold on the evidence that he did know. So in the result his desire to keep his wife or lack of intention to drive her out was irrelevant. The Act³³ said nothing about intention: it used the word

²⁶ *Ibid.* at p. 972, letter L.

²⁷ As Dr. Goodhart has well shown in his magistral article "Cruelty, Desertion and Insanity in the Matrimonial Law" ((1963) 79 L.Q.R. 98), the presumed or "constructive intention" is really not a true intention at all but would be more accurately described as foresight. Thus, if Lord Reid's imaginary golf-ball injured a child whom he knew to be playing in the bunker, he might well be liable in negligence.

²⁸ Dubbed "disingenuous" by Lord Pearce [1963] 2 All E.R. 966 at p. 990, letter D.

²⁹ [1963] 2 All E.R. 966 at p. 990, letter C.

³⁰ *Ibid.* letter D.

³¹ [1963] 2 All E.R. 966 at p. 971, letters F, G.

³² Is this a reference to *D.P.P. v. Smith* [1961] A.C. 290?

³³ This refers to the Marriage Act, 1928 (No. 3726), of the State of Victoria, s. 75 (a), whereby wilful desertion (but not cruelty) is made a ground for divorce; hence, the reliance in *Lang* on the former, and not the latter, ground.

'wilfully'. So the decision was that if without just cause or excuse you persist in doing things which you know your wife will probably not tolerate, and which no ordinary woman would tolerate, and then she leaves, you have wilfully deserted her, whatever your desire or intention may have been. That seems to be in line with what I am now submitting to your lordships is the law in cases of cruelty."³⁴

Professor Goodhart, writing after *Gollins* and *Williams* had been decided by the Court of Appeal,³⁵ suggested that, in the absence of an actual intention to be cruel, cruelty should be tested by the same objective standard as negligence in the law of tort, namely, the "probable foresight of the reasonable man" in relation to the consequences of the act in question, the only subjective requirement being that the act itself must have been done intentionally.³⁶ Dr. Biggs, in his scholarly but ill-timed monograph on the concept of matrimonial cruelty,³⁷ likewise concluded that in order to establish cruelty it must be shown that the respondent foresaw the consequences of his conduct and where such foresight could not be proved it might be presumed by resort to the presumption that a person intends the natural and probable consequences of his acts.³⁸ Moreover, he argued (very persuasively) that his conclusion was supported by authority, especially the case of *Lang*.³⁹ For him, however, the presumption is irrebuttable only in the sense that it is invoked in the last resort where there is no adequate evidence to prove either the existence or the absence of foresight in the respondent.⁴⁰

Significantly, both Willmer and Davies L.J.J. in the Court of Appeal spoke in terms of foresight,⁴¹ and the former had even more explicitly adopted this test in *Windeatt*.⁴² Lord Reid, however, categorically rejects such a test:

"Irrebuttable presumptions have had a useful place in the law of tort in facilitating the change from a subjective to an objective standard. In matrimonial affairs we are not dealing with objective standards, and it is not a matrimonial offence to fall below the standard of the reasonable man (or the reasonable woman). We are dealing with this man and *this* woman."⁴³

For his lordship then it is not the foresight of the reasonable man, but the intention or at least the knowledge of the actual respondent that has to be considered, and this only in those cases where the state of his mind is in any way material. For "if the conduct complained of and its consequences are so bad that the petitioner must have a remedy, then it does not matter what was the state of the respondent's mind."⁴⁴

Lord Evershed agreed with Lord Reid's opinion and considered that this husband's conduct could be described by the words of Sir William Scott in

³⁴ [1963] 2 All E.R. 966 at p. 973, letter I *et seq.*

³⁵ "Cruelty, Desertion and Insanity in Matrimonial Law" (1963) 79 L.Q.R. 98.

³⁶ *Ibid.* at p. 125.

³⁷ John M. Biggs, *The Concept of Matrimonial Cruelty* (1962 and so pre-*Gollins*).

³⁸ See especially Chap. V, "Foreseen Consequences" and his conclusion at p. 98.

³⁹ [1955] A.C. 402. A similar conclusion to that of Dr. Biggs about the effect of this case was reached by Sir Carleton Allen in his valuable article "Matrimonial Cruelty" (1957) 73 L.Q.R. 317 and 512.

⁴⁰ Biggs, *op. cit.* at p. 96.

⁴¹ Thus, in *Gollins* [1962] 3 All E.R. 897, Willmer L.J. said: "But such an intention (to injure) may in a proper case be inferred where, for instance, the conduct complained of is persisted in (a) after warning that it is having an adverse effect on the other spouse, or (b) *in circumstances in which any reasonable person would appreciate that it was likely to injure the other spouse*" (at p. 901, letter E: italics supplied).

⁴² [1962] 1 All E.R. 776, at p. 786, letter C. That his lordship is adopting in these cases an objective test of foresight is plain: see to his decision at first instance in *Usmar v. Usmar* [1949] P. 1, where he found the wife in that case cruel although "blissfully unconscious of the disastrous extent to which her conduct was undermining the marriage."

⁴³ [1963] 2 All E.R. 966 at p. 972, letter E *et seq.*

⁴⁴ *Ibid.* at p. 974, letter B.

*Evans*⁴⁵ as being "such as to show an absolute impossibility that the duties of the married life can be discharged."⁴⁶ As Dr. Biggs has pointed out, the minority of the House of Lords in *Russell* favoured this very test of impossibility as the criterion of cruelty in preference to that of injury to health, the test which the majority of their lordships adopted. It is interesting that Lord Evershed should apparently accumulate both criteria: he emphasises at the outset of his judgment that the essential requirement of injury to health has been expressly proved in the present case. Perhaps he introduces the test of "impossibility" to compensate for the discarding of the element of intention. In his view the test of "aimed at" emerged from the premise that cruelty involved a quality of malignity in the respondent, and in rejecting both premise and test he declared roundly:

"the presence of intention to injure on the part of the spouse charged or (which is, as I think, the same thing) proof that the conduct of the party charged was 'aimed at' the other spouse is not an essential requisite for cruelty."⁴⁷

LORD PEARCE'S TEST OF UNENDURABLE CONDUCT

Lord Pearce was also in favour of dismissing the appeal. He begins his long judgment by pointing out that two safeguards have been established against cruelty being founded on mere trivialities and incompatibility. There is the need for the conduct to be grave and weighty, as laid down from the days of Lord Stowell, and *Russell* stipulated that there must also be danger to health. Intention to injure has been rejected as a necessary ingredient of cruelty in cases such as *Kelly*, *Hadden*, *Squire* and *Jamieson*,⁴⁸ although it may be a deciding factor in some doubtful cases. His lordship traced the germ of the doctrine of "aimed at" from *Horton*⁴⁹ in 1940 to its full expression in *Kaslesky*⁵⁰ which adopted and elaborated Denning L.P.'s earlier dictum in *Westall*.⁵¹ His lordship had some sympathy with the court's desire in *Kaslesky* "to supply some mesh that would separate the grain from the chaff." Unfortunately, the doctrine had created confusion and difficulty. In his view the test was not a happy one from a practical standpoint and it could only be made to work if it was "patched by presumptions." Under the "aimed at" doctrine the court is at once faced with the difficulty that much cruelty is purely selfish and is not aimed at the victim nor prompted by any intention or desire to injure:

"A court may, as a piece of prima facie reasoning, presume that a person intends the probable consequences of his acts. But if that presumption is rebuttable and the court insists on proof of intention, then in many cases of cruelty it cannot honestly give relief against the bigot, the obtuse, the insensitive, the self-centred."⁵²

He goes on to say that to treat the presumption as irrebuttable in order to avoid the absurdities indicated by him is to arrive back at the same objective test as Dr. Lushington had applied over a hundred years ago⁵³ when he claimed that he

⁴⁵ (1790) 1 Hag. Con. 35: Sir William Scott later became Lord Stowell.

⁴⁶ But, as Sir Carleton Allen has well shown (*op. cit.*, p. 324), Lord Stowell's judgment in *Evans*, read as a whole, implies that marriage only becomes impossible where the wife is in physical danger. It was the dissenting minority in *Russell* who tried to erect impossibility into a test independent of injury to health. This, in the view of the majority (and of Sir Carleton Allen), would be to face the courts with an insoluble problem.

⁴⁷ [1963] 2 All E.R. 966 at p. 976, letter E.

⁴⁸ *Kelly v. Kelly* (1870) L.R. 2 P. & D. 59; *Hadden v. Hadden*, *The Times*, December 5, 1919; *Squire v. Squire* [1948] 2 All 51; *Jamieson v. Jamieson* [1952] A.C. 525.

⁴⁹ *Horton v. Horton* [1940] 3 All E.R. 380.

⁵⁰ *Kaslesky v. Kaslesky* [1950] 2 All E.R. 398; [1951] P. 38.

⁵¹ *Westall v. Westall* (1949) 65 T.L.R. 337.

⁵² [1963] 2 All E.R. 966 at p. 990, letter D.

⁵³ *Dysart v. Dysart* (1844) 1 Rob.Eccl. 106 at p. 116.

must consider "the conduct *itself* and its probable consequences" rather than motives or intentions.

Having thus rejected intention, whether actual or presumed, as an essential ingredient of cruelty, Lord Pearce propounds his own criteria as follows:

"It is impossible to give a comprehensive definition of cruelty, but when reprehensible conduct or departure from the normal standards of conjugal kindness causes injury to health or an apprehension of it, it is, I think, cruelty if a reasonable person, after taking due account of the temperament and all the other particular circumstances, would consider that the conduct complained of is such that this spouse should not be called on to endure it."⁵⁴

He indicated that a similar test was propounded for constructive desertion by the Court of Appeal in *Hall*,⁵⁵ save that in constructive desertion there need be no injury to health.

THE DISSENTING OPINIONS

In their dissenting judgments both Lord Morris and Lord Hodson agree with Willmer and Davies L.JJ. in the court below that, in addition to grave and weighty conduct and injury to health, cruelty requires, as a third ingredient, an intention to injure, or at least persistence in conduct with knowledge of its effect. Lord Morris would allow the intention or knowledge to be presumed where any reasonable man must have known the consequence of his conduct; and he anticipates Lord Pearce's criticisms of "disingenuous presumptions" by observing that "the process of drawing an inference does not involve imputing an intention that did not in fact exist, but involves deducing from proper material that an intention did exist."⁵⁶ Lord Hodson does not advert to this point but remarks⁵⁷ that the converse of the decision in *Russell*, namely, that once injury to health could be attributed to matrimonial discord then cruelty was proved, has never been advanced in English law until the present case. And both the learned law lords felt that on the ultimate question of fact, the conduct of the husband could not properly be stigmatised by the word "cruelty" in its ordinary acceptation, agreeing in this respect with the conclusion of Sir Jocelyn Simon P. and Cairns J. in the Divisional Court and Harman L.J. in the Court of Appeal. Although findings of justices should not be disturbed where there is evidence to support them, they agreed that the finding in the present case was wholly wrong and ought not to be allowed to stand.

WILLIAMS: THE CASE OF THE INSANE HUSBAND

The same five members of the House of Lords proceeded directly to give judgment in *Williams*. Again Lord Morris and Lord Hodson formed a dissenting minority.

The case began as a petition for divorce before Mr. Commissioner Gallop, Q.C., on assize.⁵⁸ The wife's petition alleged cruelty on the part of her husband. There was a history of insanity in his family, and after ten years of uneventful married life he began to hear voices and spent some time in hospital. Eventually he was certified insane, but in 1958 he was regarded as a voluntary patient and

⁵⁴ [1963] 2 All E.R. 966 at p. 992 A *et seq.*

⁵⁶ [1962] 3 All E.R. 518. This case will be returned to later.

⁵⁶ At p. 978, letter F. So too Sir Carleton Allen: "while inferences of intention from actual consequences may be faulty, they are less faulty than attempts to see, as in a crystal, the workings of human minds" (*loc. cit.* at p. 524).

⁵⁷ [1963] 2 All E.R. 966 at p. 984, letter F.

⁵⁸ Unreported; but the facts of the case and the judgment are fully recited by Willmer L.J. in the Court of Appeal: [1962] 3 All E.R. 441.

in March 1959 discharged himself from hospital and returned home. His medical condition however was unchanged, and the voices were now telling him that his wife was behaving as a prostitute and that there were men in the loft of the house. He persistently accused her of adultery and sometimes climbed up into the loft to find the men. Not surprisingly, during the nine months he was at home in this state his wife's health was damaged.

The learned Commissioner had no difficulty in holding that she had made out her case of cruelty, unless the second limb of the M'Naghten Rules applied. He found as a fact that the respondent knew what he was doing in making the accusations but that he did not know that they were wrong in any sense of the that the M'Naghten Rules applied and in particular to hold that the second limb of these Rules applied as well as the first.

The Court of Appeal (Willmer and Davies L.JJ., Donovan L. J. dissenting) held that they were bound by the court's previous decision in *Palmer*⁶⁰ to hold that the M'Naghten Rules applied and in particular to hold that the second limb of these Rules applied as well as the first.

In the House of Lords Lord Reid swept aside the argument that the language of the 1937 Act had altered the law of cruelty by its use of the expression "treated" with cruelty.⁶¹ Accordingly, he turned back to the old law to see the effect of insanity upon allegations of cruelty. In 1884 Lord Penzance stated that an insane man was likely enough to be dangerous to his wife's personal safety, but that the remedy lay "in the restraint of the husband, not the release of the wife."⁶² The same conclusion was reached in the Scottish case of *Steuart* in 1870.⁶³ But modern methods of treatment for mental illness, with compulsory detention only as a last resort, mean that adequate protection may not be available to a spouse under the mental health legislation. In *Hanbury* (1892) the jury found, as directed by Sir C. Butt, that the husband was capable of understanding "the nature and consequences" of his acts, and the wife obtained her decree on the ground of adultery coupled with cruelty.⁶⁴ On appeal⁶⁵ Lord Esher took this finding to mean that the husband knew what he was doing and that he was doing wrong, but he reserved his opinion on the question whether the petitioner would be entitled to divorce if the respondent did not know the nature of what he was doing or that he was doing wrong.

Under the Matrimonial Causes Act, 1937, the first relevant case was *Astle*,⁶⁶ in which Henn Collins J. decided that, as the respondent did not know the nature and quality of his acts, those acts could not amount to cruelty, his reason for adopting the M'Naghten Rules being that they were the test applied in all other courts. *Astle* was criticised *obiter* in *Squire*,⁶⁷ in the course of rejecting the need for cruelty to be malignant or intentional. The next year the question came again before the Court of Appeal in *White*,⁶⁸ but in that case the respondent's type of insanity did not come within the M'Naghten Rules and was therefore disregarded, the Court of Appeal taking the view that the mere fact of insanity was no defence to a charge of cruelty. Denning L. J. further observed that the M'Naghten Rules did not apply to the law of divorce, insanity being no defence in divorce proceedings. This view was adopted by Pearce J. in *Lissack*⁶⁹ where

⁶⁰ [1954] 3 All E.R. 494.

⁶¹ See now Matrimonial Causes Act, 1950, s. 1 (1) (c): "on the ground that the respondent ... has ... treated the petitioner with cruelty." Cf. Matrimonial Proceedings (Magistrates' Courts) Act, 1960, s. 1 (1) (c): that the defendant... has been guilty of persistent cruelty to the complainant."

⁶² *Hall v. Hall* (1864) 3 Sw. & Tr. 347 at p. 349.

⁶³ *Steuart v. Steuart* (1870) 8 Macph. (Ct. of Sess.) 821.

⁶⁴ *Hanbury v. Hanbury* [1892] P. 222.

⁶⁵ (1892) 8 T.L.R. 559.

⁶⁶ *Astle v. Astle* [1939] 3 All E.R. 967.

⁶⁷ [1948] 2 All E.R. 51.

⁶⁸ *White v. White* [1949] 2 All E.R. 233.

⁶⁹ *Lissack v. Lissack* [1950] 2 All E.R. 233.

he held that on the earlier authorities insanity was no defence to a charge of cruelty.

Finally the matter came back before the Court of Appeal in *Swan* and *Palmer*.⁶⁹ In the former case *Lissack* was disapproved, all members of the court holding that insanity was a defence if the first limb of the M'Naghten Rules was satisfied; Somervell L. J. went further in thinking that the second limb by itself would not constitute a defence, that is, if the respondent knew the nature and quality of his acts but did not know that they were wrong. The facts of *Palmer* much resembled those in *Williams*, the husband being insane with the delusion that his wife was unfaithful and assaulting her on several occasions. It was held that he knew what he was doing and knew it was wrong, both limbs of the Rules being applied; in the result the wife succeeded in establishing cruelty.

Lord Reid also referred briefly to the Scottish authorities, which, after some judicial veering, settled in *Breen* upon the view that insanity is a defence.⁷⁰ Although the M'Naghten Rules are no part of the law of Scotland, the Scottish cases are valuable on the general question of insanity as a defence in cases of matrimonial cruelty.

THE CHOICE BEFORE THE HOUSE

Lord Reid concluded his review of the authorities with a summary of the four solutions, "none wholly satisfactory," between which the House must then choose. These were:

- (1) that the M'Naghten Rules must be applied (the solution of the majority in the Court of Appeal);
- (2) that only the first limb of the Rules should be applied (the solution of the dissentient in the Court of Appeal, Donovan L.J.);
- (3) that insanity was no defence;
- (4) that insanity was a defence if it had given rise to the cruel acts.

His lordship found three main difficulties in adopting solution (1). First, in criminal cases a jury may interpret the rules liberally to give the accused the benefit of the doubt and so mitigate their inherent defects; but in a divorce case "it would be impossible to give the benefit of the doubt to an insane aggressor against the injured spouse."⁷¹ Secondly, there was the difficulty of attributing a meaning to "wrong" appropriate to a divorce case: the meaning adopted for criminal cases, "contrary to law," obviously could not apply.⁷² Thirdly, the M'Naghten Rules would introduce into divorce law their capricious distinction between different types of insanity.

The half-way house of solution (2) was not favoured by his lordship, although it would supply a straightforward enough test. It was subject to the objection that "it discriminates between people who on evidence are proved to be equally irresponsible by reason of disease of the mind."⁷³ Of the two clear-cut alternatives that remained he recognised that there were two schools of thought, even among judges, between those who believed that there could not be cruelty without some kind of *mens rea* and those who thought that there could. In his view "the law cannot just take cruelty in its ordinary or popular meaning because that is too vague: we must decide what, if any, mental state is a

⁶⁹ *Swan v. Swan* [1953] 2 All E.R. 854; *Palmer v. Palmer* [1954] 3 All E.R. 494.

⁷⁰ *Breen v. Breen*, 1961 S.C. 158.

⁷¹ [1963] 2 All E.R. 994 at p. 1002, letter G.

⁷² See *Sofaer v. Sofaer* [1960] 3 All E.R. 468, where Collingwood J. suggested "culpable."

⁷³ [1963] 2 All E.R. 994 at p. 1003, letter C. His lordship had earlier observed that there were types of insanity outside the M'Naghten Rules which no less deprived the insane man of responsibility.

necessary ingredient.” At this point he referred briefly to his opinion in *Gollins* and observed that the law had long abandoned the original and stricter requisite of malignity or intention to hurt and accepted a second and lesser degree of *mens rea* or “blameworthiness,” such as knowledge that one is injuring the health of one’s spouse and persistence in that injurious conduct. *Gollins* was itself such a case. A third possibility was that it sufficed if the acts were intentional, even if not blameworthy because there was neither malignity nor foresight of the consequences; but this solution, which would permit the first limb of the M’Naghten Rules to provide a defence, Lord Reid had already rejected. Reverting then to the second kind of *mens rea*, he proceeds to show that this test of “blameworthiness” is unsatisfactory.

INSANITY NO DEFENCE TO CRUELTY

In this key passage of his argument he observes that there are many spouses who are not insane but are either sick in mind or body or so stupid, selfish or spoilt that they plainly do not appreciate or foresee the harm which they are doing to the other spouse, and “perhaps they are now so self-centred that nothing would ever get the truth into their heads.”⁷⁴ Lord Reid supposes that no one would now maintain that cruelty cannot be proved against such a person, “If his acts are sufficiently grave and really imperil the other spouse.” And it is difficult in some of these cases to attribute “more than a speck or scintilla of blame” to the respondent in the sense that he, not the reasonable man, ought to have realised the consequences of what he was doing and could have done otherwise if he had tried. He goes on:

“If we are to make culpability an essential element in cruelty, we can really only bring in these people by deeming them to have qualities and abilities which the evidence shows that they do not possess. Surely it is much more satisfactory to accept the fact that the test of culpability has broken down and not to treat entirely differently two people one of whom is just short of and the other just over the invisible line which separates abnormality from insanity.”⁷⁵

He concludes that a decree should be pronounced against such an abnormal person not because his conduct was aimed at his wife, nor because a reasonable man would have realised the position, nor because he must be deemed to have foreseen or intended the harm he did, but simply because the facts are such that, after making all allowances for his disabilities and for the temperaments of both parties.⁷⁶ It must be held by the objective observer that the character and gravity of his acts are such as to amount to cruelty. And his lordship sees no good reason why what is right for an abnormal person should not apply to an insane person. Hence he would allow the appeal and grant the wife the decree sought.

Both Lord Evershed and Lord Pearce agree with Lord Reid’s conclusion. Lord Evershed is firmly of the opinion that the second limb of the M’Naghten Rules has no application, which disposes of the present appeal. But in view of the even division of his brethren he feels obliged to express an opinion on the general question of insanity as a defence to cruelty. He would reject the M’Naghten Rules altogether as inapplicable to divorce cases: “cruelty is not a crime.”⁷⁷ Furthermore he maintains, though “with some hesitation,” that the test of cruelty is “wholly objective.”⁷⁸ This expression he explains by the

⁷⁴ At p. 1004, letter B *et seq.*

⁷⁵ *Ibid.* letter D.

⁷⁶ Thereby, of course, introducing a subjective element: cf. his lordship’s statement in *Gollins* at p. 970: “We are dealing with this man and this woman.”

⁷⁷ At p. 1006, letter B.

⁷⁸ At p. 1009, letter C.

example of a man who is seen beating his wife, his child or his dog: according to the objective test "the question would be, whether, according to the judgment of a reasonable man who saw the performance, the actor could fairly be said to be treating his wife, his child or his dog with cruelty?"⁷⁹ It follows therefore that proof of insanity such that the spouse did not know the nature and quality of his act is "not necessarily" an answer to cruelty.

Lord Evershed reaches this conclusion with obvious reluctance. Thus, he says:

"If the decision in this matter rested with me alone I am disposed to think that I should take the view that, on the ordinary sense of language, a man could not and would not be said to be treating another with cruelty if he was shown, by reason of mental disease or infirmity, not to be at all aware of what he was doing—if, to take an extreme case, a man who was observed to be beating physically his wife with the utmost severity were proved to be quite unaware that he was doing other than beating his drawing-room rug."⁸⁰

And, as we have seen, he introduces "not necessarily" as words of qualification when rejecting insanity as a defence. By this qualification he wished to signify that the mental derangement of the person charged cannot be wholly disregarded—certainly where the victim of the cruelty is aware of the disorder. "But the test will still be objective—in all the circumstances of the case should it fairly be said that the spouse charged has treated the other with cruelty?"⁸¹

Lord Evershed concludes that generally speaking the conduct of the party charged will not fail to be properly described as cruel merely because he is unaware of the nature and quality of his conduct, and he is led to this conclusion by Lord Reid's argument that, to hold otherwise, would be to draw an unfair and illogical distinction between one kind of insanity and another—to the serious detriment of the victim of the cruelty.

THE BALANCE OF HARDSHIP

Lord Pearce again adds his voice to that of the majority. He demonstrates that in tort and contract the common law affords no clear or uniform solution of the problem whether the defendant's insanity affords him immunity. In the matter of divorce the common law is of no more help than the criminal law. Divorce is not punitive, rather "the frailties of humanity produce various situations which demand practical relief and the divorce Acts owe their origin to a merciful appreciation of that demand."⁸² The Act of 1937, in first allowing divorce for cruelty, was enacted, "in order to alleviate the hardship to respondents and petitioners alike of being tied for life to a marriage that had broken down."⁸³ The omission of "guilty" in section 2 of the 1937 Act was deliberate: the new section was breaking away from the old idea of insistence on a matrimonial offence in that it was adding incurable insanity as a ground for divorce.

His lordship reviews the previous authorities and shows how they culminate in the decision of the Court of Appeal in the present case where it was held for the first time that the second limb of the M'Naghten Rules applied. It was also the first reported case in the whole history of English matrimonial law in which a respondent had ever succeeded on a defence of insanity. In the result, "the shackles of the M'Naghten Rules, which have caused so much difficulty in

⁷⁹ At p. 1008, letter E.

⁸⁰ At p. 1009, letter A.

⁸¹ *Ibid.* letter D.

⁸² At p. 1022, letter H.

⁸³ At p. 1023, letter D.

criminal cases, have been fastened on to divorce suits at a time when the criminal courts are emerging from their confinement.”⁸⁴

The practical considerations of allowing the defence are then considered by his lordship. He discusses the plight of a wife who seeks relief against an insane husband whether on the ground of the cruelty arising from his mental illness or on the ground of his acts of constructive desertion. If the husband is sufficiently insane he may be given immunity for both his cruelty and his acts of constructive desertion; but he may not be so continuously insane as to be detained permanently in which case, as the law now stands, it is doubtful if she has any “reasonable cause” for not living with him, so that if she leaves the husband, she will probably be in desertion herself and without home or maintenance. The principle of “separation by necessity” founded upon *Lilley*⁸⁵ presents difficulties and depends upon her paying lip service at least to a willingness to return whenever it is safe to do so, whereas the truth may well be that after her ordeal she is not prepared to do so in any event. After five years she may possibly obtain her release on the ground of incurable insanity, but this is by no means certain.

In Lord Pearce’s words “the frequent hardship to the petitioner so greatly exceeds the more infrequent hardship to a respondent that the practical social considerations speak strongly against insanity as a defence to cruelty.”⁸⁶ He cites in aid the recommendation to like effect of the Morton Commission.⁸⁷ He would not impose on the words “treated with cruelty” in the Act either the gloss “intending to be cruel or knowing that it was cruel” or even the gloss “intending to do the act which was in fact cruel.” He sees no justification for applying either the second or the first limb of the M’Naghten Rules. He admits the attractive simplicity of applying the first limb. But to do so would create a dividing line which in practice would not be easy to apply, which would at times make the courts powerless to help when need was most needed, and which would cause more hardship than it alleviated. Moreover it is not the dividing line which has been drawn in criminal cases nor that drawn in cases of contract, but it is that which has, after much doubt, been drawn in cases of tort.⁸⁸ “Why” he asks “if a decree on the ground of cruelty can be granted against a man who is driven by the impulses of a diseased brain, should there be a line, shared only by the law of tort, which puts those who do not know their acts into a different class from those who cannot avoid their acts?”⁸⁹ In his view, the distinction is one of sentiment rather than logic and one that the House of Lords should not impose in the absence of any uniform legal principle that compels such a distinction; insanity should, like temperament and other circumstances, be one of the factors that may be taken into account in deciding whether a wife is entitled to relief. Thus, where the conduct in question could not amount to cruelty in the absence of an actual intention to hurt, an insane spouse would not be held to be cruel. But where the conduct would be held to be cruelty regardless of motive or intention, insanity should not bar relief.

THE DISSENTING OPINIONS

In his dissenting judgment Lord Morris thought that the mental health of the parties should be a relevant and integral part of the inquiry whether one spouse has treated the other with cruelty. Insanity was a fact which must be taken into account rather than a “defense”: as was said by the House of Lords in *King*,⁹⁰

⁸⁴ At p. 1026, letter F.

⁸⁵ *Lilley v. Lilley* [1959] 3 All E.R. 283 (discussed in (1960) 23 M.L.R. 1).

⁸⁶ [1963] 2 All E.R. 994 at p. 1027, letter I.

⁸⁷ Report of Royal Commission on Marriage and Divorce (1956, Cmd. 9678). para. 256.

⁸⁸ *Morriss v. Marsden* [1952] 1 All E.R. 925.

⁸⁹ [1963] 2 All E.R. 994 at p. 1029, letter C.

⁹⁰ *King v. King* [1953] A.C. 124.

whether one spouse has treated the other with cruelty is a *single* question. For his lordship cruelty is a matrimonial "offence" and a "grave accusation" involving "opprobrium." It follows that there must at least be an intentional act before one can find cruelty. Here he quotes with approval the much-cited phrase of Shearman J. in *Hadden*:

"I do not question that he had no intention of being cruel, but his intentional acts amounted to cruelty."⁹¹

Accordingly, he would prefer to follow the older English cases in not classing as cruelty conduct which preceded from "madness, dementia, or positive disease of the mind"⁹² an approach also adopted by modern Scottish authorities. for

"the consideration of the mental state of the spouse whose conduct is complained of may be a deciding factor in reaching a conclusion that that spouse has not treated the other with cruelty."⁹³

This conclusion leads his lordship to ask whether there is any test or formula by which to measure the extent of the relevancy of the mental state of the respondent. His answer is that it is undesirable to seek to use any set form of words or any formula by which to measure whether someone who is mentally afflicted has treated another with cruelty. The M'Naghten Rules may often be helpful as guides, for which purpose he could see no justification for picking on one of them to the exclusion of others. "But there is no magic in the mouthing of some phrase or formula." Rather, cruelty should be regarded as an issue of fact uncomplicated as far as possible by questions of law and released from anchorage to any phrase or formula. On the facts of the present case he agreed with the finding of the trial judge; for, in his lordship's judgment,

"if certain conduct can properly and fairly be said to be the definite result of mental illness..., it would be contrary to the fitness of things to stigmatise it as cruelty."⁹⁴

Lord Hodson, who also dissented, differs from Lord Morris in preferring the orthodox approach of discussing insanity as a "defense" to a charge of cruelty. On his view of the authorities the phrase cruelty or persistent cruelty in the modern statutes was meant to bear the same meaning as it had previously borne in the ecclesiastical courts, and nothing in the older cases suggested that a madman would have been regarded as cruel. In his opinion "cruelty" involves an implication of blameworthiness. If cruelty then is to be excused by insanity (as he believes it is), that is because intention is relevant and the effect of insanity is to negative intention. Lord Hodson agreed with Asquith L. J.⁹⁵ that, if insanity were immaterial, it would follow that the intention of the aggressor is irrelevant, for the act must be looked at from the point of view of the victim and one looks no further than that.

As to what degree of insanity will furnish a defence, Lord Hodson thinks that the M'Naghten Rules have at least the merit of simplicity. Like Lord Morris, however, he would not wish to be bound by any form of words. The first limb of the rules, as applied to cruelty, has received a wider measure of acceptance than the second and goes some way towards recognising the subjective element in cruelty. But in his lordship's view it does not go far enough and the second limb "or its equivalent" is needed to cover the case of one who is conscious of what he is doing but through disease of the mind does not know that is it wrong. He agreed with Davies L.J. that the word "wrong" could not bear the meaning

⁹¹ *The Times*, December 5, 1919.

⁹² The phrase of Sir J. P. Wilde in *Hall v. Hall* (1844) 1 Rob.Eccl. 106 at p. 116.

⁹³ [1963] 2 All E.R. 994 at p. 1015, letter D.

⁹⁴ *Ibid.* at p. 1016, letter F.

⁹⁵ *White v. White* [1949] 2 All E.R. 339 at p. 347.

“contrary to the law” which it bore in a criminal context but that it meant simply “wrong” (presumably, morally wrong). He is fortified in his conclusion by the decision of the Court of Session in *Breen* where it was held (*per* Lord Patrick) that:

“In principle no blame can be attached to a man who at the time of the acts in question was by reason of alienation of mind disabled from coming to a rational decision in regard to the acts.”⁹⁶

Nor did he think that the wife would be left wholly remediless if her petition were refused. If circumstances arose in which the husband were able to maintain his wife she could seek a maintenance order from him under the principle in *Lilley*⁹⁷ by showing that a *de facto* separation had been imposed on her by force of circumstances.

THE EXTENSION OF MATRIMONIAL CRUELTY

In the light of the foregoing analysis of the judgments in *Gollins* and *Williams*, what is their effect upon the law of matrimonial cruelty?

In the first place, the old norms of “grave and weighty conduct” and “injury to health” have been retained. What has been jettisoned is the prescribing of any particular state of mind in the offending spouse. In future, the attitude of mind will go only to the gravity and weight of the conduct complained of, and not stand on its own feet as a separate requisite of cruelty. But where there is actual intention to injure or foresight that conduct will have injurious consequences, such states of mind may in a proper case so colour a spouse’s behaviour as to remove it from the spectrum of the ordinary wear and tear of married life. Again, where proof of an actual intention or actual foresight is lacking the court may still resort to the presumption that a person intends (or at least foresees) the natural and probable consequences of his acts. But in future there will be less need to have recourse to presumptions about intent or foresight. Whether or not a certain mental state has been proved or presumed, the gravity and weight of the conduct is to be assessed objectively in the sense that the court will ask itself whether (as Lord Pearce put it) “a reasonable person, after taking due account of the temperament and all the other particular circumstances, would consider that the conduct complained of is such that this spouse should not be called upon to endure,” or (in Lord Reid’s words) whether “the conduct complained of and its consequences are so bad that the petitioner must have a remedy.”⁹⁸

This emphasis on the court’s obligation to provide a remedy, or on “justice demanding a remedy,”⁹⁹ is the second feature to notice in the two cases. In *Gollins* the wife could have had her remedy, as Willmer L. J. showed, without abandoning the requisite of intent or foresight, but the majority of the House of Lords were compelled to go further in that case in anticipation of their finding a remedy for the wife in *Williams*: hence, the rejection of any state of mind as essential for cruelty in the first case, from which could follow logically in the second the rejection of an unsound mind as providing a defence.

In regard to insanity the courts have thus achieved by a kind of consistorial equity the change in the law recommended by the Royal Commission.¹ On the other hand, they have discarded the element of intention, which the Commission thought a valuable safeguard.²

⁹⁶ 1961 S.C. 158 at p. 182.

⁹⁷ See note 85, *supra*.

⁹⁸ Italics supplied.

⁹⁹ *Per* Lord Reid: [1963] 2 All E.R. 966, at p. 973, letter E.

¹ Para. 256.

² “These (*i.e.*, the requirements of injury to health and intention) are valuable safeguards, the removal of which would in our view lead to divorce on the ground of incompatibility of temperament” (para. 129).

Cruelty has always had an in-built equity or judicial discretion by reason of the requirement that the conduct shall be grave and weighty, the weighing being in the hands of the court. Now, however, a much wider area of discretion is being claimed: witness the reference to unendurable conduct that must afford the victim a remedy (*per* Lord Pearce) or to conduct showing an absolute impossibility that the duties of married life can be discharged (*per* Lord Evershed). Such conduct is assessed objectively from the standpoint of the reasonable man or "the objective observer," but this is only an alias for the court. The danger of any system of equity is that it may not treat like cases alike, and in consistorial law this danger is multiplied by the large number of lay justices having jurisdiction in matrimonial matters. Appeals too are encouraged where judicial discretion replaces hard legal principle.

A third feature in the cases under review is that they play down such subjective elements as intention, guilt, blameworthiness, culpability, not only in cruelty but also (as we shall see) in constructive desertion. Judged from the standpoint of the objective observer, these matrimonial offences have become, in criminal terms, offences of absolute prohibition, for which a guilty mind is no longer indispensable. But if matrimonial offences (or some of them) are to be drained of their culpability, what happens to the doctrine of the matrimonial offence as the basis of our divorce law? Once one allows that there can be cruelty without culpability, then one has divorce without fault. Lip service may still be paid to the doctrine of the matrimonial offence, but behind this legal fiction the courts are accepting the principle of the breakdown of the marriage as the basis for divorce. Much of the language of the majority in the House of Lords reflects this approach. Thus, the extensive arguments based upon a balance of hardship fit strongly into the context of the doctrine of the matrimonial offence but are more appropriate, say, to the ground of incurable insanity, confessedly a ground posited upon the principle of breakdown. And Lord Pearce stated the *ratio legis* behind the ground of cruelty to be that of alleviating the hardship to both spouses in being tied for life "to a marriage that had broken down."

On this, perhaps the most fundamental, aspect of the case, it is submitted that the House of Lords has now made cruelty (and constructive desertion) a ground to be grouped with incurable insanity under the principle of breakdown. Of the present grounds for divorce³ only adultery and its congeners (rape and unnatural practices), with actual desertion, remain unequivocally matrimonial offences in the sense of involving *mens rea* or culpability. Or at least this is so where one is dealing with the kind of blameless conduct or "constructive cruelty" which was present (as the House decided) in *Williams*. If this submission be correct the latest decisions can only discredit still further the "offence" doctrine by emphasising its superficiality. For, on deeper analysis, adultery, cruelty and either form of desertion are all equally symptomatic of marriage breakdown.

A fourth question which the cases provoke is where the limits are to be drawn to circumscribe this doctrine of constructive cruelty. In *Williams* the husband was mentally sick, but can only distinguish between categories of sickness? What of the husband, physically crippled or diseased, the nursing of whom gradually undermines his wife's health? Can that wife now seek release on the ground of cruelty? And what of the husband whose criminal tendencies land him in prison for a long term while his wife has to make shift for herself and the children, again with injury to her health? Is this cruelty? Certainly her lot might be described as a "cruel" one; fate has dealt her a "cruel" blow in her marriage. Such metaphorical usage of the epithet was called in aid by Donovan

³ Cf. the numerous "causes of complaint" which confer jurisdiction upon magistrates' courts under the Matrimonial Proceedings (Magistrates' Courts) Act, 1960. Desertion and cruelty apart, these are mostly framed in terms of culpability (*e.g.*, wilful neglect to maintain).

L.J. to illustrate its ordinary connotation of "merciless." It is true that Lord Reid picks out such commonplaces of language to demonstrate that the law cannot take cruelty in its ordinary or popular meaning because that is too vague; but he proceeds to discard the requisite of intention or foresight that would have given precision to the concept of matrimonial cruelty and resorts instead to the equally vague formula of "the character and gravity of his acts being such as to amount to cruelty." With respect, it is hard to see how this differs substantially from the Divisional Court's test of "cruelty in the ordinary acceptance of the term," and it is significant that Lord Evershed, who agreed with Lord Reid in both cases, states categorically that the question is whether the acts or conduct of the spouse charged were cruel according to "the ordinary sense of the word." By this test (or Lord Reid's) it is not easy to see how the doctrine of unintentional cruelty can be restricted only to situations of sickness of mind. Already indeed the cases have been followed at first instance so as to allow a wife a divorce for cruelty where her husband insisted on being tickled.⁴ Clearly there will be a period of uncertainty whilst the limits of the new concept of cruelty are worked out in the courts. For limits there will have to be.⁵

A fifth question then arises. At least, it may be said, this notion of constructive cruelty will be kept within bounds by the insistence on injury to health. But even this prerequisite is not as strict as might appear. In the first place, the terms "health" and "injury" have both been progressively expanded to take account of mental conditions of which the courts have been made aware by the modern sciences of psychiatry and psychology. In the second place, it will be recalled that the full expression in *Russel* spoke either of injury to health or of "a reasonable apprehension" of such injury. The case law on this alternative of prospective injury is surprisingly scanty,⁶ but further expansion of cruelty might well come by using medical evidence to establish that there is a reasonable apprehension that the petitioner's health will suffer in the future unless the court gives the relief sought.⁷

Quite often, one suspects, the injury to health does not materialise because the sufferer of ill-treatment takes his or her own remedy of self-help by leaving the offending spouse. In other words, constructive desertion forestalls the injury to health: what would have been a divorce for cruelty if the petitioner had not left comes before the court, sooner or later⁸ as a divorce on the ground of desertion in the constructive form. It remains to consider how far this ground has been affected by the new cases on cruelty.

THE ANIMUS IN CONSTRUCTIVE DESERTION

Just as cruelty used to be thought to require a certain mental attitude on the part of the offending spouse, so the offence of constructive desertion was compounded of grave and weighy conduct accompanied by an "intention to drive away." The consequence however of the ill-treatment in the latter offence was not injury to health but the withdrawal of the ill-treated spouse from cohabitation.

⁴ *Lines v. Lines* (1963) 107 S.J. 596.

⁵ Using hindsight one way may now see that if Parliament had added to the Divorce (Insanity and Desertion) Act, 1958, a clause to implement the Royal Commission's other recommendation concerning insanity (*viz.*, that it should be no defence to cruelty) there would have been no need for judicial distortion of the concept in order to find a remedy in *Williams*; and Willmer L.J.'s propositions would have provided a remedy in *Gollins*.

⁶ *Fromhold v. Fromhold* [1952] 1 T.L.R. 1522 (C.A.), which is cited in this context in *Rayden on Divorce* (8th ed.) at p. 121, is hardly in point as there was a previous history of violence (bruises, a black eye and a knife-wound).

⁷ This might offer a way to evade the strict rules governing insanity as ground for divorce: in *Williams*, of course, there was such evasion, but injury to health had already occurred.

⁸ The constructive desertion must, of course, persist for three years to be ground for divorce.

The development of the mental element in constructive desertion has hitherto followed a more or less parallel course to the *animus in cruelty*. Thus, in place of an actual intention to drive away or expel, the courts have accepted the alternative of knowledge or foresight on the part of the offender that his conduct will have this consequence. And as in cruelty they have sometimes been prepared to infer such an intention or knowledge by resort to presumptions and the standard of the reasonable man. Despite some oscillations, the judicial practice now seems settled along these lines, as may be exemplified by *Lang* in the Privy Council.⁹ *W.* (No. 2) in the Divisional Court,¹⁰ and, most recently, *Hall* in the Court of Appeal.¹¹ In this last case, a finding of constructive desertion by the justices was upheld because the husband, who persistently came home drunk at a late hour, "must have known" (*per* Diplock L.J.) or "should have known" (*per* Ormerod L.J.) that his wife would in all probability not continue to endure his conduct if he persisted in it.

Now that the House of Lords has held a particular mental attitude to be no longer essential in cruelty, will constructive desertion likewise shed its requirement of *animus*? The references to *Hall* in *Gollins* suggest that cruelty and constructive desertion will continue to march together. Thus, Lord Pearce, after defining cruelty in terms of conduct which a reasonable person would consider the ill-treated spouse "should not be called upon to endure," states that the judgments of the Court of Appeal in *Hall* propound a similar test for constructive desertion.¹² In fact, as we have seen, both Ormerod and Diplock L.J.J. emphasise that the husband must have foreseen the result of his conduct; only Danckwerts L.J. omits any reference to the husband's *animus* and states baldly: "the question is whether *this* man's conduct to *this* wife has been of such a nature that she could not reasonably be expected to endure it further..."¹³ It seems likely, however, that Lord Pearce's view of *Hall*'s case will be adopted. In this event the courts will have brought about in effect the change in the law recommended by the Morton Commission. The Commission, it may be recalled,¹⁴ wished to have a statutory definition of desertion embracing both actual and constructive forms and so forded that *conduct of a grave and weighty nature which is such that a spouse could not reasonably be expected to continue with the conjugal life* should raise an irrebuttable presumption that the offending spouse intended to bring the married life to an end. The extension of the *Gollins* principle to constructive desertion would do away with the need to presume any such bogus intention: constructive desertion would be sufficiently defined by the passage in italics.

Whatever the merits of the concept of cruelty without culpability, there can be no doubt that it is an advantage for cruelty and constructive desertion not to be subject to different rules in regard to *animus*. Until *Gollins* and *Williams* they had in common the need for either intention or foresight. Common legal principles for the two offences are desirable because in practice cruelty and constructive desertion frequently arise on the same facts: witness the cases

⁹ [1955] A.C. 402.

¹⁰ [1961] 2 All E.R. 626, in which the Divisional Court (Lord Merriman P. and Baker J.) disapproved of *Boyd* [1938] 4 All E.R. 181 and followed *Cooper* [1954] 3 All E.R. 415, *Ivens* (*ibid.* at p. 446) and *Lang* (*supra*) in allowing an expulsive intent to be presumed where the offending spouse must have known the consequences of his conduct. *Cooper* and *Ivens* were both cases of cruelty, but in *Waters* [1956] 1 All E.R. 432 Lord Merriman had already observed, in following *Lang*, that the same considerations regarding *animus* should apply to both offences.

¹¹ [1962] 3 All E.R. 518.

¹² [1963] 2 All E.R. 966 at p. 992, letter B.

¹³ [1962] 3 All E.R. at p. 524, letter F.

¹⁴ See para. 155. This recommendation was by a majority only of the Commission, five of the nineteen members not concurring.

of *Lang* and *W.* (No. 2).¹⁵ If a wife were not only injured in health but also driven from home by her husband's unendurable conduct, it would be absurd to find cruelty proved, but to reject a complaint of constructive desertion for want of an expulsive intent.

Again, if insanity is to be no defence to a charge of cruelty, it cannot logically provide a defence to acts of constructive desertion. For if the expulsive conduct consists of cruel acts it would again be absurd to say that the act constituted cruelty, despite the respondent's insanity, yet because of the insanity did not constitute constructive desertion. It is otherwise of course in actual desertion, as was shown in *P. v. P.* where a wife suffered from insane delusions that her husband was committing adultery and meant to murder her; when she eventually left him, his charge of desertion failed for want of an *animus deserendi* on her part.¹⁶ *Animus* is needed here to distinguish actual desertion from involuntary separation.

CONCLUSION

Due to the "metaphysical niceties" of the English law of divorce,¹⁷ conduct between spouses in the nature of ill-treatment¹⁸ appears to fall into six ascending legal categories or grades.¹⁹ At the lowest point in the scale is the "wear and tear of married life." Conduct of the spouses falling into this category is disregarded by the law either on the principle of *de minimis* or by analogy to the doctrine of *volenti non fit injuria* in tort or of an implied term in contract: the spouses have made their bargain "for better, for worse" and cannot therefore complain if they get more of the latter.²⁰ At the other end of the scale comes cruelty, the two essentials of which now are grave and weighty conduct on the part of the offending spouse and resultant injury to, or danger to the health of, the other spouse: intention to injure or foresight that injury will result will go to the weight and gravity of the conduct complained of, but if that conduct and its consequences are so bad that the victim must have a remedy, then the state of mind, even the insanity of the offender, is immaterial.

Close behind (or alongside²¹) cruelty comes constructive desertion. This likewise involves grave and weighty conduct but the consequence is not (necessarily) injury to health but the withdrawal of the innocent spouse from cohabitation. Again, it seems that in future the *animus* of the constructive deserter will go only to the weight and gravity of his conduct and that no particular state of mind will be essential in an extreme case. Hard to distinguish from conduct amounting to constructive desertion is that providing a just cause

¹⁵ So too *Bowron v. Bowron* [1925] P. 187, where, as in *W.* (No. 2), the summons was for constructive desertion, rather than persistent cruelty, because the latter fell outside the six months' limitation period.

¹⁶ *P. v. P.*, *The Times*, July 31, 1963.

¹⁷ The phrase is that of Diplock L.J., in *Hall* [1962] 3 All E.R. at p. 52, letter E).

¹⁸ Lord Merriman P. in *Jamieson* [1952] A.C. at p. 540 speaks of cruelty as requiring conduct which can fairly be described as "ill-treatment," but does not further define the term, regarding it no doubt as self-explanatory. Variants are "ill-usage" (per Channell B. in *Kelly v. Kelly* (1870) L.R. 2 P.D. at p. 61), "ill-conduct" (per Wilde J.O. in *Power v. Power* (1865) 4 Sw. & Tr. at p. 177). The modern emphasis on ill-treatment stems probably from the wording of the Matrimonial Causes Act, 1937 (see note 60 above).

¹⁹ See Report of Royal Commission on Marriage and Divorce (1956, Cmd. 9678), para. 153 where the first four categories in the text are distinguished.

²⁰ But see the comment of Danckwerts L.J. in *Hall* (at p. 524, letter F): "I would respectfully suggest that there is too much talk in matrimonial cases about a party accepting the other 'for better or for worse' ... the phrase in jurisdictions in which divorce is not recognized might have some sense, but in this country, where the law provides for divorce, it seems to me to be something of a cynical jest."

²¹ Conduct amounting to cruelty or constructive desertion differs not in gravity but in consequence. Indeed, until 1925, cruelty could not form the basis of an order under the Summary Jurisdiction (Married Women) Act, 1895, unless it had caused the wife to leave the home and live apart from her husband.

for the innocent spouse's leaving as an answer to a charge of actual desertion²²: just cause also requires grave and weighty conduct such as to make married life impossible, but it has never, it seems, required any particular *animus* on the part of the offending spouse.²³

Somewhere below conduct providing just cause for leaving but above that which is no more than the wear and tear of married life comes "conduct conducing" to the adultery, desertion or insanity of the ill-treated spouse.²⁴ The remaining category of ill-treatment is that sufficient to revive condoned adultery or cruelty. It is hard to see where exactly this comes in the scale: such criteria as have been suggested would seem to equate "conduct reviving" with just cause for leaving in point of gravity.²⁵

In the face of these Byzantine refinements, which cry aloud for simplification, the House of Lords has at least gone far to equate the measures of ill-treatment required for cruelty and constructive desertion.²⁶ But Willmer L. J., by his rationalisation in *Gollins* of the previous authorities, had already achieved this whilst preserving the safeguard of a mental element for both offences, the *animus* either of intention or of what Dr. Goodhart has described as the foresight of the reasonable man. The rejection of *animus* as an essential for either offence is consistent with the rejection of insanity as a defence to cruelty (and, *semble*, constructive desertion), but it opens the door to divorce without fault and the replacement of the "offence" doctrine by that of breakdown. The law has been thrown into confusion by seeking to engraft upon statutes framed in terms of matrimonial offences a judicial interpretation founded upon the principle of breakdown. The judgments of the majority in the House of Lords have thus made more compelling the statutory reform of the law of divorce, and one more radical than the modest proposal which failed on June 21, 1963, to commend itself to the second chamber.²⁷

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²² Or an answer likewise to a petition for restitution of conjugal rights: *Russell v. Russell* [1895] P. 315 (C.A.).

²³ Thus, Asquith L.J., in *Buchler v. Buchler* [1947] P. 25: "To afford such justification the conduct of the party staying on need not have amounted to a matrimonial offence." Also Bucknill L.J. in *Edwards v. Edwards* [1950] P. at p. 11: "There can be sufficient cause for desertion which falls short of cruelty."

²⁴ M.C.A., 1950, s. 3 (2) (iv) refers to "such wilful neglect or misconduct as has conduced to the adultery or unsoundness of mind or desertion." So far as concerns conduct conducing to desertion, Willmer J. in *Postlethwaite v. Postlethwaite* [1957] 1 All E.R. 909 was of opinion that the misconduct must be more than the ordinary wear and tear of married life but not sufficiently bad to amount to a just cause for a separation: "conduct which falls short of justifying the separation but which may, in part, excuse it."

²⁵ e.g., per Bucknill L.J. in *Richardson v. Richardson* [1950] P. 16: "conduct which makes married life together impossible"; cf. the description of just cause for leaving propounded by Barnard J. in *Dyson v. Dyson* [1953] 2 All E.R. 1511: "conduct so grave and weighty as to make married life impossible." Condoned *adultery* cannot be revived after July 31, 1963 (M.C.A. 1963, s. 3).

²⁶ And for just cause for leaving.

²⁷ p. 625 above.

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APPENDIX "54"

MARRIAGE BREAKDOWN OR MATRIMONIAL OFFENSE:

A CLINICAL OR LEGAL APPROACH TO DIVORCE

by

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Divorce rates in this country are among the highest in the world; and divorce procedures, in consequence of a bewildering variety of laws and practices in the various states, present in this country a pattern of unusual diversity and complexity.¹ In light of the considerable progress which has been made in the understanding of the marriage relationship, and in the development of high-level marriage counseling services, perhaps the time has come to abandon some of our present divorce procedures, based as they are on the unrealistic concept of the matrimonial offense, and the adversary principle which is its inevitable corollary. It is suggested that they should be replaced with an investigatory system which will establish with reasonable certainty whether the marriage has deteriorated to the point of being unworkable.²

It is hardly necessary to dwell upon the fact the present methods of handling divorce are not giving satisfaction. The wide variations in state laws may reflect that "rugged individualism" which was the glory of our frontier communities; but in the days of jet travel it becomes an absurdity to realize that as a man and his wife travel across the United States on the same plane, the basis on which they could legally terminate their marriage, in the country of which they are citizens, changes every few minutes!

That is, however, only the beginning of the tale of absurdities as they appear to an observant person not involved in administering the machinery of the law. It is, for example, illegal for a man and his wife to be divorced by mutual consent. Yet every lawyer in the land, and every divorce court judge, knows perfectly well that the overwhelming majority of divorce suits are in fact arranged by mutual consent. And it is good that they are. Otherwise, the complications that already exist might well be further compounded.

It is equally clear that divorce is granted in this country, in most instances, because a "matrimonial offense" has been perpetrated by one partner against the other. The principle, presumably, is that this offense destroys the marriage as a functioning partnership, and the union may therefore be dissolved. Yet in the

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¹ The opinions herein are those of the author and not necessarily those of the American Association of Marriage Counselors.

² Proposals of this kind have been made, and rejected, in the past. Nevertheless, a serious reopening of this question would seem to be justified at the present time.

This article has made use of material contributed by the author to the April 1962 issue of *McCalls*. It is based also on material from the following sources:

Blake, Nelson Manfred, *The Road to Reno: A History of Divorce in the United States* (1962); Ernst, Morris L. and Loth, David, *For Better or Worse: A New Approach to Marriage and Divorce* (1952); Harper, Fowler V., *Problems of the Family* (1952); McGregor, O. R., *Divorce in England* (1957); Rheinstein, *Trends in Marriage and Divorce Law of Western Countries*, 18 *Law & Contemp. Prob.* 1 (1953); Royal Commission on Marriage and Divorce, Report 1951 to 1955, (1956).

event *both* partners have committed matrimonial offenses, the marriage is presumably doubly violated, and, in most states, this prevents either partner from seeking a divorce!

The layman also observes that the law, unintentionally of course, appears to encourage perjury. A woman may appear in a divorce court in Nevada and assure the judge that she has come to the state with the intention of settling there; when in fact she has no such intention, and actually has a return ticket in her pocket. Again, in New York State, a man arranges to be found in bed in a hotel room with a woman he has never seen before, and in whom he has not the slightest sexual interest, in order that his wife may tell the divorce court judge that her husband has committed adultery. The average decent American citizen finds all this embarrassing and distasteful. Apparently, many legal authorities share this opinion.³ There is no need to dwell further on these unpleasant aspects of our legal system. It seems to be clear that in the eyes of much of the legal profession, present divorce procedures are often dishonest, discriminatory, distasteful, and disreputable.

The question to be considered is why this unhappy situation exists. It would seem that the reason is because our laws appear to be inadequate instruments to deal with these complex human problems. The modern divorce court is a relatively new institution which came into existence not as a well-thought-out solution to contemporary problems, but by a series of events which were almost accidental.

In the ancient world, the state made no attempt to interfere in such personal questions as marriage and divorce. In Roman society, not only were there no divorce courts, but there were no divorce laws as we understand them. The function of the courts was to help to settle questions of property rights brought for solution by couples who had privately decided to divorce. By the middle of the twelfth century, the Roman Church had succeeded in establishing ecclesiastical courts to deal with marital problems throughout most of Western Christendom. These courts were entrusted with, among other duties, the task of granting annulments and separations. No divorces, in the sense in which divorce is understood today, could be granted because of the Church's doctrine of the indissolubility of the marriage bond. The ecclesiastical court could grant *separatio a mensa et thoro* but not *divortium a vinculo*. The ecclesiastical courts granted judicial separation, without the right to remarry, usually on grounds of adultery and cruelty, although other grounds were sometimes allowed. In this context, the concept of the matrimonial offense was entirely logical. The Church absolutely forbade the dissolution of a valid marriage. But in these circumstances, it would have been inhuman to insist that husband and wife should

³ Paul Sayre, former Professor of Law at Iowa State University: "The scheming of the parties in an atmosphere of falsehood, as well as the fraud on our courts, works a degrading influence on the quality of our civilization and brings our whole system of justice into disrepute." *Divorce: A Reexamination of Basic Concepts*, 18 Law & Contemp. Prob. 1, 28 (1953).

Max Rheinstein, Professor of Comparative Law at the University of Chicago: "The discrepancy between the law of the books and the law in action, which we find in so many states, has, through its tolerance or promotion of collusive practices and perjury, developed into a serious threat to the morals of the bar and the respect for law among the public." *Divorce: A Reexamination of Basic Concepts*, *supra*, at 19.

Paul W. Alexander, Judge at the Family Court Center, Toledo, Ohio: "No one is more painfully conscious than the legal profession of the utter imbecility of our present divorce procedure and the pernicious and almost wicked philosophy upon which it is based. Every honest lawyer is ashamed of the atmosphere of hypocrisy and lies in which he usually must handle a divorce case." *Family Life Conference Suggests New Judicial Procedures and Attitudes Towards Marriage and Divorce*, 32 J. Am. Jud. Soc'y 40 (1948).

Professor Henry Bowman, of the Sociology Department in the University of Texas, reports a conversation with a judge after hearing eighteen divorces granted, at the rate of one every eight minutes, in a mid-west court: "The judge later admits that in his opinion at least half the plaintiffs did not deserve decrees on the basis of the evidence submitted; but he also feels that he was helpless to do anything about it and that refusing them divorces would only make them perjure themselves further." *Marriage For Moderns* 515-16 (4th ed., 1960).

continue to live together after some grievous outrage had been committed by one against the other. A man whose wife had proved unfaithful might not wish to remain with her, or to maintain her, although she must remain legally his wife. A woman who had been brutally treated by her husband might wish to be free from the obligation to go on living with him and having sex relations with him, although she was compelled to remain his wife. In such situations, after appropriate investigation, the Church would allow them to live apart. And the Church could also rule that a guilty wife could no longer expect to be maintained by her husband, and the guilty husband could no longer expect to have sexual access to his wife. These arrangements, on humanitarian grounds and under the circumstances, were eminently just and sensible.

As a more or less delayed result of the Reformation, matters concerning marriage and divorce were transferred from the ecclesiastical to the civil courts, in some nations only very recently. This transition evidently took place in the midst of a good deal of confusion, and the essential court pattern was not radically changed. The civil courts, however, had the power to grant complete dissolution of the marriage with the right of the partners to remarry. The justification of this was still the matrimonial offense, and the usual grounds were adultery and malicious desertion, which Protestants believed were justified by the Bible as actions that violated the very nature of marriage and justified its termination.

As time passed, a more liberal atmosphere replaced the rigid legalistic view, and divorce was viewed in a humanitarian rather than in a theological perspective. The newer attitude was that any state of affairs that made marriage intolerable for either partner could justify the granting of a divorce. This continued to the point, found in the United States today, where the available grounds for divorce are so numerous, and often so loosely interpreted, that any determined married person, with enough money to spend, can find a way to dissolve his union.⁴

From the Roman Catholic supremacy in the Western world to the present day, divorce procedures have undergone two radical changes. First, there was the change from the view that the matrimonial offense warranted only separation *a mensa et thoro*, to the view that it warranted divorce *a vinculo*, with the right to remarry. Second, there was the change from the view that divorce with the right to remarry could be granted only when marriage was technically (that is, theological) violated, to the view that it could be granted when a marriage was in practice rendered unworkable. These two successive changes involved a radical reorientation in our complete approach. Yet *throughout this whole process of change we have retained essentially the same machinery*. Is it any wonder that the machinery is creaking?

It would seem that today most people believe that marriage should be terminated when the husband-wife relationship is no longer able to function. This is a sound concept. If divorce is justified at all, the obvious reason for granting it is that the marriage has broken down beyond repair. On the other hand, if the state has any responsibility in this matter at all, it would be acting irresponsibly to grant a divorce as long as there is any chance that the marriage can be rehabilitated. This issue, however, simply cannot always be decided solely on the basis of establishing that a "matrimonial offense" has been committed. Nor do the concepts of guilt and innocence have any real relevance to the viability of the marriage. It is not infrequent that the marriage counselor encounters a marriage in which the husband has driven an upright wife into adultery, or where the wife has goaded her husband into acts of cruelty that were foreign to his whole nature. Ask any qualified marriage counselor to

⁴ This brief historical summary is based mainly on Blake, *op. cit. supra* note 2, chs. 1-2; McGregor, *op. cit. supra* note 2, ch. 1; Rheinstein, *supra* note 3.

distinguish the innocent from the guilty partner in the last ten marriages he has dealt with. He will tell you that it is impossible to apply such concepts to the complex interrelationships of married people.

This is not to make light of offenses committed by marriage partners against each other. Certainly married persons should not be permitted to perpetrate outrages upon their spouses with impunity. Most certainly they should have the protection of the law when they need it. But this, surely, they already have. As Professor Paul Sayre has remarked, "You don't have to marry in order to have legal protection against others punching your nose. Every citizen has this protection without marriage."⁵

It would seem, therefore, that the time may have come to consider a completely new approach to divorce. It would be consistent with what is now believed to be the true causes of marriage breakdown and consistent with what these causes entail regarding the circumstances in which a marriage should be dissolved: namely, the existence of convincing evidence that the marriage relationship has degenerated to the point where it has become intolerable for one or for both, and can not be rehabilitated.

This is not a startling new idea. It is already in operation, along with other procedures, in Greece, Switzerland, Yugoslavia, and Japan. It is already the sole basis on which divorce can be granted in the Soviet Union and in most of the Communist countries. In England, the members of the Royal Commission on Marriage and Divorce were evenly divided on the recommendation that divorce procedure based on the principle of marriage breakdown become the law of the land. Here in the United States, the principle is implicit in some of the statutory grounds for divorce.⁶

The real problem, it would seem, is not accepting this principle as a basis for divorce. The problem is how to implement it in practice. There are those who believe that divorce should be granted automatically when it is sought by the mutual consent of husband and wife. The argument is that if both spouses wish to discontinue the relationship, surely that is proof that the marriage has broken down. This is a ground for divorce (with certain safeguards) in Norway, Sweden, Denmark, Belgium, and Portugal. It is said that ninety per cent of all Japanese divorces are based on mutual consent. It does not seem valid, however, to consider mutual consent a sufficient reason for granting a divorce. A marriage is not simply the business of the two people concerned. There is a third party involved: the society to which the two persons belong. Just as a marriage can be recognized only when it is socially approved and meets the required conditions, so, the power to grant a divorce should rest finally with the state.

While the mutual consent of the parties to a divorce is greatly to be desired, it should never be the ultimate criterion. One can imagine situations in which a couple, in a mood of frustration and despair, might consent to end their marriage when, in fact, with skilled help the marriage could be made workable. On the other hand, one can imagine a marriage partner withholding consent for reasons that are selfish, vindictive, or pathological.

Another presumption of marriage breakdown can be raised after a period of prolonged and sustained separation. This is a common ground for divorce in our modern world. Indubitably prolonged separation would seem to be a reliable index of marital failure. It would appear, however, that there is something inhuman about requiring people whose marriage has totally broken down to

⁵ Sayer, *supra* note 3, at 30.

⁶ Grounds which imply the breakdown of marriage, rather than a matrimonial offense are: insanity (29 states), living apart (18 states), disappearance (4 states), mental incapacity (2 states, Georgia and Pennsylvania), physical malformation preventing intercourse (Kentucky), incompatibility (3 states, Alaska, New Mexico and Oklahoma), feeble-mindedness and epilepsy (Delaware). These are not listed as grounds for annulment. Bowman, *supra* note 3, at 534-35.

prove it by tolerating the misery of separation, with no right of remarriage, for a long period of years.⁷

If a marriage must be dissolved, it would appear that this should be done under essentially the same circumstances as those in which it was instituted in the first place. A marriage can be effectuated when, in accordance with the standard of the social order, the prospective partners are of age, of sound mind, and not related within the prohibited degrees of kinship. Similarly, when a claim is brought by one or both partners that, despite all hopes entertained and all efforts made, the achievement of a workable marriage has proved impossible, through investigation should be made to establish whether or not this claim is valid. If it proves to be so, dissolution of the marriage should be granted. This investigation, however, should have nothing to do with matrimonial offenses, or with the establishment of guilt or innocence. These are irrelevant concepts which only confuse the issue. Outrages committed by the partners against each other are of course signs and symptoms that will help the clinician in his diagnosis, but the investigation as such should focus upon what has gone wrong with the relationship, why it went wrong, and what are the chances of putting it right. That is to say, the investigation should not be a legal one, but a clinical one.

Can this be done? The answer is in the affirmative. In fact, this is precisely what the professional marriage counselor is doing all the time. The only difference is that the marriage counselor works with the couple who come to him voluntarily, and refers his findings to *them* for a decision concerning the course of action to be taken. This is an over-simplification, of course, because the marriage counselor is engaged not only in a diagnostic determination, but also in a therapeutic operation which often leads the couple to see their whole situation in a completely different perspective. In a sense the findings are not those of the counselor, but of the couple, arrived at with his professional help. While counseling is more than investigation, it acquires direction through the essential assistance of the investigatory process.

Could the marriage counselor function effectively in dealing with couples whose motive in approaching him was to seek a way out of their marriage, instead of seeking to improve their relationship? Why not? In fact, the marriage counselor often does have to deal at least with one partner who has given up hope that the marriage relationship can be effectively restored. The skilled marriage counselor, on the basis of his training and experience, given adequate time with the couple, can arrive at a fairly reliable verdict concerning the viability of the marriage. While he himself would never claim that such a verdict could be completely accurate, there is no doubt that it would be a far more reliable index than is provided by establishing that a matrimonial offense has been committed; far more accurate, also, than a decision to seek divorce by mutual consent, arrived at by the couple themselves.

This new approach, for the first time in history, is now practicable. In the past, not enough was known about the complexities of marital interaction, nor were there persons thoroughly trained to deal with these matters. Now this situation has been radically changed.

This approach is already being used. A number of courts are currently utilizing the talents of qualified marriage counselors.⁸ Unfortunately some of the early experiments in this field were not successful. In some cases at least, as a result of ignorance or a misguided attempt to save money, some courts used so-called "marriage counselors" who did not meet even the minimal qualification

⁷ In the case of Portugal, ten years of such separation are required.

⁸ Courts with which the author is personally familiar include Los Angeles County Superior Court, California; Family Court Center, Toledo, Ohio; County of Hamilton Court of Common Pleas, Cincinnati, Ohio; Denver District Court, Colorado; Family Court of Milwaukee County, Wisconsin.

required for membership of the American Association of Marriage Counselors. Presumably a court of law would hesitate to accept medical evidence from persons who were not fully qualified as medical practitioners. Yet courts have used poor judgment in making use of persons whose qualifications in the field of marriage counseling were highly questionable, with the kind of results that could be expected. This situation, however, is now rapidly changing for the better.

If this procedure of using breakdown of marriage as the basis for divorce were adopted, how would it work out in practice? Divorce should still be granted, as at present, by a court of law. The law would also, of course, have to deal with the various settlements concerning maintenance, access to children, etc., that follow from divorce. The condition for the granting of the divorce itself, however, would no longer be the submission of legal proof that one of the parties was guilty of a matrimonial wrong, but the submission of satisfactory evidence that, on the basis of a thorough clinical investigation extended over a sufficient period of time, it was apparent that the marriage had broken down beyond repair. When the judge was satisfied on this account, the divorce would be granted without guilt being imputed to either party.

In reference to the financial questions involved, the investigation costs would be met, as the present legal costs of divorce are met, by the parties themselves. If the money now being collected by attorneys for establishing grounds for divorce were to be transferred to duly authorized marriage counselors, it would be sufficient in most cases to cover the cost of a final all-out attempt to save the marriage on the basis of a clinical investigation. With due respect to the legal profession, it would seem that the clients' money would be better spent in this way. Neither would it result in any serious hardship to the members of the legal profession, among whom divorce practice is by no means a popular part of their present duties. Those who are now specializing in divorce practice could gradually be transferred to more useful, and more congenial, fields of service.

Would the marriage counseling services used by the divorce courts be attached to the courts, or would they be separate? Both sides of this question have been defended. The question is not of major importance. Once the basic principle of a new approach to divorce is accepted, its practical implications can be worked out without too much difficulty.

While the primary reason for proposing this new approach to divorce is that it is long over-due, and would be preferable in every way to present procedures, there are several subsidiary reasons for regarding it with favor. It would guarantee the fullest exploration wherever a real possibility of reconciliation existed. That this is often not done under our present system is not the fault of the attorney, but of the system itself. The "adversary" concept of divorce inevitably tends, not toward easing the conflict between the spouses, but toward intensifying that conflict. Once involved in divorce proceedings, husband and wife find themselves in a climate which encourages them to fight each other for all that they can get. This is damaging and degrading, and may in fact destroy any last remaining chance of softening their hearts and bringing them together again. The counseling approach, by contrast, would focus attention of using all possible means to *resolve* the conflict in the marriage.

An opportunity, moreover, would be provided for the couple to examine, calmly and objectively, and with skilled help, the real reasons why the marriage failed. There would be no need for them to be defensive about their personal responsibility for that failure, since no one would be trying to establish their guilt. Many could undergo a healthy learning process that would drain off some of the needless bitterness and rancor that generally arise in such situations. Even if this did not result in reconciliation it would prove to be a valuable experience. Since most divorced persons sooner or later remarry, this opportunity to face the

implication of their personal deficiencies as marriage partners could show them clearly what readjustments they would have to make for a subsequent marriage.

Furthermore, the complex *sequelae* of divorce—money settlements, care and custody of the children, dealing with family and community reactions, and the like—could be settled in a much more cooperative spirit after a period of counseling, than in the atmosphere of mutual recrimination often generated by present procedures. The counseling process, even if it did not reunite the couple, could help them to achieve the kind of perspective that would be likely to result in the acceptance of wise and sensible legal settlements, especially in regard to the custody of their children.

Finally, the absence of imputations of guilt and innocence would spare children the painful sense that one of their parents had been publically exposed as an evil or malicious person, while the other had been judged to be, by comparison, a paragon of virtue. Children would suffer much less as a result of their parents' divorce if they could see it as human tragedy which everyone concerned had tried to prevent, but which despite all efforts, could not in the end be avoided.

No doubt there would be legal objections to this new way of dealing with divorce. The nature of law is to give stability and permanence to the values found to be important to human welfare, and the law is normally resistant to change. This is as it should be. Changes in the approach to divorce, however, have already taken place. Among the some forty grounds for divorce in the laws of the various states, there are already some that imply crude manifestations of marital breakdown, without the implication of matrimonial offence. Much more eloquent, however, is the fact that about half of all divorces granted in the United States stem from proof of cruelty, in some shape or form. Taken at its face value, this startling fact would suggest that Americans are vicious, sadistic people. Yet most would deny the implication that nearly a quarter of a million Americans each year treat their spouses with such brutality as to make life intolerable. What is really happening, obviously, is that "cruelty" is the legal fiction providing the way out of marriage for couples who are suffering conflict and tension in their relationship. Would it not be better to face the facts, and make the necessary clinical investigations in order to ascertain if these conflicts and tensions can be resolved?

While some lawyers would resist the proposed approach, in the belief that dealing with divorce is their preserve and should not be surrendered to any other professional group there should be no objection to the new approach being carried out by lawyers, provided they take the clinical training necessary to equip them for the task. This would require a profound change in the training and attitudes of lawyers. A few outstanding attorneys have sought to equip themselves to undertake counseling at a professional level, but they constitute a tiny minority of their profession. The proportion of clinically qualified members of the American Association of Marriage Counselors whose major professional field is law is less than one per cent. Inevitably, the legal profession is going to have to make much wider use of professional marriage counselors, or more lawyers must become qualified marriage counselors to carry out their responsibilities.

An atmosphere of humanity and realism should be introduced into divorce procedures. Any sound divorce system should operate like a flexible net, letting through those whose marriages are manifestly unhealthy and destructive to themselves and to their children; but doing everything possible to retain in being those marriages that can be made to function as the basis of effective family life. The major purpose is that all possible means of reconciliation may be fully explored by skilled clinicians before a single American marriage is allowed to end in divorce. Surely, this is not making divorce easy. In many cases, indeed, it

would be making it more difficult. It would, however, take many elements of injustice and discrimination out of our divorce procedures, by the removal of obsolete but traditional obstacles. It is expected that many needless divorces would be avoided, with obvious benefits to society.

In any human crisis, those involved deserve the best help that can be given them. A legal settlement of marital problems too often does not reach down to the level of their true need. It is no more than scene-shifting, which leaves the characters still emotionally confused, with their difficulties perhaps increased by their divorce experience. Sometimes this may be the best that can be done for them. But the evidence is strong that there is a better way. An enlightened society should be able to do more to help men and women achieve success in the great arts of living and of loving.

APPENDIX "55"

BREAKDOWN VERSUS FAULT—RECENT CHANGES
IN UNITED KINGDOM AND NEW ZEALAND DIVORCE LAW

by

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In 1963 the New Zealand divorce law was revised in the Matrimonial Proceedings Act, 1963, which came into force on January 1, 1965. At the same time in England the Matrimonial Causes Act, 1963, made a number of amendments to the law of that country. A comparison of the two on the matters dealt with by both makes an interesting study, particularly in considering the extent to which the basic principles on which the dissolution of a marriage is permitted differ between the two countries.

The Royal Commission on Marriage and Divorce which reported in 1955 (the Morton Commission) distinguished between the doctrine of the matrimonial offence, under which divorce is viewed as a remedy available to one party for an infringement by the other of the undertakings entered into at marriage, and the doctrine of the breakdown of marriage, under which it is seen as a means of legally ending what has already come to an end in fact.¹

English law is firmly based on the matrimonial offence doctrine, though there is one notable exception among the grounds, namely, insanity. Nevertheless, adherence to the doctrine is evident throughout the English legislation: and the members of the Morton Commission were with one exception agreed that the existing law should be retained, though they were evenly divided on whether the time had not come to introduce an additional ground based on the breakdown principle.² New Zealand law, being originally derived from English law, is also built to a considerable extent on the offence theory but the influence of the breakdown principle is clearly to be seen as well, and recent additions to the structure have tended to increase that influence.

The most noteworthy move made in New Zealand towards the breakdown theory occurred in 1920 when separation by agreement for three years or more was introduced as a ground for divorce.³ Little more than a year later, as a result of the case of *Mason v. Mason*,⁴ public opinion induced a retreat to the extent that the respondent was given the right to prevent the granting of a decree if he or she could show that the separation was the petitioner's fault.⁵ In 1953, partly as a result of a gap that had been shown in the law, divorce was made possible where the parties had been living apart for at least seven years and were unlikely to be reconciled⁶: but even then it was felt that public opinion was not ready for the idea that a so-called "guilty" person should be able to procure a divorce against the wish of the other party and the legislature

* Of the Department of Justice, Wellington, New Zealand.

¹ Report of Royal Commission on Marriage and Divorce (Cmd. 9678), paras. 56 and 57.

² *Ibid.* paras. 65-67.

³ Divorce and Matrimonial Causes Amendment Act, 1920 (N.Z.), s. 4.

⁴ [1921] N.Z.L.R. 955; [1921] G.L.R. 522, 635.

⁵ Divorce and Matrimonial Causes Act, 1921-1922 (N.Z.), s. 2.

⁶ Divorce and Matrimonial Causes Amendment Act, 1953 (N.Z.), s. 7.

imported into the ground the same proviso as attached to a petition based on a separation agreement.

The length of the period required before a petition could be presented on this ground might have been thought to preclude the likelihood of its acting as an inducement to a person to deliberately break up his marriage, even if the proviso had not been added. However, this consideration was not sufficient argument against the notion that divorce should be primarily a remedy for a wrong, which ought to be granted, if not necessarily at the instance of the wronged party, at least not against his or her wishes.

Over ten years have passed since the introduction of this ground for divorce in New Zealand, and the opposing view has now prevailed. The provision which gave the respondent a veto if the petitioner was responsible for the separation was the subject of judicial criticism, notably by F. B. Adams J. in *Towns v. Towns*,⁷ and was protested against both by the New Zealand Law Society and by individual members of the public. In consequence, it was not repeated in the Matrimonial Proceedings Act, 1963, and since the coming into force of that Act it will be possible for either party to a marriage to obtain a divorce on that ground, despite the opposition of the other. The ground is a discretionary one only, but there is no attempt in the statute to indicate the basis on which the court might exercise its discretion to refuse a decree.⁸ The words of Salmond J. in *Mason v. Mason*,⁹ already referred to, when discussing the similar discretion then existing in separation agreement cases, are however of particular relevance:

“A refusal on this ground must be justified by special considerations applicable to the individual instance, and must be consistent with due recognition of the fact that the legislature has expressly enabled either party, innocent or guilty, to petition for divorce on the ground of three years’ separation.”

It is to be noted that the New Zealand law still differs from the Australian Matrimonial Causes Act, 1959, which makes separation for five years a ground for divorce in that country. There, however, the court is bound to refuse a decree if it is satisfied that because of the petitioner’s conduct or for any other reason it would, in the particular circumstances of the case, be harsh and oppressive to the respondent, or contrary to the public interest, to grant a decree. In addition it has a discretion to refuse a decree if the petitioner has committed adultery that has not been condoned or, if condoned, revived.¹⁰

Although it is clear that by no means all New Zealanders support the recent change, it has nevertheless been accepted with relatively little complaint. This is in strong contrast with the position in England, where it has not yet been possible to introduce seven years’ separation as a ground even with the safeguard of a veto for the person not in any way responsible for the separation. This, or a more restrictive variation of it, was the additional ground on which the Morton Commission divided, the basic objection to this particular form being expressed by those who opposed in it the words “that a spouse who had committed no recognised matrimonial offense could be divorced against his will.”¹¹

The United Kingdom Matrimonial Causes Act, 1963, began life as a Private Member’s Bill. When it was introduced into the House of Commons it made provision for divorce on the ground of seven years’ separation, but with the proviso that a decree could not be granted if the respondent objected unless the court was satisfied that the separation was in part due to the unreasonable

⁷ [1957] N.Z.L.R. 947.

⁸ Matrimonial Proceedings Act, 1963 (N.Z.), s. 30.

⁹ [1921] N.Z.L.R. 955 at p. 963.

¹⁰ Matrimonial Causes Act, 1959 (Aust.), ss. 28 (m) and 37.

¹¹ Report (Cmd. 9678), para. 69 (xxiv).

conduct of the respondent. Despite the proviso which, as was pointed out in the Morton Commission's report,¹² was more favourable to a respondent than the present New Zealand provision which places the burden of proof on the respondent, the move was not successful. The provision had subsequently to be dropped in the Commons¹³ and the Act as eventually passed adds no new grounds for divorce to English law.

Both the English Act and the New Zealand one alter the law as to collusion, but the New Zealand changes are more far-reaching. Collusion is not easy to define precisely but it is clear from the English cases that it embraces a fairly wide range of agreements between the parties relating to the initiation or the conduct of divorce proceedings, and such New Zealand cases as there are have not departed from the English decisions.

In one of the latest reported cases on the subject, *Noble v. Noble and Ellis* (No. 2),¹⁴ Scarman J.'s definition, which was implicitly accepted by the Court of Appeal, was that "A collusive bargain is one with a corrupt intention: it is an agreement under which a party to the suit for valuable consideration has agreed either to institute it or to conduct it in a certain way."¹⁵ It is clear, however, from the examples that he gives that the corrupt intention need not in any sense involve the intent to deceive the court or to keep the true facts from it—rather in some cases the reverse. Thus he cites as instances "the reluctant petitioner induced by the offer of some benefit to take proceedings against an eager respondent" and "a co-respondent induced by a promise of some benefit...to provide evidence or to bear witness at the trial against the respondent."¹⁶ It is not stipulated that in the one case the proceedings should not be justifiable or that in the other the evidence be false. All that is required is that "the parties intend by their agreement to match institution of suit or any aspect of its conduct with the provision of some benefit to the party instituting or in that aspect conducting the suit."¹⁷

This point is of particular interest in view of the fact that, whereas in section 30 of the Matrimonial Causes Act, 1857 (U.K.), which made collusion a bar to a decree, there was no qualification of the term, section 7 of the 1860 English Act provided for the intervention of the Queen's Proctor where he suspected that any parties to a divorce suit were or had been acting in collusion "for the purpose of obtaining a divorce contrary to the justice of the case." This difference was faithfully copied into the New Zealand legislation by the Divorce Act, 1898, and was continued in the Divorce and Matrimonial Causes Act, 1908, and the Divorce and Matrimonial Causes Act, 1928.¹⁸ In the early New Zealand case of *Livingstone v. Livingstone*,¹⁹ it is clear that Denniston J. thought that the additional words ought to be imported into the actual definition of collusion, and indeed he used the words in his decision.²⁰ Despite this, however, he did not consider he was at liberty to decline to follow the English case of *Churchward v. Churchward*,²¹ in any case which was fairly identical on the facts, and it was on the facts that he distinguished the case he had before him.

One factor which influenced Denniston J. in his attitude towards the scope of collusion in New Zealand law was what he termed "the spirit of the divorce

¹² *Ibid.* para. 71 (vi).

¹³ An attempt was made to revive it in the House of Lords, but this too failed.

¹⁴ [1964] 1 All E.R. 577; (C.A.) 769.

¹⁵ At p. 581.

¹⁶ At pp. 581 and 582.

¹⁷ At p. 582.

¹⁸ ss. 15, 17 and 24 (1), and s. 24 (3).

¹⁹ [1902] 21 N.Z.L.R. 626.

²⁰ At p. 637.

²¹ [1895] P. 7.

law”²² of the country. That comment was made nearly twenty years before separation by agreement for three years was made a ground for divorce in New Zealand, but even then the tendency was towards less restrictive laws than those from which they had been developed. With the introduction of that ground the difference in outlook between the two countries might be considered even more pertinent in this context. When an agreement between the parties can itself form the basis of a petition a wide definition of the type of agreement which is to be regarded as a barrier to a decree hardly seems appropriate. A New Zealand judge could not borrow the words of McCardie J. in discussing the question of *Laidler v. Laidler*,²³ “Divorce by mutual consent is remote from the contemplation of English Law.”

There is one respect in which New Zealand law has for many years favoured the petitioner more than did the corresponding English law on the subject of collusion. This is not the result of any initiative taken in New Zealand—it arises rather because a change made in England in 1937 was not, whether by accident or design, followed in the former country. The Matrimonial Causes Act, 1857 (U.K.), required the court to refuse a decree for divorce if it found that the petition had been presented or prosecuted in collusion with either of the respondents.²⁴ This same provision was followed in the 1867 New Zealand Act and (until the Matrimonial Proceedings Act, 1963, came into force) remained the law where adultery was the ground for the petition.²⁵ In other cases a finding of collusion gave the court a discretion whether or not to grant a decree.²⁶

In England adultery was the only ground for divorce until as late as 1937. When in that year, arising out of a Private Member’s Bill sponsored by Mr. A. P. (Now Sir Allan) Herbert, the Matrimonial Causes Act, 1937, added insanity, cruelty and desertion as grounds, a change was also made in the provisions as to collusion, and since then the petitioner has had the burden of disproving it when it was in issue.²⁷ Since 1937, then, the position has been that in England the requirement has been for the court to be satisfied there was no collusion and unless so satisfied to dismiss the petition; whereas in New Zealand collusion has had to be proved by the person alleging it and it has then operated as a ‘mandatory bar to a decree only in the case of adultery.

The Morton Commission considered that it was still necessary to retain collusion as an absolute bar in England but thought that uncertainty as to its scope had created difficulties. It therefore recommended definition by statute on the basis of the following considerations:

- (i) the spouses should be restrained from conspiring together to put forward a false case or to withhold a just defence, and
- (ii) divorce should not be available if one spouse had been bribed by the other spouse to take divorce proceedings or had exacted a price from him for so doing.²⁸

In addition the Committee recommended that it should be provided by statute that it should not amount to collusion if reasonable arrangements were arrived at between husband and wife, before the hearing of the suit, about financial provision for one spouse and the children, the division of the matrimonial home and its contents, the custody of, and access to, the children, and costs. It should be the duty of the petitioner to disclose any such arrangements to

²² At p. 639.

²³ [1920] 123 L.T. 208; 90 L.J.(P.) 28; 36 T.L.R. 510.

²⁴ s. 30.

²⁵ Divorce and Matrimonial Causes Act, 1928 (N.Z.), s. 17.

²⁶ *Ibid.* s. 15.

²⁷ Matrimonial Causes Act, 1937 (U.K.), s. 4. Matrimonial Causes Act, 1950 (U.K.), s. 4.

²⁸ Report (Cmd. 9678), para. 234.

the court at the hearing and the parties should be able to apply to the court before or after the presentation of the petition for its opinion on the reasonableness of any contemplated arrangements.²⁹

Such a provision originally appeared in last year's English Bill but not in the Act as passed. The Act did, however, make a significant change in the law on this subject by reverting to the requirement of a positive finding of collusion and, despite the Morton Commission's opinion to the contrary, making collusion merely a discretionary bar to a decree in every case.³⁰ The probable effect of this change may be seen in the case of *Head (formerly Cox) v. Cox (Smith cited)*,³¹ in which Wrangham J., though he did not attempt to lay down a set of principles to guide the court in exercising its discretion in respect of collusion, had to consider the matters which he thought of relevance in the case before him. One of these was the question whether the collusive agreement was likely to produce a result contrary to the justice of the case. Although this was not the only consideration, its inclusion as an important factor, along with such matters as public interest and possible prejudice to any children, seems to mean a very considerable difference in the practical results of the collusion rule.

The 1963 New Zealand act also changed collusion into a discretionary bar only, even in the case of a petition on the ground of adultery. It went further, however, and restricted the scope as well, by adding the words "with intent to cause a perversion of justice" to the relevant provision.³² These words appear also in the Australian Matrimonial Causes Act, 1959, but there, however, such collusion, if proved, is an absolute bar to a decree.³³

What constitutes an intent to cause a perversion of justice may be arguable but it is submitted that it is something different from the corrupt intention referred to in *Noble v. Noble and Ellis*, already discussed. Whatever the consideration for it, an agreement to institute proceedings where a ground for divorce exists, or to provide evidence of adultery which has been committed, can hardly be said to show any intent to cause a perversion of justice. Nor is such an intent necessarily present in every "arrangement which . . . tends to pervert the course of justice," an expression used by Denning J. in *Emanuel v. Emanuel*.³⁴ An agreement may be of a type which if allowed would have a general tendency to produce unjust results through the suppression of facts in some cases and yet itself be wholly lacking in any intention to bring about such a result or any likelihood of doing so.

To gauge the effect of the additional words one may usefully look again at the case of *Head (formerly Cox) v. Cox (Smith cited)*, already referred to. There the agreement concerned the abandonment of certain charges by both parties and of a claim for maintenance by the wife. It had been arrived at between three experienced counsel and was frankly disclosed to the court, and the judge found that there was certainly one offence of uncondoned adultery on which relief could be granted to the petitioner (the proof of the respondent's original charge of cruelty might possibly have caused the court to exercise its discretion against her). Despite the absence of any desire or endeavour to deceive the court it was freely admitted that the agreement was collusive and the question was whether or not the court's discretion should be exercised in respect of it. In New Zealand, it is submitted, since the new Act came into force an agreement entered into in similar circumstances could not be held to be even a discretionary bar to a divorce by reason of collusion.

²⁹ *Ibid.* para. 235.

³⁰ Matrimonial Causes Act, 1963 (U.K.), s. 4.

³¹ [1964] 1 All E.R. 776.

³² Matrimonial Proceedings Act, 1963 (N.Z.), s. 31.

³³ Matrimonial Causes Act, 1959 (Aust), s. 40.

³⁴ [1946] P. 115; [1945] 2 All E.R. 494 .

Indeed it is arguable that the combined effect of the recent changes on the subject has probably been to remove the concept of collusion completely from New Zealand law. A perversion of justice will not occur unless the court does not have the true facts before it. Will not proof of an agreement designed to bring about that result inevitably bring to light also the very facts the knowledge of which would itself be sufficient to prevent that perversion? If for example it is shown that the respondent has agreed to withhold evidence sufficient to disprove the charge of desertion alleged against him the court has no need to rely on the collusive agreement in order to dismiss the petition. Or if adultery has been condoned the condonation will itself effectively bar a decree once it is revealed that the parties have entered into an agreement to suppress the evidence of it.

In these circumstances it appears at first sight that it would have been more logical for collusion as now defined in New Zealand to be made a mandatory bar to a decree in every case, as in Australia. In that event it might have been unnecessary but there would at least have been no inconsistency between the court's obligation to dismiss the petition on the other evidence and its discretion whether or not to dismiss it on the score of collusion. A reason for the discretion can however, be found in the possibility of parties to divorce proceedings entering into an agreement designed to hide from the court facts which they believe to be material but which even when known do not affect the result. If that happened the new law would not prevent a decree being granted unless the court considered that in the particular circumstances public interest required the petition to be dismissed as a penalty for the parties' misconduct. Then too the collusion might relate to another discretionary bar, namely that the petitioner's own habits or conduct induced or contributed to the wrong complained of.³⁵ The existence of the discretion is clearly consistent here.

The scarcity of reported cases in New Zealand relating to collusion suggests that it had never been of particular importance in that country. Though any move to abolish it expressly would most probably have been strenuously opposed by the legal profession it is perhaps not too much to hope that it will now in practice depart from the law "unwept, unhonoured and unsung."

The United Kingdom Act when introduced as a Bill was called the Matrimonial Causes and Reconciliation Bill and the facilitation of reconciliation attempts was one of the important purposes of the measure. The word "reconciliation" was removed from the title in the House of Lords but two of the provisions intended to assist that end remained. The Act first of all abolishes the anomalous rule under which a husband who had sexual intercourse with his wife after he became aware of a matrimonial offence committed by her was conclusively presumed to have condoned the offence. The new rule is that for both parties sexual intercourse raises a presumption of condonation which may be rebutted by evidence to the contrary.³⁶ The other provision allows a continuation or resumption of cohabitation for a period of not more than three months to be ignored for the purposes of condonation (and also in calculating a period of desertion) if it has been done with a view to effecting a reconciliation.³⁷

Both these changes were recommended (in the one case unanimously, in the other by a majority) by the Morton Commission (though the period recommended for the second provision was one month)³⁸ and were made also by the New Zealand Act, though in somewhat different form and with a two-month period instead of the English three months.³⁹ The effect of the English sections is

³⁵ Matrimonial Proceedings Act, 1963 (N.Z.), s. 31.

³⁶ Matrimonial Causes Act, 1963 (U.K.), s. 1.

³⁷ *Ibid.* s. 2.

³⁸ Report (Cmd. 9678), paras. 241 and 242.

³⁹ Matrimonial Proceedings Act, 1963 (N.Z.), s. 29 (4) and (5).

however to a certain extent negated by another provision which makes adultery which has been condoned incapable of being revived⁴⁰; and it is interesting to note from an English writer⁴¹ that this section was the result of an amendment introduced into the House of Lords less than a fortnight before the Bill received the Royal Assent.

The rule as to condonation has been developed within the framework of the matrimonial offence theory and it is peculiarly appropriate to that theory. At the same time the results it achieves are not inconsistent with the breakdown doctrine, and this is the more so as a result of the two amendments to the law made in both England and New Zealand. In so far as an act which constitutes a matrimonial offence may be taken as evidence of the failure of a marriage, it is clear that where an act of that kind has been completely forgiven it cannot be used to prove there has been such a failure as would justify the granting of a divorce on that basis. But subsequent conduct reviving the offence, coupled with the other person's desire for a divorce, may once again provide evidence that the marriage is at an end. By abolishing in the case of adultery the rule that a condoned offence may be revived for the purposes of divorce, the English legislation appears not only to have made the path more difficult for couples genuinely anxious to attempt conciliation but also in one respect at least to have ensconced the matrimonial offence theory more firmly in the law.⁴²

One of the provisions in English law which it was suggested at the time should have been included in the 1963 New Zealand Act was that making cruelty one of the grounds on which a divorce may be obtained. There are already a very large number of grounds in New Zealand, however, and the inclusion of any more is open to objection unless it is clear that they do not carry more disadvantages than advantages. One disadvantage of cruelty as a ground that emerges clearly from the English reports is the manner in which it encourages the washing of dirty linen in public. This is so to some extent with any defended divorce petition. However it seems to be the more so where cruelty is the ground by reason of the very nature of the charge, which involves a standard of behaviour rather than a matter of fact and may require evidence of many incidents in the married life to establish it. If it is contested the mutual recriminations that can so easily occur present a sorry spectacle that it would be preferable to avoid if possible.

A further argument against the suggestion is to be found in the anomalies and inconsistencies of the English cases on the subject. Although the worst of these have now been removed by two 1963 cases the present situation is still uncertain, as is shown in a careful review of the law in recent article by Dr. L. Neville Brown,⁴³ and not wholly satisfactory, as is discussed later.

These considerations would not be decisive if it could be shown that the absence of cruelty as a ground created hardship in New Zealand. The Government did not however receive any representations from persons who had suffered as a result. Moreover it is significant that, although cruelty has always been a ground for a separation decree (and the decree being little used no changes were made last year in the provisions relating to it) and such a decree can itself found a petition for divorce after three years, the number of of separation decrees on every ground is usually under ten (in contrast with well over 1,000 decrees absolute in divorce. It seems clear therefore that, in those cases where a person wishing to obtain a divorce would be able to allege cruelty, some other ground is almost invariably available under the present law.

⁴⁰ Matrimonial Causes Act, 1963 (U.K.), s. 3.

⁴¹ Miss O. M. Stone in 26 M.L.R. (No. 6), 676.

⁴² It is to be noted, however, that the amendment was aimed at bringing the law of England into line with that of Scotland, which does not allow for revival of a condoned offence.

⁴³ "Cruelty Without Culpability or Divorce Without Fault," 26 M.L.R. (No. 6), 625.

The two decisions discussed by Dr. Brown in his article were those given by the House of Lords in *Gollins v. Gollins*⁴⁴ and *Williams v. Williams*,⁴⁵ which as he points out have made a very great change in the basis on which English divorce law rests by in effect removing cruelty from the matrimonial offence concept and thus giving the breakdown principle a considerable place in the law.

Both decisions were given by a majority of three to two and the composition of the court was the same in both cases. *Gollins*' case has now established that an intention to injure the other party is not an essential element of cruelty in divorce proceedings and *Williams*' case lays it down that the M'Naughten Rules are inappropriate in divorce proceedings on that ground and hence that insanity affords no defence to the petition.⁴⁶

The general requirement of an intention to injure on the part of the petitioner, and in particular the proposition that a defendant who because of insanity did not know what he was doing should not be liable to be divorced for cruelty, are wholly in line with the doctrine of the matrimonial offence. Their rejection involves a shift in emphasis from the respondent's act to its effect on the petitioner and the marriage. The question that has ultimately to be considered now is whether in the words of Lord Pearce in *Gollins*' case, "a reasonable person, after taking due account of the temperament and all the other particular circumstances, would consider that the conduct complained of is such that this spouse should not be called on to endure it."⁴⁷ This means that the breakdown principle is gaining ground in the law, a trend which will meet with the approval of many people. Yet even a strong supporter of that principle cannot be wholly satisfied with the results of these cases, for several reasons. In the first place, as Dr. Brown suggests, they raise a number of queries, such as the limits that are to be drawn to circumscribe what he calls "this doctrine of constructive cruelty," and the effect of the decisions on the requirement of *animus* in constructive desertion.⁴⁸ Secondly, regardless of whether or not there is any implication of culpability in the legal meaning of cruelty in divorce proceedings, in the minds of most people the word imports a measure, probably a large measure, of blameworthiness; and it is unfortunate that the respondent who is not responsible for his actions should be labelled with the term. As Lord Evershed said in *Williams*⁴⁹:

"If the decision in this matter rested with me alone I am disposed to think that I should take the view that, on the ordinary sense of language, a man could not and would not be said to be treating another with cruelty if he was shown, by reason of mental disease or infirmity, not to be at all aware of what he was doing—if, to take an extreme case, a man who was observed to be beating physically his wife with the utmost severity were proved to be quite unaware that he was doing other than beating his drawing-room rug."

Accepting that a decree was justified, would not another basis for it be preferable?

The third comment that may be made on the law as it now stands in England is that the legislature and the courts do not appear to be pulling wholly in the one direction. It is of interest that it was one of the dissenting Law Lords in both *Gollins*' and *Williams*' cases, Lord Hodson, who was responsible for the

⁴⁴ [1963] 3 W.L.R. 176; [1963] 2 All E.R. 966.

⁴⁵ [1963] 3 W.L.R. 215; [1963] 2 All E.R. 994.

⁴⁶ This change in the law was recommended by the Morton Commission—Report (Cmd. 9678), para. 256.

⁴⁷ [1963] 2 All E.R. 966 at p. 992.

⁴⁸ p. 646 *et seq.*

⁴⁹ [1963] 2 All E.R. 994 at p. 1009.

insertion of the provision in the 1963 Act that condoned adultery cannot be revived.

Dr. Brown ends his article with a plea for the statutory reform of the law of divorce in England, which, as he says, has been "thrown into confusion by seeking to engraft upon statutes framed in terms of matrimonial offences a judicial interpretation founded upon the principle of breakdown."⁵⁰ Although New Zealand law has long shown a tendency to admit the influence of the breakdown principle, and the tendency is increasing, it remains true that it still exhibits an ambivalence which the 1963 Act might have taken the opportunity to remove. Further substantial changes are unlikely to be made for many years. When they are it may be that a clean break with the matrimonial offence principle will be considered and the grounds for divorce reframed (whether in one comprehensive ground or in a number of grounds which all support the same finding of a total failure of the marriage) so that the decree becomes, not a penalty for wrongdoing, but the legal severance of a tie that no longer exists in fact.

⁵⁰ At p. 651.

APPENDIX "56"

DIVORCE LAW IN AUSTRALIA—FEDERAL UNIFORMITY

by

WILLIAM LATEY, Q.C.

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Both parties in the Parliament of the Commonwealth of Australia have accepted the Matrimonial Causes Bill introduced by Mr. Menzies's government in May last. The Bill embodies one of the most important changes in any of the Dominions of the British Commonwealth based on a federal system that has occurred in the present century. Put shortly, the measure brings about uniformity of jurisdiction and of the grounds for matrimonial causes throughout the Australian Commonwealth, so that no longer will there be conflicts of jurisdiction and anomalies of law as between State and State in that Dominion. Moreover, though the test of domicile will continue to be the main basis of jurisdiction in divorce, domicile will be in Australia as a whole and not merely as hitherto in each of the States of that Dominion.

Mr. Joske, Q.C., author of the well known textbook on marriage and divorce law in Australia, was the pioneer of this reform by introducing a Private Member's Bill in the House of Representatives in 1957. This had the encouragement and support of Mr. Evatt, Leader of the Opposition and himself formerly Attorney-General, and other legal members of the legislature. It found favour with the government, to whom Mr. Joske relinquished the reins when he was assured that the measure was to be adopted after redrafting.

The Second Reading

Sir Garfield Barwick, Q.C. the Attorney-General, moving the second reading of the Bill on May 14th last, paid a generous tribute to Mr. Joske for his labours as a pioneer. He said: "The object of this Bill is to give the people of Australia, for the first time in our history, one law with respect to divorce and matrimonial causes and such important ancillary matters as maintenance of divorced wives and the custody and maintenance of the children of divorced persons. Upon the Bill becoming law, Australia, so far as my research goes, will be one of the first countries under a federal constitution to deal comprehensively and uniformly on a national basis with matrimonial causes. Indeed, the power to make such a law is seldom vested by a federal constitution in the national Parliament. Matrimonial causes have usually been left to the component states or provinces. With great prescience, however, the members of the Australian Constitution vested in this Parliament a power, concurrent with that of the States, to make laws with respect to these matters. This is par. xxii of sect. 51 of the Constitution. . . For almost two complete generations this power has been left largely to the States."

Mr. Joske's Bill

Sir Garfield then referred to Mr. Joske's private member's Bill, passed by Parliament in 1955, which brought under the Matrimonial Causes Act, 1945, categories of married women not previously included, with the result that all wives resident in Australia for the prescribed period could institute divorce proceedings in the state or territory of their residence. In 1957 Mr. Joske

introduced a further Bill to bring about uniformity within the Australian Commonwealth. Sir Garfield added that the government had accepted Mr. Joske's faith that the people were ready to receive an Australian Act to preserve and protect family life, and to grant dissolution of marriage and other matrimonial relief on grounds common to all Australians.

He pointed out four principal differences between the present measure and Mr. Joske's Bill, viz.:—

- (1) Development of the reconciliation provisions;
- (2) Universal grounds for relief instead of partial changes;
- (3) Present state courts to administer the law, instead of creating a new federal divorce court.;
- (4) Maintenance proceedings in divorce and matrimonial causes generally to be regulated by federal law, claims for maintenance where no such cause is pending to be left to the State magistrates as hitherto.

Marriage Guidance

The Attorney-General, in dealing with the first of these matters, emphasised the national interest in preserving the principle of lifelong marriage and the integrity of family life, and announced that under clause 9 of the Bill the Attorney-General would be empowered to grant from time to time out of moneys appropriated by Parliament for this purpose to an approved marriage guidance organisation such financial assistance as he may determine. In this connection, it may be noted, the Royal Commission on Marriage and Divorce in this country, reporting in 1956 (Cmd. 9678 pp. 94-99) paid a tribute to the principal marriage guidance societies for their valuable work and urged on the state the need of generous subsidies to them. But, despite some measure of state financial support, the National Marriage Guidance Council at present has to depend largely on the aid of philanthropic bodies and persons.

It is proposed that in Australia as in England the marriage guidance organisations should be conducted independently of the civil service and that voluntary marriage counsellors, properly qualified and trained for their delicate duties, should undertake this sympathetic task. The Australian Bill goes further and by clause 12 provides that marriage counsellors should take an oath of secrecy and that they should not be competent or compellable to give evidence in any court as to any admission or communication made to them in their capacity as marriage counsellors. The latter alteration in the English law of evidence was proposed by the Royal Commission (par. 358), but despite sedulous campaigning by the National Marriage Guidance Council it has not found a place in the various Acts which were passed in 1958 to give effect to many of the Royal Commission's recommendations.

Judges and Reconciliation

Under the head of reconciliation a very important duty is imposed on the court by clause 14. The court must give consideration from time to time to the possibility of a reconciliation of the parties to the marriage in appropriate cases, and with that end in view the judge may either adjourn the proceedings for a fortnight, or longer if the spouses desire it; or with the consent of the spouses interview them in his chambers, with or without counsel, as he thinks proper; or nominate an approved marriage guidance organisation or a person with experience or training in marriage conciliation, or in special circumstances some other suitable person to endeavour, with the consent of those parties, to effect a reconciliation. Under clause 15, if the judge fails thus to bring about a reconciliation, the case will be remitted to another judge, unless the parties request

the original judge to try the case. Nothing said in the course of such conciliation proceedings will be admissible in any court: clause 16.

Commenting on these provisions, Sir Garfield Barwick said that they were designed to impress upon the legal profession that in the administration of the law with respect to matrimonial causes they must not lose sight of the human relationships with which they were dealing. The court, he said, must keep permanently in mind the paramount desirability of preserving the marriage and must not merely execute the law as if the human consequences of so doing were not its concern. "I would expect judges," he added, "not to undertake to conciliate unless there are sound prospects of success. . . The delay and additional expense caused by failure in a case where there were sound prospects of success I would consider a small hazard against the prize of reconciliation. . . Whilst this part of the Bill directed to reconciliation is clearly more useful in contested suits rather than in uncontested suits, I would expect it to have significant utility even in undefended cases. . . Consequently, this Bill provides a new mechanism, at the one moment designed to bring the consequences of divorce for the children to the notice of the parents, and to secure the welfare of the children when divorce ensues."

Pausing here, the writer may be pardoned for saying that that is a bold experiment which may be justified by results. The question of introducing conciliation into our judicial system was considered by the Denning Committee in 1946 (Cmd. 1024), mainly in connection with a concrete scheme outlined by the President, Lord Merriman, but that committee recommended for various reasons that marriage guidance services should not be combined with judicial procedure for divorce. Yet in one respect both the English and Australian courts have always been under a duty in suitable cases to order the return of one spouse to another by the ancient procedure of restitution of conjugal rights, surviving from the procedure of the ecclesiastical courts before the Matrimonial Causes Act, 1957. This procedure has all but fallen into disuse here, because there is no sanction to compel one spouse to return to the other. It is retained, however, in the Australian Bill (clauses 56 to 59) perpetuating the English law, and Sir Garfield in his second reading speech spoke of its function as an aid to reconciliation.

One Domicile in Australia

Hitherto the conception of domicile in Australia has been in respect of each single state, as it is in the Dominion of Canada and in the U.S.A.

Under clause 22 any person domiciled in Australia as a whole may commence proceedings for divorce. A person either domiciled or resident in Australia may commence proceedings for nullity of marriage, judicial separation, restitution of conjugal rights or jactitation of marriage, in respect of which (clause 24 (2)) the principles and rules of the old ecclesiastical courts in England as nearly may be will continue to be applied. In decrees of divorce or nullity a finding of domicile must be included.

By clause 23 for the purposes of this Act a deserted wife who was domiciled in Australia either immediately before her marriage or immediately before the desertion, and a wife who is resident in Australia at the date of instituting proceedings and has been so resident for the period of three years immediately preceding that date, will be deemed to be domiciled in Australia. The English equivalent is "*ordinarily resident*"—Matrimonial Causes Act, 1950, sect. 18 (1) (b)—a formula which has lent more flexibility to the jurisdiction. Clause 25 provides for staying and transferring proceedings to avert a conflict of jurisdiction. By clause 39 proceedings for divorce cannot be commenced within three years after the date of the marriage except by leave of the court, granted on the grounds of exceptional hardship on the applicant or exceptional depravity on the

part of the other spouse. This is in accordance with the English law, except that leave is not required under the Australian Bill on charges of adultery, wilful refusal to consummate the marriage, and rape, sodomy and bestiality (sub-sect. (2)).

Many Grounds for Divorce

When one comes to the numerous grounds of divorce formulated in the Bill, they have been collected from the various States of Australia, subject to certain differences. The grounds set out in clause 27 are:—

- (a) Adultery.
- (b) Wilful desertion for not less than two years (three years in England).
- (c) Wilful and persistent refusal to consummate the marriage (still a ground for nullity, not divorce, in England).
- (d) Cruelty.
- (e) Rape, sodomy or bestiality.
- (f) Habitual drunkenness or drug addiction for not less than two years.
- (g) Husband's frequent convictions for crime since marriage within five years with a minimum of three years' imprisonment and habitually failing to support wife.
- (h) Respondent imprisoned since marriage for not less than three years for offence punishable by death or life imprisonment or imprisoned for five years or more and still in gaol.
- (i) Respondent since marriage and within one year immediately preceding the petition convicted on indictment of grievous bodily harm or the intent to inflict such on petitioner or attempt to murder petitioner.
- (j) Respondent's habitual and wilful failure for two years immediately preceding the petition to maintain the petitioner under order or separation agreement.
- (k) Respondent's failure to comply with a decree for restitution of conjugal rights after a year or more.
- (l) Respondent of unsound mind at date of petition and unlikely to recover and since the marriage and within six years immediately preceding the petition has been for periods aggregating at least five years confined in a mental institution and is still so confined (see sect. 32 as well).
- (m) Separation whether by agreement or order for a continuous period of not less than five years immediately preceding the petition and no reasonable likelihood of resuming cohabitation (but see sect. 37 for qualification).
- (n) Absence of a spouse in circumstances and for a time sufficient to presume his or her death.

It will be observed that, though several of the grounds above mentioned might come under the heading of cruelty in English law, those which allow divorce for serious crime or neglect to maintain go beyond the English law, despite the recent judicial trend here to regard repeated convictions for crime as a form of cruelty.

Divorce by Consent

To English lawyers and sociologists the ground for divorce contained in (m) above should be of absorbing interest, in view of the Royal Commission's refusal

to recommend divorce by consent in this country. What the Australina Attorney-General said about this in the early part of his speech was as follows:—

“There are those who feel that recognition of the importance of family life must itself cause us to seek some way out of the situation that arises when man and wife, without misconduct or matrimonial offence on the part of either, become estranged and break off their relationship beyond all possibility of reconciliation, and out of that other situation where the innocent party refuses to take the initiative and to seek a dissolution, preferring to imprison the other party within the bonds which have become meaningless and little more than a provocation. Accordingly, some communities have provided a means whereby two people so placed may be enabled with regularity within the law to start a family afresh with another.”

The communities to which he was referring are Western Australia, South Australia and New Zealand, which already allow divorce after certain periods of separation, seven years in the case of New Zealand, to either spouse whether the other is willing or not. There is however a saving clause which is reproduced in sect. 33 of the Australian Bill, and should be read with ground (m) in sect. 27 as follows:—

(1) Where the court is satisfied that, by reason of the conduct of the petitioner, whether before or after the separation commenced, or for any other reason, it would, in the particular circumstances of the case, be harsh and oppressive to the respondent, or contrary to the public interest, to grant a decree on that ground to the petitioner, the court shall refuse to make the decree sought. (That might be a sufficient safeguard for the respondent spouse if he or she opposed the petition and the petitioner were exposed to cross-examination, but in undefended cases it would not appear to be any safeguard and the divorce would go through as if by consent of both parties.)

(2) The court may, in its discretion, refuse to make a decree of dissolution of marriage on the ground of separation if the petitioner has, whether before or after the separation commenced, committed adultery that has not been condoned by the respondent, or having been so condoned, has been revived. (As the exercise of the discretion of the court notwithstanding the adultery of the petitioner follows the English model, this would be some safeguard against a collusive divorce by consent.)

(3) Where petitions by both parties to a marriage for the dissolution of the marriage are before a court, the court shall not, upon either of the petitions, make a decree on the ground of separation if it is able properly to make a decree upon the other petition or any other ground. (This sub-clause would appear to impose upon the judge the duty of probing into matters which might not be the subject of any pleading.)

The Royal Commission, in summing up on this matter as regards England, said (Cmd. 9678, 1956, at p. 16): “Our objection to divorce by consent is so fundamental that it cannot be met by the provision of conditions or safeguards, however stringent these might be.” Even if the condition were laid down, said the commission, that the consent (of the other party) should be fairly given, it would put a very difficult burden on the court. It would usually be impossible to find out if an unwilling spouse had been worn down by pressure into giving an unwilling consent. Then the ground would be open to abuse and a weak or self-sacrificing spouse, who genuinely did not want a divorce would be left virtually unprotected. However, in his review of this difficult matter, Sir Garfield Barwick expressed the opinion that the safeguards in clause 33 of the Australian Bill would prevent any abuse of this ground for divorce, i.e., separation for five years or more.

The figures of decrees of divorce throughout Australia for the five years ending 1956 were:

1952	7042
1953	7962
1954	6457
1955	6724
1956	6435

The majority of marriages so dissolved were of less than 15 years' duration; about 40 per cent of less than ten years' duration.

Constructive Desertion

This Bill includes some definitions that in the English system are left for judicial interpretation. Thus one the ground of desertion clause 28 effects a change in the law relating to constructive desertion by providing in effect that the spouse whose conduct caused the withdrawal from cohabitation of the other will be deemed guilty of desertion notwithstanding that the other spouse may not in fact have intended to cause the aggrieved spouse to leave. This aspect of constructive desertion was considered by the Judicial Committee of the Privy Council in *Lang v. Lang* ((1954) 3 All E. R. 571) on appeal from Australia. Clause 29 enables desertion to begin where one of the parties to a separation agreement requests the other to resume married life in good faith and the other refuses to do so without reasonable justification. Clause 30 alters the present law by providing that where desertion has begun, the desertion shall not be deemed to be terminated by reason only that the deserting spouse has become insane, if the court is satisfied that the desertion would probably have continued if the deserter had not become insane.

On these two points, as well as on most others, the proposed Australian law bears a close resemblance to the English. Inasmuch as there is no party opposition to the Bill it is believed that there will only be minor alterations, if any, before it becomes law.

APPENDIX "57"

MARRIAGE AND DIVORCE

UNITED KINGDOM

ROYAL COMMISSION ON MARRIAGE AND DIVORCE

SOME POINTS OF INTEREST FOR CANADA

by

W. KENT POWER

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—"I cannot remember reading a report of a Royal Commission¹ which is so clearly expressed and which puts the case in such an interesting way. If any of your Lordships is ever in need of a little light reading I would recommend this particular Report as one which is worthy of consideration... [It] will long be a reference book on the vital problems that [the Commission] studied." With these statements made by Lord Silkin in the House of Lords² the present writer fully concurs. In its conciseness, lucidity and skilful arrangement in parts, divisions and subdivisions, and in its absolute freedom from stuffiness and technical jargon, it furnishes a model for all those who write on legal or sociological subjects. Lord Mancroft said that he found it on sale in Venice but was "slightly startled to see that it was listed, not as one would expect under 'Law' or 'Sociology', but under 'Romance' "!

By thus introducing this brief commentary the present writer does not wish any of his readers to infer that the Report of the United Kingdom Royal Commission on Marriage and Divorce is not a very serious and very useful production. It will be extremely helpful, not only to sociologists and academic students of law, but also, especially its appendices, to legal practitioners. The appendices cover fifty pages, and Appendix III, which tabulates the grounds of divorce (1) in some other Commonwealth countries, (2) in some European countries, and (3) in the states of the United States of America and its possessions, furnishes a wealth of information useful both to the divorce-law reformer and to the practising lawyer. The use of the word "other" preceding "Commonwealth" is significant, as indicating clearly that the distinguished commission look upon England and Scotland as "Commonwealth countries".

Another fact very interesting to Canadians is that this is the third such report in England in a little over a century. The first, that of 1853, resulted in the act of 1857 (c. 85), which is law to-day in five of our provinces (those between Lake Ontario and the Pacific). The second report, that of 1912, resulted finally (World War I having intervened) in the revolutionary "Herbert Act" of 1937. This act greatly enlarged the grounds for divorce in England, by adding to the then existing grounds, namely, adultery and (for a wife) sodomy and bestiality, the new grounds of desertion, cruelty and incurable insanity (with qualifications as to time in respect of desertion and insanity), and it also made the wilful refusal to consummate a marriage a ground in itself for annulment. Before this, such a refusal was merely evidence (as it still is in the five Canadian provinces)

¹ Royal Commission on Marriage and Divorce; Report 1951-1955 (London: Her Majesty's Stationery Office, 1956, Cmd. 9678, 11s. 6d. net).

² Parliamentary Debates (Hansard), House of Lords Official Report, Vol. 199, No. 133, Oct. 24th, 1956.

from which the court might infer, in a proper case, impotency. These enlargements did not, however, go far enough to meet the views of the extreme "leftists" among the reformers; and in March 1951 Mrs. Eirene White, M.P., succeeded in obtaining, by a vote of 131 to 60, a second reading for her bill, which had for its object, broadly speaking, that either a husband or wife should be entitled to obtain a divorce if the parties had been separated for not less than seven years. The "inconvenient" question which the government was then confronted with was, in the words of Lord Silkin, "shelved for a number of years" by the government's promise to set up a royal commission covering the whole subject of marriage and divorce.

The scope of the inquiry the present Royal Commission was directed to make was "very wide, embracing not only the law relating to divorce and other matrimonial proceedings but also the administration of that law in all courts, and the law governing the property rights of husband and wife. Moreover, for the first time, the subject of the inquiry extended to Scotland, as well as to England and Wales." (para. 13 of the report). It is worthy of note that no similar commission has ever been set up in Canada, although one was suggested by Senator Aseltine a few years ago when reporting on the work of the Senate Divorce Committee, of which he was the conscientious chairman. The present writer ventures the prophecy that some day in the not distant future that suggestions will be adopted, if only, to quote Lord Silkin, as a "recognised and timely method of shelving inconvenient questions", and some, at least, of the recommendations of that commission will be made law. Action was eventually taken on the first and second of the English reports, and in each case the action was in the direction of facilitating divorce in the case of unfortunate marriages.

An indication of the conscientious thoroughness of the commission's investigation is the fact that it held 102 meetings and heard evidence from 67 organizations and 48 individual witnesses; and it spent £35,463 4s. 6d.

The results were not, however, revolutionary. The commission was much concerned by the large number of cases in which marriage had broken down, but it did not believe that a restricting of the grounds for divorce would cure that situation. It did not, therefore, recommend that any of the grounds established by the "Herbert Act" should be dropped. On the other hand, it recommended that sodomy and bestiality should be grounds which a husband, as well as, at present, a wife, could invoke (para. 1204, sub-para. 11) (it distinguished, however, between sodomy by a wife and lesbianism); that wilful refusal to consummate should be a ground for divorce instead of, as at present, annulment (sub-para. (5) (a)); and that acceptance by a wife of artificial insemination by a donor without her husband's consent should be a ground (sub-para. (5) (b)).

On the fundamental question before it, namely, whether an irretrievable breakdown of a marriage should be a ground for divorce, in addition to the existing grounds, nine of the eighteen members, including Lord Morton of Henryton, the chairman, opposed the adoption of this additional ground, and nine of them supported it, and, in a separate statement (p. 340), one of these nine, Lord Walker (Senator of the College of Justice in Scotland), went so far as to advocate the abandonment of the doctrine of matrimonial offence and its replacement by a provision that marriage should be indissoluble unless, the parties having lived apart for three years, either party shows that the marriage has broken down, in the sense that it is one where the facts and circumstances of the lives of the parties adversely to one another are such as to make it improbable that an ordinary husband and wife would ever resume cohabitation. In his speech in the House of Lords³ Lord Merriman, President of the Probate, Divorce and Admiralty Division of the High Court (referred to by some wag as the

³ *Ibid.*, cols. 1002 ff.

"Wills, Wives and Wrecks Division") called these two sides of the commission the "Morton party" and the "Keith party". "But what nobody supported", said Lord Morton of Henryton, speaking in the same debate, "was that men who had gone off leaving a guiltless wife for seven years, should come back and divorce her against her will, notwithstanding that she might have conscientious scruples, and thereby deprive her, she having committed no matrimonial offence at all, of her status as wife", and of the rights pertaining to that status.⁴

Children and marriage guidance. The report indicates very forcefully the commission's concern with the well-recognized fact that the children are often the innocent victims of a broken home. It therefore recommended that the decree nisi be not made absolute until the court is satisfied that the arrangements proposed for the care and upbringing of the children are the best which can be devised in the circumstances. (In British Columbia, where there is no decree nisi, this practice would, of course, mean that no decree would be granted until the court was so satisfied.) It will be noted that the present writer used the word "often" in referring to the children of a broken home as "the victims", but "children of a broken home" has not, in my opinion, the same meaning as "children of a divorced couple". The latter children are very often the beneficiaries of a divorce; in other words, it is far better, in my opinion, for their health, physical and mental, and their happiness, that they be enabled by a new marriage of a divorced parent to be brought up in a home where there is mutual kindness, respect and understanding than to be compelled by the restrictions of the law to remain in one where they live in an atmosphere made tense by recriminations, and, in many cases, are witnesses of scenes of violence and have to listen to foul language.

As Lord Chorley said in the House of Lords debate:⁵

Where there is failure, where marriage has broken down, I think it is best to face up to the fact frankly and to grant divorce as they do in so many other countries. I think it is time that we followed their example. It is easy to make jokes about divorce in America, but when I was in America I came into personal contact with a number of cases of successful divorce, and I was very much impressed with what I regard as the sensible attitude of the Americans in this matter . . .

I appreciate that to those who take a deeply religious view it may seem revolting. Nevertheless, I think it is common sense; and I think the trend of opinion in this country is going the same way . . . It is significant that over the last years judgments of the courts have tended to mould themselves to the feelings of the people.

The commission also wisely emphasized the need of much more pre-nuptial and post-nuptial guidance on the difficulties and responsibilities of marriage. It, therefore, recommended (para. 1204, sub-para. 25) that a suitably qualified body be set up to review the marriage law and the existing arrangements for pre-marital education and training; and also (sub-para. 26) that the state "should give every encouragement to the existing agencies engaged in matrimonial conciliation, as well as to other agencies which may be approved in the future; [but] it should not define any formal pattern of conciliation agencies or set up an official conciliation service". It further recommended (sub-para. 27) that "Exchequer grants to voluntary agencies towards the cost of training and central administrative expenditure should continue to be made", and (sub-para. 30) that "the provisions of the Legal Aid and Advice Act, 1949, relating to legal advice should now be brought into operation".

⁴ *Ibid.*, col. 985.

⁵ *Ibid.*, cols. 1026-1027.

The only real hope [said Lord Silkin] of making the marriage institution more successful is by action at the beginning. If it were possible, the right solution would be to make marriage more difficult and divorce more easy; but that is not a matter which is within the realms of possibility, except when the parties are too young. The fact remains that one of the great difficulties is that in many cases marriages are too hastily entered into by people without guidance and without experience. That, I would say, is probably the greatest cause of the breakdown of marriages. Frequently they are entered into without a realisation on the part of either party of what the obligations of marriage are.⁶

Evidence of facts learned by a guidance councillor in the course of conciliation work should, it was recommended (sub-para. 31), be inadmissible in any matrimonial proceedings between the spouses.

Collusion. The commission found that "it is still necessary to retain collusion as an absolute bar...there is no need for a change of principle", but they recommended that collusion should be defined by statute on the basis that "husband and wife should be restrained from conspiring together to put forward a false case or to withhold a just defence", and also that "a divorce should not be obtained if the petitioner has been bribed by the other spouse to take proceedings or has exacted a price from him for so doing. The present difficulties have arisen, in our opinion, because of the absence of a clear definition of the latter consideration." (para. 234) "We accept that it may be advantageous that the parties should be able to discuss through their solicitors arrangements which will adjust their position after the divorce, provided that any arrangement reached is not the result of a bargain of the nature [of bribery]. We recommend, therefore, that it should be expressly provided by statute that it should not amount to collusion if reasonable arrangements are arrived at between husband and wife, before the hearing of the suit, about financial provision for one spouse and the children, the division of the matrimonial home and its contents, the custody of, and access to, the children, and costs." The parties should be able to apply to the court, before the presentation of the petition or while the suit is pending, for the court's opinion on the reasonableness of any such arrangements. (para 235)

This recommendation should suggest to Canadians the important query whether, under the division of powers between the federal and provincial legislatures, it may not be possible for valid provincial legislation to deal with the making of such arrangements, in respect at least of some of the subjects which the commission recommends should be dealt with.

Speaking in the House of Lords, Lord Merriman said, "I feel it very important that the ignorance about what collusion is, or may be, should be dispelled...To my mind, 'collusion' means a corrupt bargain; and the corruptness is the essence of it. It may be to bribe the other party to bring the petition—it need not necessarily be on false grounds, and the bribe need not necessarily be money, though those are merely palliations. The essence is that it is a corrupt bargain to bribe the party to bring the petition, or, it may be, to suppress a defence or falsify the facts. That is the essence of collusion."⁷

The fact is, as Mr. Justice Coyne of the Manitoba Court of Appeal has pointed out,⁸ that some judges have been led to their disagreement with the policy of the divorce act to give a much wider meaning to "collusion" than it originally had.

Lord Merriman, who was opposed to the "break-down" theory, said that he had tried between 1933 and 1947 between 12,000 and 15,000 undefended divorce

⁶ *Ibid.*, col. 977.

⁷ *Ibid.*, cols. 1008, 1007.

⁸ *Riley v. Riley*, [1950] 1 W.W.R. 548, at p. 563, 57 Man. R. 527, [1950] 2 D.L.R. 694.

cases and that it was "sheer nonsense to suppose that the bulk of undefended divorce cases are collusive". As to divorce by consent, he said that "the mere fact that the parties are both thankful to be rid of each other is not an answer to the suit and does not turn what is a remedy for a proved wrong into a divorce by consent", that is, one "where the agreement of the parties is the only basis on which divorce is sought".

The religious aspect. The report stated that "this Report will contain no discussion of what may be called the religious aspects of marriage and divorce" (para. 38). Speaking in the House of Lords,⁹ Lord Morton of Henryton, the chairman, said, after referring to the fact that there are many people who sincerely believe that a marriage can never be ended except by death, "It was not for us to go into matters of that kind at all. We were appointed in a country where legislation has been passed to enable people to get a divorce on certain grounds and it was for us to consider simply this: are these the best grounds that can be devised?" If this view of the duty of such a commission be correct in relation to England and Scotland, in each of which a state church exists (and the writer firmly believes that the view is the only correct one, so long as a divorce law exists), it is infinitely more appropriate in Canada; and legislators and writers on the subject should keep it in mind. No divorce-law reformer wishes to interfere with any person's religious beliefs, but, especially in a country where there is no state church, it is not consistent with democratic principles that any denomination or group of denominations should be allowed to impose by law their beliefs on very large numbers of their fellow citizens who do not adhere to those beliefs. The proper solution, in the writer's opinion, is to require a civil ceremony *as the legal basis* of marriage; and to permit all those who wish to do so to add a religious ceremony and to feel bound by it in their religious lives. The duty of legislators is to concern themselves solely with the law applicable to all citizens.¹⁰ This view will, I think, ultimately prevail.

Insanity as a ground. The report said:

We do not think that the arguments against having insanity as a ground are any more cogent than before. Where a spouse, at the end of sufficient period of care and treatment, is held to be incurably insane, the continuance of a normal married life has clearly become impossible; as the Gorell Commission said, 'the married relationship has ended as if the unfortunate insane person were dead, and the objects with which it was formed have become thenceforward wholly frustrated'. [para. 176]

[But] insanity has no precise definition and is a term used to describe varying degrees of mental disorder ranging from a mild delusional state to the extreme cases of paranoia or schizophrenia. In our view, divorce should be available only to a person whose spouse is suffering from insanity to such an extent that it can be said that the objects of the marriage relationship have been wholly frustrated. It seems to us, therefore, that the adoption of incurability as the sole test would not be satisfactory and that some additional safeguard is required which will serve as a criterion of the mental disorder. [para. 187]

In our opinion the most satisfactory safeguard is to require a sufficient period of care and treatment in a hospital or similar institution to have elapsed before proceedings can be started. This is a test which has worked quite satisfactorily in both England and Scotland over a number

⁹ *Ante*, footnote 2, col. 987.

¹⁰ In an interesting B.B.C. broadcast (printed in *The Listener* of Oct. 25th, 1956) under the title "Marriage, Real and Legal" the religious conception of marriage is referred to as a "metaphysical union" or real marriage, which, in that speaker's opinion, is indissoluble, as contrasted with a merely legal marriage, such as the marriage of a divorced person while the other party to the divorce is living.

of years. But we think that the present statutory definition of care and treatment is too narrow in the light of modern developments in the treatment of persons suffering from mental illness. . . [para. 189]

Condonation. Fourteen of the commission believed that a successful reconciliation would likely be best promoted, once a matrimonial offence is discovered (in, may the writer add, both the oldfashioned and present sense of "discovered"), by permitting the husband and wife to live together in the matrimonial home. They therefore proposed that the husband and wife be allowed to have a trial period of cohabitation up to one month, which should be deemed not to amount to condonation. The other five members, including the chairman, were unable to support this proposal, but all nineteen agreed that husband and wife should be on the same footing with regard to the presumption of condonation raised by acts of sexual intercourse between them (paras. 240-243).

Cruelty. Of especial practical interest to Nova Scotia readers is the commission's view that the present law in the United Kingdom with regard to cruelty as a ground for divorce should remain unaltered as to the present legal requirements on injury to health and intention, except in one respect, namely, it should not be necessary for the plaintiff to prove that he or she needs protection, but proof of cruelty should in itself confer a right to divorce (paras. 129-132). The commission rejected the suggestion that cruelty should be defined by statute.

Single act of adultery as ground. The commission rejected the suggestion that a divorce should be denied, or the court should at least have a discretion to deny it, where the suit is based on the commission of a single act of adultery (para. 119).

Proposed new restrictions. Proposals for introducing new restrictions on the granting of divorces were rejected. One such was that the court should have a discretion to refuse a decree where it thinks the refusal would be in the interests of the children. After referring to the extremely difficult task such a rule would impose on the court, the commission said: "It may also be doubted whether the children's interest would be best served if they could be regarded by their parents as the reason for the failure of the divorce proceedings" (para. 219).

Property rights. The most valuable part of the report, so far as its immediate usefulness to Canadian practitioners is concerned, is Part IX dealing with property rights as between husband and wife. This part covers 30 pages (124 paragraphs) and constitutes a helpful monograph on this subject, especially on a deserted wife's right to remain in the matrimonial home, a phase of the law which is still not settled by the highest authority, although "In recent years the law has developed in such a way as to give the wife some sort of right to remain in the matrimonial home if the husband has deserted her and left her in occupation" (para. 603). In Canada, in those provinces in which "homestead" statutes (sometimes called Dower Acts) are in force, this problem is of course simplified, where the home is owned by the husband (and, also, in some provinces, by the wife) by the restriction which such statutes place on its sale or other disposal.

The domicile factor. To Canadians, especially, an extremely valuable section of the report is Part XII, The Basis of Matrimonial Jurisdiction and the Recognition of the Jurisdiction of Other Countries, and the accompanying Appendix IV, Draft Code (Jurisdiction and Recognition). Most Canadian practitioners will agree with the statement that "The most pressing problem revealed by the evidence is the hardship occasioned by a 'limping marriage', that is to say, a marriage which is regarded in one country as dissolved but in another country as still in being . . ." (para. 789). "We take the view that a greater measure of recognition should be given to the exercise of jurisdiction in other countries.

Only in this way can a start be made towards lessening the number of 'limping marriages'... Furthermore [critics of *Travers v. Holley*, [1953] P. 246, [1953] 3 W.L.R. 507, [1953] 2 All E.R. 794, will note this] we are proposing that recognition should be given to a divorce obtained in the exercise of a jurisdiction which is not based on the domicile or the nationality of the spouses, but which is substantially similar to that which is to be exercised by the English and Scottish courts, for instance a jurisdiction based on residence. We do not exclude the possibility of setting up an international Convention for the recognition of divorce decrees." (para. 812)

"The majority [of the Standing Committee on Private International Law set up by the Lord Chancellor in September 1952] favoured the retention of the present rule that domicile should consist of residence in a country accompanied by an intention to live in that country permanently. However, to assist in the determination of a person's domicile, the majority recommended the adoption of certain presumptions designed to facilitate proof of the necessary intention. The most important of these presumptions is that where a person has his home in a country, he should be presumed to intend to live there permanently. The presumption is to be rebuttable, but it was said that the practical effect of the proposal will be that in cases which go to trial the burden of proof will be placed upon the person who seeks to show that the domicile of origin has not been abandoned for a domicile of choice . . . We therefore accept the suggestions of the majority in the Standing Committee, which we think represent an improvement on the existing law, and we are content to endorse their recommendations as they stand." (paras 816 and 818) "We think, however, that the court should be able to exercise divorce jurisdiction in favour of a husband or wife who satisfies certain residential conditions provided that it does so in circumstances which are favourable to the recognition of its decrees in other countries." (para. 827)

The conclusion of the commission was (para. 810):

We consider that the time has come for a comprehensive set of rules to be framed in a Statute, which will set out clearly:

- (i) the circumstances in which the English and Scottish courts will have jurisdiction in divorce proceedings;
- (ii) the law which should be applied for a proper determination of the issues in such proceedings; and
- (iii) the circumstances in which recognition will be granted in England and Scotland to pronouncements of divorce in other countries.

and (para. 811):

We consider that domicile should continue to be the main basis, but not the sole basis, upon which divorce jurisdiction is exercised by the English and Scottish courts. We think that there should be some relaxation in the strict requirements of the law as to domicile in order to bring it more into line with the concept which obtains in other countries . . .

and (para. 825):

We recommend, therefore, that a wife who is living separate and apart from her husband should be entitled to claim a separate English or Scottish domicile for the purpose of establishing the jurisdiction of the English or Scottish court to entertain divorce proceedings by her, notwithstanding that her husband is not domiciled in England or Scotland, as the case may be. The burden of proof should be on the wife to establish that the circumstances are such that, had she been a single woman, she would be held to have acquired an English or Scottish domicile . . .

To the present writer one of the most significant aspects of these recommendations on domicile is the great advance in realistic thinking disclosed by the report over the very unrealistic attitude of the Judicial Committee in *Cook v. Atty. Gen. for Alta. and Cook*,¹¹ which applied the separate country doctrine as between the different provinces of Canada. With all due respect for the members of that august tribunal, they indicated, or a majority of them did, an appalling lack of appreciation of the way life is carried on in this country of branch offices and frequent changes of residence from one province to another. To expect a man working in Toronto, who is told by his company to report in, say, Calgary tomorrow, to have any definite intention on arriving there about remaining there is the sort of decision which exasperates the intelligent layman. It is true that the decision can be defended as an application of established rules, but if that defence is resorted to then it is only fair to point out that the rules in question are judge-made law and did not come to fruition until almost forty years after the act of 1857 was passed.¹² Therefore it was not necessary for the same high tribunal which declared it to give such an unrealistic extension. Is it not now open to the present highest court for this country to decline to follow the *Cook* case?

The report has been, of course, the subject of comment in the legal journals of the United Kingdom.¹³ A most interesting criticism was made by Lord Chorley, the distinguished practitioner, teacher of law and General Editor of the *Modern Law Review*, in his speech in the House of Lords already referred to. He attacked, among other things, the composition of the commission. In his view it was "top-heavy" with lawyers, eight, including only one solicitor. "After all", he said, "the barrister is not the person who sees this type of case in the raw; it is the solicitor who does that. If we had to have all these lawyers I think it would have been better to have a number of knowledgeable solicitors." Possibly this opinion may be cited in support of the Canadian system of not separating the two branches of the profession. His other "serious criticism" of the composition of the commission was that there were "practically no people who could approach his matter in a scientific way . . . this sort of problem has been intensely studied in the sociology departments of the universities and in other institutions over the last fifty years or more. Yet no social scientist was put on this Commission."

More important, felt Lord Chorley—and certainly important in the light of the growing interest in legal research in Canada—is his criticism "in regard to the method of taking evidence. The witnessess . . . largely gave evidence on the basis of conjectures and value judgments, and even prejudice. There was very little research into actual facts . . . some of the witnesses . . . indicated how extremely difficult it was to form conclusions on a number of these problems because of the absence of real research . . . Lord Morton of Henryton was evidently of the opinion that these questions are so intimate that it is not really possible to do research into them, but I do not think that is so; and I think that if he were aware of some of the work which has been done in this country, in America, and perhaps particularly in some of the Scandinavian countries into this sort of problem, he would be prepared to revise his judgment on this sort of point."¹⁴

W. KENT POWER*

¹¹ [1926] 1 W.W.R. 742, [1926] 2 D.L.R. 762, [1926] A.C. 444.

¹² *Le Mesurier v. Le Mesurier*, [1895] A.C. 517, 64 L.J.P.C. 97.

¹³ For example, the Special Family Law Number of the *Modern Law Review* (November 1956).

¹⁴ *Ante*, footnote 2, cols. 1017-1018.

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APPENDIX "58"

MATRIMONIAL CAUSES JURISDICTION: THE FIRST YEAR

BY

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Early in 1961 the present authors published *Matrimonial Causes Jurisdiction*. That was a study of the law of jurisdiction, choice of law and recognition of foreign decrees under the *Matrimonial Causes Act 1959*. That Act did not come into operation until after the book went to press, and the present article is intended as a review of the subsequent case and statute law bearing on the matters dealt with in the book.

1. *Constitutional Questions.*

The *Matrimonial Causes Act 1959* depends on various provisions of the Commonwealth Constitution, for the greater part, though not entirely, on s 51 (xxii) supported by s. 51 (xxxix). The authors drew attention to possible questions of constitutional validity which might arise in connexion with particular provisions.¹ The only discussion of constitutional questions so far has been by Barry J. in the Supreme Court of Victoria in *Skitch v. Skitch*² with reference to s. 71 of the Act. Barry J. said: "I may add that I do not think that the extent of the impact of s. 71 upon the traditional divorce law will be fully realized for some time to come. It stipulates in imperative terms that where there are children of the marriage who are under sixteen years of age, or who come within sub-s. 3, a decree *nisi* shall not become absolute unless the court is satisfied that proper arrangements in all the circumstances have been made for the welfare and, where appropriate, the advancement and education of those children. The court must therefore satisfy this obligation unless it finds under s. 71 (1) (b), there are 'such special circumstances' that the decree *nisi* should become absolute notwithstanding that the court is not satisfied that the arrangements envisaged by s. 71 (1) (a) have been made. This obligation may require the judge to exercise powers created by s. 85 in a case where there are children under sixteen of the marriage sought to be dissolved, and to do so without the consent of the parties or even in disregard of their wishes. Indeed, it seems that the consent of the parties to arrangements under s. 71 (1) (a) is in no sense conclusive, but is only one of the elements to be considered in arriving at the state of satisfaction necessary before a declaration under s. 71 (1) (a) may be made by the court. The judge may thus be taken from his traditional role and required to be an active instrument of social policy designed, presumably, to safeguard and promote the interests of such children. Whether the imposition of this obligation is constitutionally valid may require to be determined by the High Court of Australia".

The investment of State Supreme Courts with federal jurisdiction, which is the device favoured by the Act³, is authorized by s. 77 (iii) of the Common-

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¹ See Cowen and Mendes da Costa, *Matrimonial Causes Jurisdiction* (1961), p. 4; see also Ch. 2 *passim*.

² (1961) 2 F.L.R. 8, at p. 12.

³ See ss. 23 (2), 92 (2).

wealth Constitution. But only judicial power may be invested; see *Queen Victoria Memorial Hospital v. Thornton*⁴ and *Insurance Commissioner v. Associated Dominion Assurance Society*⁵, and the question raised in *Skitch v. Skitch* was whether the obligations cast on State Supreme Courts by s. 71 were properly within the definition of judicial power. The sections confers broad discretionary powers; as the judge observed, State courts are required to act as active instruments of social policy. Section 71 has been considered and applied many times in the course of the first year of the Act without further question of validity, and while therefore no decision has been given on the point, it is submitted that the exercise of such discretion as s. 71 requires, while very extensive, is nevertheless not so unconfined and atypical as to warrant the conclusion that it is not properly described as an investment of judicial power.

2. Jurisdiction

The scheme of the Act is that proceedings under the Act, so far as they are instituted in the Supreme Court of a State, and so far as they are taken on appeal therefrom to the Full Supreme Court of a State, shall be in federal jurisdiction (ss. 23 (2), 92 (2)). Similar provision is made for pending proceedings, defined by s. 110 as proceedings which have been instituted before the date of commencement of the Act, but not completed before that date. Such proceedings shall be continued only in accordance with Pt. XIII of the Act entitled "transitional provision"⁶. Section 23 (2) (b) invests State Supreme Courts with federal jurisdiction to hear and determine matrimonial causes continued in accordance with Pt. XIII. These provisions led *Pape J.* in the Supreme Court of Victoria in *Dorney v. Dorney*⁷ to conclude that "...on 1st February 1961, the Commonwealth Matrimonial Causes Act 1959 came into operation, and thereafter the entire matrimonial causes jurisdiction became Federal jurisdiction...".

The decision of the High Court in *Schumann v. Schumann*⁸ shows, however, that this statement requires some qualification. Before the Act came into operation a decree of divorce was pronounced in the Supreme Court of South Australia. An appeal to the Full Supreme Court was heard before the Act came into operation but reserved judgment was not delivered until after that date. The question was whether an appeal from that decision to the High Court was subject to the requirement of special leave as prescribed by s. 93 of the Act. The High Court held that it was not subject to s. 93, and that the case was covered by the express provisions of s. 115 of the Act. In its judgment, the High Court pointed out that while the Act expressly authorized the continuance of the appeal in the Full Supreme Court and thereby authorized it to give judgment, the exercise of jurisdiction by the Full Supreme Court *throughout* was state and not at any time federal jurisdiction; and the express provisions of the Act make it clear that this is so; see ss. 23 (2) (b) and 92.

In *Howe v. Howe*⁹ only federal jurisdiction was exercised, but a question arose as to the jurisdictional basis for the making of the decree. It was held that the provision for a statutory domicile in s. 24 (1) of the Act applied to a deserted wife whose proceedings for divorce were continued under Pt. XIII. The wife had instituted proceedings in Victoria before the Act under Pt. IIIA of the Commonwealth Matrimonial Causes Act 1955, on the basis of three years' residence.

⁴ (1953) 87 C.L.R. 144; *Cowen, Federal Jurisdiction in Australia*, (1959), p. 155.

⁵ (1953) 89 C.L.R. 78, at 85 per Fullagar J. Cited by Barry J. in *Skitch v. Skitch* (1961) 2 F.L.R. 8, at p. 12.

⁶ Sections 8 (1) (b); 111.

⁷ (1961) 2 F.L.R. 18, at p. 19.

⁸ (1961) 35 A.L.J.R. 289.

⁹ (1961) 2 F.L.R. 2.

She was however domiciled in Australia immediately before her marriage, and *Barry J.* held that she could petition upon that jurisdictional basis. Section 112(6) appears clearly enough, to support this conclusion¹⁰. In *Tweedie v. Tweedie*¹¹ *Barry J.* confirmed the opinion¹² that s. 112(1) of the Act temporarily preserved the operation of the Commonwealth *Matrimonial Causes Act* 1945-1955 in pending proceedings. *Barry J.* held, notwithstanding the general repeal effected by s. 4, that s. 112 authorized the continuance of proceedings commenced under Pt. IIIA of the Commonwealth *Matrimonial Causes Act* 1945-1955 and that a decree could therefore be pronounced upon the basis of the wife's residence for three years. He preferred, however, to invoke s. 112 (6) and to make a decree on the jurisdictional basis that the parties were domiciled according to the principles of the common law in Australia. The wife had petitioned in the Supreme Court of Victoria, and her husband was domiciled either in Queensland or New South Wales, and therefore, for the purposes of the Act, in Australia. And in *Morkunas v. Morkunas*¹³, *Barry J.* said that it was "consonant with the general intention of the *Matrimonial Causes Act* 1959 to invoke the jurisdiction created by that Act rather than to use the procedural device provided by Pt. III of the *Matrimonial Causes Act* 1945-1955". Whether any practical consequence, for example, in respect of international recognition of a decree, results from preferring one basis of jurisdiction to the other, it is not easy to say.

The fact that State Supreme Courts exercising jurisdiction by authority of the Act exercise federal jurisdiction—except in such cases as *Schumann v. Schumann* which are not likely to arise very frequently and only during the transitional period—raises some interesting problems. One of these was adverted to by *Barry J.* in *Cooper v. Cooper and Ford*¹⁴. "As judges of the Supreme Court who sit in this jurisdiction are exercising Federal jurisdiction, it will be essential for the satisfactory working of the Act that a judge in the one State should follow the decision of a judge in another State unless there is some compelling reason for him not to do so, . . .".

One of the main objects of the Act, indeed its principal design, is the enactment of a uniform matrimonial causes law for Australia. Yet it is clear that many of the provisions of the Act will call for authoritative construction; and in some areas of matrimonial causes law the Act preserves the rules of the common law, some of which, particularly in the conflict of laws field, are uncertain and will therefore also call for authoritative exposition. The High Court may of course provide this, although the appeal to that Court is restricted by s. 93. Section 91, however, provides useful machinery for an authoritative exposition of a point of law by the High Court when the matter arises on trial in a Supreme Court. This is a legislative grant of original jurisdiction to the High Court¹⁵ and in *Skitch v. Skitch*¹⁶ *Barry J.* expressed the hope that various difficulties arising out of the Act would "be dealt with as promptly as possible under the provisions of s. 91, so that an authoritative elucidation may be obtained from the High Court of Australia. If I am asked by any party to do so, I shall be glad to state a case for the determination of the High Court upon any question of law arising under the Act".

But failing an authoritative determination by the High Court—and determination by that Court whether in original or in appellate jurisdiction would be authoritative—the question adverted to by *Barry J.* in *Cooper v. Cooper and Ford* is an important practical one. The State Supreme Courts sit in federal

¹⁰ *Cowen and Mendes da Costa op. cit.*, pp. 146-147.

¹¹ (1961) 2 F.L.R. 21.

¹² *Cowen and Mendes da Costa op. cit.*, p. 8.

¹³ (1961) 2 F.L.R. 24, at p. 25.

¹⁴ (1961) 2 F.L.R. 303, at p. 304.

¹⁵ See *Cowen and Mendes da Costa op. cit.*, p. 21.

¹⁶ (1961) 2 F.L.R. 8, at pp. 13-14.

jurisdiction as Australian courts; among State Supreme Courts a petitioner does not have to select one rather than another, and the choice of forum is subject only to the controls of s. 26. Interesting problems of authority may arise. In *Cooper v. Cooper and Ford*¹⁷, Barry J. declined to follow two recent decisions of the Supreme Court of New South Wales on the interpretation of s. 72 (3) (b) of the Act, specifically on the question whether a court, in the exercise of its discretion, could reduce the period at the expiration of which a decree *nisi* will become *absolute* to less than twenty-one days. Barry J., answering that question affirmatively, declined to follow the New South Wales decisions, and found compelling reason in the construction of the Act itself for the course he adopted. Barry J.'s view was subsequently preferred and followed by Bibbs J. of the Supreme Court of Queensland in *Alcock v. Alcock*¹⁸. As between co-ordinate jurisdictions it is to be expected that there will be some disagreements, though Barry J.'s emphasis on the importance of uniform decision will surely be heeded. But interesting problems in federal jurisdiction may arise when a single judge of a State Supreme Court is faced with what he regards as an erroneous or unsatisfactory decision of the Full Supreme Court of another State. As a practical matter, resort to s. 91 of the Act for an authoritative determination by the High Court would be highly desirable in such a case, though the judge cannot state a case for the High Court without the agreement of at least one of the parties. But failing such a reference, there is a question as to whether the rules of precedent would constrain a single judge sitting in federal jurisdiction under the Act to follow the Full Supreme Court decision. There is no authority directly in point, though it would appear that the scheme and policy of the Act point to the conclusion that the Full Court decision should be regarded as binding. As between Full Courts, it would seem that the principles and practice stated in *Cooper v. Cooper and Ford* would apply in the same manner as they do as between co-ordinate courts of first instance.

A question of some difficulty was posed by Barry J. in *Skitch v. Skitch*. It was whether a decree of divorce made in pending proceedings was a decree to which s. 8 (4) of the Act applied. Section 8 (4) provides that where a marriage is dissolved or annulled by a decree under the Act, a prior maintenance order made by a court of summary jurisdiction ceases to have effect upon the making of the decree. The issue was whether a divorce decree made in pending proceedings was a decree under the Act within the meaning of s. 8 (4). There is much to be said for what Barry J. described as the "sensible conclusion"¹⁹ that such a decree fell within s. 8 (4) and he held accordingly. But there are difficulties in the way of this conclusion. Section 8 (1) draws a distinction between matrimonial causes instituted under the Act and matrimonial causes continued in accordance with Pt. XIII; s. 23 (2) draws a distinction with respect to the investment of jurisdiction in courts to hear and determine matrimonial causes instituted under the Act and matrimonial causes continued in accordance with Pt. XIII; s. 112 in Pt. XIII provides that except as otherwise provided in that Part, the law to be applied and the practice and procedure to be followed in and in relation to pending proceedings for a decree of divorce, nullity or judicial separation shall be the same as if the Act had not been passed, and s. 113 expressly makes various sections of the Act applicable to pending proceedings "as if those proceedings had been instituted under this Act and any decree made in the proceedings had been made in proceedings so instituted". Section 8 (4) is not included among the sections made applicable by s. 113.

The conclusion to which these various provisions point is that a decree made in pending proceedings, while obviously made by authority and operation

¹⁷ (1961) 2 F.L.R. 303.

¹⁸ (1961) 2 F.L.R. 333.

¹⁹ (1961) 2 F.L.R. 8, at p. 12.

of the Act, is not a decree "under this Act" for the purposes of s. 8 (4). But Barry J. in reaching the contrary conclusion in *Skitch v. Skitch* relied, it would seem, on the fact that the State Supreme Court whether entertaining a matrimonial cause instituted under the Act of a matrimonial cause in pending proceedings was exercising federal jurisdiction. In the context he was considering, this was undoubtedly true, but with respect, not determinative of the point. It is clear on the face of the Act that in pending proceedings, a State Supreme Court while exercising federal jurisdiction may apply under s. 112 rules of law, practice and procedure which would have applied had the Act not been passed. The determination of the applicable law depends on the construction of the Act, not on the exercise of federal jurisdiction, *simpliciter*. And for the reasons already adumbrated, there is a strong argument for the conclusion that s. 8 (4) does not apply where a decree has been made in pending proceedings.

*Francis v. Francis*²⁰, in the Supreme Court of South Australia, dealt with the question of a stay of proceedings, for which provision is made by s. 126 of the Act. In that case a wife domiciled in Victoria presented a petition for divorce in South Australia in November 1959 under Pt. IIIA of the Commonwealth *Matrimonial Causes Act* 1945-1955. In November 1960, the husband filed a defence. On 15th March, 1961, the husband applied for a stay of proceedings under s. 13A (1) of the 1945-55 Act, and on 16th March, 1961, he instituted proceedings for divorce in the Supreme Court of Victoria. If an application for a stay had been made to the Victorian Court after 16th March, 1961, s. 26 of the Act would have been directly in point. But on the hearing of the application in the Supreme Court of South Australia, it would appear that s. 13A (1) of the previous Commonwealth Act provided the only remedy as s. 8 and Pt. XIII of the Act of 1959 do not seem in these circumstances to make s. 26 applicable to pending proceedings. Section 13 A (1) (a) and (b) of the Act 1945-1955 contain provisions similar to those of s. 26 (1) and (2) of the Act of 1959. The sub-section which Mayo J. considered as relevant to the application was the parallel provision to s. 26 (2). Section 26 (2) provides: "Where it appears to a court in which a matrimonial cause has been instituted under this Act (including a matrimonial cause in relation to which the last preceding sub-section applies) that it is in the interests of justice that the cause be dealt with in another court having jurisdiction to hear and determine that cause, the court may transfer the cause to the other court".

Mayo J. stated²¹ "There is, however, the more serious question concerning what the 'interests of justice' may demand. It is on that aspect that I thought it desirable to have my reasons reported, so that if the application goes further, the reasons can be looked at. It can be seen whether, if I have a discretion, I have exercised it rightly, and, if I have not, whether I have gone wrong in my conclusion. I have not, as I mentioned before, found authority amplifying what constitutes in a like purpose to the present, the 'interests of justice'. No doubt, questions of costs are involved in the interests of justice. It may be that the costs here will be greater than the costs if the matter were proceeded with in Victoria, due in part to the transport of witnesses. But I doubt whether I should accede to the application in the circumstances, the defendant having acted in such a dilatory way, as can be seen from the dates given. From the affidavits it would appear that it is entirely a matter of the personal dilatoriness of the defendant. I do not think in the interests of justice the decision of the issue should be postponed until the pleadings have been filed in the Victorian action. It is impossible to hazard a guess when that action would be ready to be set down for hearing, and more difficult still to say when it would come on for hearing. I have no idea when that action would be likely to be heard in Victoria".

²⁰ (1961) 2 F.L.R. 263.

²¹ *Ibid.*, at p. 266.

There seems no reason to doubt that these observations are equally applicable to s. 26 (2) and, despite the difference of wording, that they also serve as a general guide to the interpretation of s. 26 (1).

3. *Australian domicile.*

Section 23 (4) and (5) confer jurisdiction in matrimonial causes by reference to a domicile or residence *in Australia*. This breaks new ground; before the Act came into operation, domicile, so far as Australia was concerned, was determined by reference to a State or Territory: an *Australian* domicile as such was unknown. This had been the subject of critical comment in the Full Supreme Court of Victoria in *Armstead v. Armstead*²² and also in the Supreme Court of the Northern Territory in *Fullerton v. Fullerton*²³. The Act provides that proceedings for a decree of dissolution or nullity of a voidable marriage should not be instituted except by a person domiciled in Australia. As Barry J. observed in *Lloyd v. Lloyd*²⁴, "Although that Act does not in terms state that there is an Australian domicile, the existence of an Australian domicile is assumed, and it is implicit in the provisions of Pt. V of the Act that a domicile in Australia is a juristically acceptable concept". As to this, Barry J. had some interesting observations: "The Parliament of the Commonwealth of Australia has legislated either on the basis that, independent of the Act, there is an Australian domicile, or that, for the purposes of the law it has made relating to matrimonial causes, there is now an Australian domicile by virtue of the Act. The Parliament is competent to make laws with respect to marriage and with respect to divorce and matrimonial causes (Constitution s. 51 (xxi), (xxxi)), and the *Matrimonial Causes Act* 1959 was enacted in the exercise of constitutional power... There is thus unity of law with respect to matrimonial causes throughout Australia, and when the *Marriage Act* 1961 (No. 12 of 1961) comes fully into operation, there will be a similar unity of law with respect to marriage. It appears a necessary incident of the power to make a law with respect to matrimonial causes that the foundation of jurisdiction should be prescribed"²⁵.

In so far as the prescribed basis of jurisdiction was domicile in Australia, Barry J. said: "The proposition that a person cannot have more than one domicile at a given time (*Dicey's Conflict of Laws*, 7th Ed., p. 89) seems designed to avoid conflicts and inconsistencies in respect of personal law, and in a constitutional framework such as exists in Australia it may require qualification. (Cp. *Graveson, The Conflict of Laws*, 4th ed., p. 75.) I see no reason inherent in the common law concept of domicile why the Parliament of the Commonwealth is not competent to create or recognize the existence of an Australian domicile for the purposes of its law with respect to matrimonial causes, even though for other purposes the domicile of an Australian citizen may be connected only with a State or Territory. Probably difficulties will not often arise, because if a person is domiciled in Australia, ordinarily he would be resident and domiciled in a State or a Territory. If it is necessary, a domicile in one of those localities would satisfy the strict requirements of private international law, even if, contrary to the view I hold, the assertion of the Act that there is an Australian domicile is not in conformity with classical notions. However, cases do occur where evidence is not available from a husband whose domicile of origin was in another country, and although it may be clear that he has abandoned that domicile, and has resided in Australia with the intention of permanent or indefinite residence in this country, the court may not be able to find with sufficient assurance that he has acquired a domicile in a particular State or Territory. In such a case the ques-

²² [1954] V.L.R. 733, at p. 736.

²³ (1958) 2 F.L.R. 391. Decided by *Kriewaldt J.* in 1958, but not reported until 1961.

²⁴ (1961) 2 F.L.R. 349, at p. 350.

²⁵ *Ibid.*, at pp. 350-351.

tion whether there is, for the purposes of private international law, an Australian domicile may be of importance, and in my opinion it should be answered affirmatively"²⁶.

The present writers have elsewhere discussed various questions raised by this very interesting passage²⁷ and it may suffice briefly to summarize what was said there. It is believed that *Barry J.*'s view that for the purposes of the Act a domicile may be acquired in Australia without deriving that domicile from one necessarily acquired in a State or Territory is correct; and that the purposes of the Act are better served by this conclusion. As the late *Kriewaldt J.* put it in *Fullerton v. Fullerton*²⁸ in advance of the enactment of the Act: "There would seem to be good reasons, however, for Australia being regarded as one 'country' for the purpose of the loss of a domicile of origin. It is easy to conceive of a person as having become a permanent member of the Australian community without having identified himself with any one State or Territory. The 'New Australian' immigrant furnishes a ready example. Is he to be denied domicile in Australia until after he has selected the State in which he proposes to reside permanently?"

If *Barry J.*'s view is correct, an Australian domicile will be established by satisfying the common law requirements of *animus* and *factum*, but operating within the wider geographical area of Australia as defined by the Act. As the judge pointed out, the conclusion that such an Australian domicile might be established for the purposes of the Act could mean that a person was domiciled in Australia for the purposes of matrimonial relief, while at the same time he was domiciled, say in England, for purposes of succession to movable property. An example may readily be provided: if X who has been domiciled in England throughout his life, emigrates to Australia and resides in Victoria with the intention of living in Australia indefinitely, though he has not yet made up his mind whether he will stay in Victoria or settle elsewhere in Australia, his domicile for purposes of matrimonial relief will be Australia, and, for purposes of succession to movable property, in England. And to this extent the classical rule of singleness of domicile will call for qualification in Australia because there is statute law binding on Australian courts which, on this reading of the Act, compels them to reach this conclusion.

But there is a further question with respect to recognition of a decree made under the Act on the jurisdictional basis of domicile in Australia. If a domicile in Australia depends on a domicile within a State or Territory no difficulty will arise because *Armitage v. Attorney-General*²⁹ will lead to recognition on settled common law principles. But if, on the facts stated above, an Australian court grants a decree of divorce to X on the footing of a domicile in Australia, *without* a domicile in a State or Territory, will an English court recognize the decree? No certain answer can be given because it is a new question, but, on principle, it is submitted that the answer should be affirmative. The reason has been stated by the present authors in these terms: "As *Gravenson* points out, the citizen of a federation is subject to two legal systems, state and federal, in both of which domicile may be relevant. And within Australia, as *Barry J.* said in *Lloyd v Lloyd*, there is unity of law with respect to matrimonial causes throughout the country. This follows from the distribution of legislative power by the constitution, and from exercise of that constitutional power. The legislative framework within which this unity of law is established contemplates Australia as a single law district within which a domicile by reference to the common law concepts of

²⁶ *Ibid.*, at p. 351.

²⁷ "The Unity of Domicile" (1962) 78 L.Q.R. 62.

²⁸ (1958) 2 F.L.R. 391, at p. 399.

²⁹ [1906] P. 135. The effect of that decision is briefly stated by *Cowen* and *Mendes da Costa*, *op. cit.*, pp. 83-84.

animus and *factum* may be established: why, having regard to these considerations, should an English court insist that the only domicile which can be established at common law in Australia is one established in a State or Territory? Is there not more practical good sense, more adequate appreciation of the character and organization of a federal structure, in accepting the notion of an Australian domicile in such a case...?"³⁰

If an English court accepts this argument, it follows that a court not constrained by statute to do so would accept a view of the law at variance with the classical rule of singleness of domicile, because such a person as X would for various other legal purposes, be held to be domiciled in England.

It may also be observed that the question posed by *Lloyd v. Lloyd* with respect to an Australian domicile arises not only in the context of jurisdiction, but also in determining questions of capacity to marry by reference to the relevant provisions of the Matrimonial Causes Act 1959 and the *Marriage Act* 1961.

4. *The Operation of ss. 10 and 22 of the Marriage Act 1961.*

Section 18 (1) (b) of the *Matrimonial Causes Act* 1959 provides that, subject to ss. 18(a) and 20, a marriage is void where the parties are within the prohibited degrees of consanguinity or affinity. Section 19(1) provides that after the commencement of the Act, the prohibited degrees of consanguinity and affinity shall be those only which are prescribed by the Act, while s. 19(2) declares that a marriage solemnized before the Act is not voidable on the grounds of consanguinity or affinity of the parties unless the parties were at the time of the marriage within one of the degrees of consanguinity or affinity prescribed by the Act. Section 20 makes provision for certain dispensations where parties within the prohibited degrees of affinity desire to marry. If these were the exclusive provisions of the Act on this matter, it would appear that in such a case as *Sottomayor v. De Barros (No. 1)*³¹ a different result would have been reached. There a marriage between two Portuguese domiciliaries, celebrated in England, was held void by the Court of Appeal because in the circumstances, the law of Portugal prohibited the marriage of cousins. Marriages between cousins are not within the prohibited degrees of consanguinity as prescribed by the Act. But ss. 22(2) and 25(3) of the Act have to be taken into account. Section 22(2) provides in very general terms that a provision of the Act does not affect the validity or invalidity of a marriage where it would not be in accordance with the common law rules of private international law to apply that provision in relation to that marriage, while s. 25(3) affirmatively directs the courts to apply the laws of any country or place where it would be in accordance with the common law rules of private international law to do so. While the common law rules bearing on questions of the essential validity of marriage are not perfectly clear³², s. 22(2) would appear to allow *Sottomayor v. De Barros (No. 1)* to stand, even though the marriage had been celebrated in Australia.

But this situation is not altered—because of the operation of s. 22(1) of the *Marriage Act* 1961. Part III of the Act, in which s. 22(1) appears, came into operation in May 1961 when the Act received the assent. Section 22 provides:—(1) Notwithstanding sub-section (2) of section twenty-two or sub-section (3) of section twenty-five of the *Matrimonial Causes Act* 1959, the provisions of sections eighteen, nineteen and twenty of the Act relating to the prohibited degrees of consanguinity and affinity and the Second Schedule to that Act apply in relation to marriages in Australia, other than marriages to which

³⁰ (1962) 78 L.Q.R. 62, at p. 68.

³¹ (1877) 3 P.D. 1.

³² See *Miller v. Teale* (1954) 92 C.L.R. 406, at p. 414; See also *Cowen and Mendes da Costa* op. cit., pp. 57-58.

Division 3 of Part IV of this Act applies, and to marriages under Part V of this Act, wherever the parties are domiciled or intend to make their home.

(2) Nothing in the last preceding sub-section shall be taken to prevent the application of any common-law rule of private international law in relation to a marriage or purported marriage that takes place outside Australia otherwise than under Part V of this Act.

It follows that the validity of any marriage *celebrated in Australia* (subject to the very limited exception referred to in s. 22 (1)) is, so far as consanguinity and affinity are concerned, governed by the degrees prescribed by the *Matrimonial Causes Act 1959* as extended by the *Marriage Act 1961* which by s. 23 extends them to cover degrees of consanguinity traced through or to a person who is or was an adopted child. Since a marriage of cousins is not prohibited thereby, it follows that such a marriage as that in *Sottomayor v. De Barros* (No. 1), if celebrated in Australia, would be held valid by Australian courts notwithstanding that the parties were Portuguese domiciliaries and that by Portuguese law the marriage was void. But on the actual facts of *Sottomayor v. De Barros* (No. 1) s. 22 (2) of the *Matrimonial Causes Act 1959* and s. 22 (2) of the *Marriage Act 1961* would apply, and the case would not be subject to the peremptory control of s. 22 (1) of the *Marriage Act 1961*.

Section 18 (1) (e) of the *Matrimonial Causes Act* provides that a marriage that takes place after the commencement of the Act is void where either of the parties is not of marriageable age. That Act does not prescribe a marriageable age; but this is fixed by s. 11 of the *Marriage Act* as eighteen for males and sixteen for females. Section 11 and its associated provisions are not yet in operation, so that for the present marriageable age for persons domiciled in Australia must be determined by reference to the appropriate State or Territorial law. Section 10 (1) (a) of the *Marriage Act* provides, *inter alia*, that notwithstanding any common law rule of private international law, s. 11 applies to marriages celebrated in Australia. When this part of the *Marriage Act* comes into operation, it follows, in respect of all marriages celebrated in Australia, that domiciliary prescriptions of marriageable age are to be disregarded, while the requirements of the Act in this respect must be satisfied. Section 10 (1) furnishes for marriageable age the same office as s. 22 (1) of the *Marriage Act* provides for the prohibited degrees. This is a specific departure from the common law rules of private international law; but s. 10 (2) (b) in providing that the requirements of marriageable age, as specified in the Act, shall apply to the marriage of a person domiciled in Australia, wherever the marriage takes place, does not involve a departure from the common law rules. In *Pugh v. Pugh*³³ a marriage celebrated in Austria between a domiciled Englishman and a domiciled Hungarian girl aged 15 was held void by an English court, though it was valid by Austrian and Hungarian law. Section 2 of the *English Age of Marriage Act 1949* provides that a marriage between persons either of whom was under the age of sixteen shall be void, and this section was held to apply to render the marriage void.

It is to be observed that ss. 10 and 22 (1) of the *Marriage Act*, so far as they operate in disregard of common law rules of private international law, and require compliance with the Australian *lex fori*, may produce limping marriages; that is to say marriages which are good in Australia but invalid elsewhere, or marriages that are invalid in Australia, but good elsewhere by operation of common law rules. This is the policy to which the Act gives expression, and it suggests an analogy to the common law rule stated in *Sottomayor v. De Barros* (No. 2)³⁴ that where a marriage is celebrated in England, and one of the parties is domiciled in England and has capacity to enter into it, the marriage

³³ [1951] P. 482.

³⁴ (1879) 5 P.D. 94.

will be valid in England, even though the other party is domiciled in a foreign country under the law of which he or she has no capacity to enter the marriage. This doctrine has been stigmatized as "unworthy of a place in a respectable system of the conflict of laws"³⁵ and as "inelegant"³⁶, and in the English cases it has been applied, *inter alia*, to the issue of prohibited degrees³⁷ and the requirement of parental consent³⁸. But in *Miller v. Teale*³⁹ four judges of the Australian High Court spoke of this rule as furnishing "dubious guidance", and it would seem that this is a sufficiently clear indication that *Sottomayor v. De Barros* (No. 2) would not in this respect be followed as a matter of common law in Australia. Sections 10 and 22 (1) of the *Marriage Act* go beyond *Sottomayor v. De Barros* (No. 1), s. 22 (2) of the *Matrimonial Causes Act* 1959 and s. 22 (2) though the requirements of the *lex domicilii* of both parties are not satisfied.

5. Capacity to Marry

In *Miller v. Teale*⁴⁰ it was observed in the High Court that: "Neither English nor American law has perhaps yet reached a final conclusion as to the choice of law governing general capacity to marry and the choice of law governing particular impediments or prohibitions. American law has shown a greater persistence than English law in the preference for the *lex loci celebrationis* over the *lex domicilii* in all matters affecting the essential validity of the contract of marriage".

And as the present writers have pointed out, there is ambiguity in the reference to the *lex domicilii* for one of the uncertainties in English law is whether the reference to that law is to the ante-nuptial *leges domicilii* of husband and wife, or the *lex domicilii* of the husband as at the date of the marriage, or to the intended law of the matrimonial domicile⁴¹.

This obscurity and uncertainty is in no way clarified by the Act, and the recent cost of *Breen v. Breen*⁴² raises a further problem. There the husband married his first wife in Ireland, and this marriage was dissolved in 1952 by an English court which was the *forum domicilii*. In 1953 the husband married a second time in Ireland, while his first wife was still living. At the time of the second marriage, the second wife was aware of the divorce, but she now petitioned for nullity. Her argument was based on a provision of the *Constitution of Ireland Act*, the operation of which was said to deny recognition to the English divorce, so that the husband was still married to the first wife when he entered the second marriage. *Karminski* J. carefully examined the Irish provision and concluded that it did not have this operation; that the divorce was valid, and that the second marriage was therefore valid.

What is of particular interest is the judge's assumption that Irish law was relevant to the disposition of the case: On what basis? It may have been that the second wife's ante-nuptial domicile was Irish, in which case there is no special difficulty. But there is no evidence of this from the report, and it seems more likely that the reference to Irish law is not to be explained on this ground, and if this is so, it would seem that it must be explained on the footing that Ireland was the *locus celebrationis*, and that a reference to that law was appropriate not only for the determination of questions of formalities, but also to determine questions of capacity and essential validity of the marriage. While the reference to the *lex loci* on questions of formal validity is well established law, the reference of

³⁵ Falconbridge, *Selected Essays on the Conflict of Laws*, 2nd ed. (1954), p. 711.

³⁶ Graveson, *Conflict of Laws*, 4th ed. (1960), pp. 146-147.

³⁷ *Sottomayor v. De Barros* (No. 2) (1879) 5 P.D. 94.

³⁸ *Ogden v. Ogden* [1908] P. 46.

³⁹ (1954) 92 C.L.R. 406. Applied. *Sakellaropoliulis v. Davis* (1960) 24 D.L.R. (2d) 524.

⁴⁰ (1954) 92 C.L.R. 406, at p. 414.

⁴¹ *Cowen and Mendes da Costa* op. cit., p. 58.

⁴² [1961] 3 W.L.R. 900.

matters of capacity and essential validity to that law is not so clear. That parties to a marriage must have capacity under the *lex loci celebrationis* was dogmatically asserted by *Westlake*⁴³ and *Dicey*⁴⁴ supports this view though he draws some distinctions suggesting that this rule is not so certainly applicable where the marriage is celebrated out of England as was the case in *Breen v. Breen*, though compliance with the *lex loci* is, in *Dicey's* view, required in the case of a marriage celebrated in England. On the other hand, in *In the Will of Swan*⁴⁵, *Molesworth J.* in the Supreme Court of Victoria said that it was appropriate to refer to the *lex loci celebrationis* only the context of "ceremonial and so forth". And very recently in *Ross-Smith v. Ross-Smith*⁴⁶ Lord *Morris* said: "The particular place where the ceremony of marriage takes place may have no relevance as between the parties so far as their marriage status is concerned, assuming that the ceremony did bring about such a marriage status. It seems to me that it would be most unlikely that parties who enter into a valid marriage in one particular country, which is not intended to be the country of their domicile or residence, would intend that the law to be applied to their future married status should be the law of the country in which the actual ceremony of marriage took place, and I cannot think that any agreement to such effect ought to be implied".

The tenor of the other majority speeches supports the view that the *lex loci celebrationis* has no concern with questions of capacity.

Section 18(1) (c) of the *Matrimonial Causes Act* provides that a marriage is void where it is not a valid marriage under the law of the place where the marriage takes place, by reason of a failure to comply with the requirements of the law of that place with respect to the form of solemnization of marriages. This reference to the *lex loci celebrationis* for a specific and limited purpose suggests a legislative intent that this is also the limit of the applicability of the *lex loci*, and that so far as *Breen v. Breen* holds that other questions of validity of marriage are referable to the *lex loci*, at least where that is not Australian law, it is not the law in Australia.

6. Recognition of Foreign Relief

Section 95 (2) (a) of the Act provides that the dissolution of a marriage effected in accordance with the law of a foreign country shall be recognized as valid in Australia where at the date of the institution of the proceedings that resulted in the dissolution, the party at whose instance the dissolution was effected was domiciled in that foreign country. There is a question⁴⁷ whether the rule in the *Hammersmith Marriage Case*⁴⁸, later affirmed and applied in *Maher v. Maher*⁴⁹, that recognition will not be given to a form of divorce apt to dissolve a polygamous marriage when it purports to operate on a monogamous marriage, survives in face of the broad language of s. 95 (2) (a). Recent decisions suggest a movement away from the *Hammersmith Marriage Case* doctrine as a matter of common law⁵⁰, and in *Russ v. Russ*⁵¹ *Scarman J.* narrowed the *Hammersmith Marriage Case* rule by holding that while a Talak divorce (a divorce by declaration which, under Moslem law, dissolves a marriage) obtained in the absence of a

⁴³ *Private International Law*, 7th ed. (1925), p. 19.

⁴⁴ *Conflict of Laws*, 7th ed. (1958), p. 256. See also *Cheshire, Private International Law*, 6th ed. (1961), p. 316.

⁴⁵ (1871) 2 V.L.R. (1 P. & M.) 47. See also (1951) 4 I.L.Q. 389.

⁴⁶ [1962] 2 W.L.R. 388, at p. 416.

⁴⁷ *Cowen and Mendes da Costa op. cit.*, pp. 82-83.

⁴⁸ *R. v. Hammersmith Superintendent Registrar of Marriages; Ex parte Mir-Anwaruddin* [1917] 1 K.B. 634.

⁴⁹ [1951] P. 342.

⁵⁰ *Yousef v. Yousef* [1957] C.L.Y. 515; *El-Riyami v. El-Riyami* [1958] C.L.Y. 497; *Khan v. Khan* (1960) 21 D.L.R. (2d) 171, at p. 176.

⁵¹ [1962] 2 W.L.R. 708.

wife and without court proceedings is not entitled to recognition—and this was the position in the *Hammersmith Marriage Case*—such a divorce, when recognized and recorded in the courts of the domicile and in the presence of the wife, should be recognized. It was open to *Scarman J.* only to distinguish the *Hammersmith Marriage Case* which was a decision of the Court of Appeal; but *Russ v. Russ* marks a further stage in a movement away from a rule which at least in its broadest stated terms is believed to be unsound⁵². *Russ v. Russ* should furnish guidance to Australian courts in the interpretation of s. 95 (2).

In *Abate v. Abate*⁵³, the common law rule in *Armitage v. Attorney-General*⁵⁴ was carried over into annulment, a process already accomplished in Australia by s. 95 (4) of the Act. In *Abate v. Abate*, the court treated the matter as one of nullity of a voidable marriage, and the case does not answer the question whether the common law extension of *Armitage v. Attorney-General* is limited to voidable marriages; and if it does extend to void marriages, what if the formulation of the rule in respect of such marriages. Section 95 (4) expressly extends to void marriages, and provides for recognition if the domicile of *either* party would recognize the annulment effected in accordance with the law of a foreign country. The present writers have argued that on principle the statutory extension of *Armitage* to void marriages should have been framed in wider terms⁵⁵.

Abate v. Abate is also of interest in that it is one of the very few cases in which declaratory proceedings *simpliciter* have been invoked to test the validity of a foreign annulment⁵⁶. Although such proceedings are included in the definition of matrimonial causes in the Act, the Act does not specify the jurisdictional basis upon which the court may grant declaratory relief, so that this question must be referred to the common law. The present writers have suggested that declaratory jurisdiction should exist if the petitioner is domiciled *or* resident in Australia⁵⁷ and this view may be supported by *Abate v. Abate* where the husband petitioner was temporarily resident but not domiciled in England. The Court did not, however, state the basis on which it assumed jurisdiction.

Section 95 (5), a “catch-all” subsection, provides that any dissolution or annulment of a marriage that would be recognized as valid under the common law rules of private international law but to which none of the preceding provisions of the section apply shall be recognized as valid in Australia and that the operation of the subsection shall not be limited by any implication from those provisions. This subsection gives rise to some interesting and enticing questions⁵⁸. In *Ross-Smith v. Ross-Smith*⁵⁹ which was discussed by the present writers at an earlier stage of its history⁶⁰, the House of Lords, resolving earlier uncertainty held that English courts have no jurisdiction to annul a voidable marriage on the ground that England was the *locus celebrationis*. This decision has no *direct* relevance to Australian law, because the grounds of domestic nullity jurisdiction are prescribed by s. 23 (4) and (5) of the *Matrimonial Causes Act*, and these provisions are exhaustive. In this connexion it may be observed that the treatment of *Simonin v. Mallac*⁶¹ by the majority of the Law Lords appears to vindicate the judgment of the draftsmen of the Act in not conferring jurisdiction on Australian courts *qua forum celebrations* even in the

⁵² *Cowen and Mendes da Costa*, op. cit., pp. 82-83.

⁵³ [1961] P. 29.

⁵⁴ [1906] P. 135.

⁵⁵ *Cowen and Mendes da Costa*, op. cit. p. 92.

⁵⁶ See also *Hooper v. Hooper* [1959] 1 W.L.R. 1021.

⁵⁷ op. cit. at pp. 70-76.

⁵⁸ op. cit. at pp. 93-97.

⁵⁹ [1962] 2 W.L.R. 388.

⁶⁰ *Cowen and Mendes da Costa*, op. cit., pp. 55-56.

⁶¹ (1860) 2 Sw. & Tr. 67.

case of a void marriage. But *Ross-Smith v. Ross-Smith* is relevant in that it will preclude recognition under s. 95 (5) of the Act of a foreign decree of nullity made on the basis that it was pronounced by the foreign *forum celebrationis*⁶². Section 95 (5) may nevertheless give rise to questions of recognition which will raise the question, as yet unresolved, whether *Travers v. Holley*⁶³ is, as a matter of common law, law in Australia. *Travers v. Holley* was discussed in two cases recently decided in the Supreme Court of Alberta. In one⁶⁴ the Court preferred *Fenton v. Fenton*⁶⁵; in the other⁶⁶ decided very shortly afterwards, *Travers v. Holley* appeared to be a "natural conclusion".

7. Ancillary Proceedings.

Section 84 of the *Matrimonial Causes Act 1959* empowers the court to order maintenance. Section 84 (1) provides: "Subject to this section, the court may, in proceedings with respect to the maintenance of a party to a marriage, or of children of the marriage, other than proceedings for an order for maintenance pending the disposal of proceedings, make such order as it thinks proper, having regard to the means, earning capacity and conduct of the parties to the marriage and all other relevant circumstances".

In *Sowa v. Sowa*⁶⁷ the decision in *Hyde v. Hyde*⁶⁸ was pushed a stage further. *Hyde v. Hyde* decided that the matrimonial jurisdiction of the English courts is not available to parties to a polygamous marriage. The decision specifically related to divorce, but has been applied to nullity suits⁶⁹ and also to suits for judicial separation and restitution of conjugal rights⁷⁰. In *Sowa v. Sowa* the issue was whether the wife of a potentially polygamous marriage could claim maintenance under the English *Summary Jurisdiction (Married Women) Act 1895*. The Court of Appeal found the reasoning of *Hyde v. Hyde* "inescapable"⁷¹, and held that the wife was not entitled to a maintenance order. This decision would appear to be applicable to maintenance suits under the various State Acts, and also to proceedings under Pt. VIII of the *Matrimonial Causes Act 1959*. And there seems no reason to distinguish the situation where the husband has taken only one wife from that where he has lawfully taken several: nor is it considered material whether the applicant for relief is the first wife or a subsequent wife. But there is a question whether *Sowa v. Sowa* ought to be followed in Australia.

Hyde v. Hyde, it is considered, was a product of its time, since when the attitude of the courts to polygamous marriages has radically changed. From denying effect to such marriages⁷², the trend in recent cases is to afford them broad recognition⁷³. It appears that a polygamous marriage is sufficient to raise the presumption of marital coercion⁷⁴, and in recent cases the Privy Council has upheld a claim of children of a polygamous marriage to succeed on intestacy to their father's property⁷⁵, and the claim of a wife of a polygamous marriage to

⁶² See Cowen and Mendes da Costa, op. cit. pp. 95-97.

⁶³ [1953] P. 246.

⁶⁴ *La Pierre v. Walter* (1960) 24 D.L.R. (2d) 483.

⁶⁵ [1957] V.R. 17.

⁶⁶ *Bednard and Bednar v. Deputy Registrar General of Vital Statistics* (1960 24 D.L.R. (2d) 238.

⁶⁷ [1961] P. 70.

⁶⁸ (1866) L.R. 1 P. & D. 130.

⁶⁹ *Risk v. Risk* [1951] P. 50.

⁷⁰ *Dicey's Conflict of Laws*, 7th ed. (1958), p. 288.

⁷¹ [1961] P. 70 at p. 83.

⁷² *Warrender v. Warrender* (1835) 2 Cl. & F. 488; *Harvey v. Farnie* (1880) 6 P.D. 35 affirmed (1882) 8 App. Cas. 43; *In re Bethell* (1887) 38 Ch. D. 220; *R. v. Naguib* [1917] 1 K.B. 359.

⁷³ *The Sinha Peerage Claim* [1946] 1 All E.R. 348, n.; *Srini Vasan v. Srini Vasan* [1946] P. 67; *Baindail v. Baindail* [1946] P. 122.

⁷⁴ *R. v. Caroubi* (1912) 7 Cr. App. R. 149, at p. 152.

⁷⁵ *Bamgbose v. Daniel* [1955] A.C. 107.

the grant of letters of administration upon her husband's death⁷⁶. Further, in some situations legislation has made express provision for polygamous marriages⁷⁷.

The rule denying matrimonial jurisdiction to parties to a polygamous marriage may, as in *Sowa v. Sowa*, work a denial of justice and the court acknowledged that it did so⁷⁸. In *Lim v. Lim*⁷⁹, *Coady J.* refused the claim of a wife of a polygamous marriage to alimony, but stated: "It does not seem to me consistent with common sense that this plaintiff who was admitted into this country under our immigration laws as the wife of the defendant and who, in China prior to her coming to this country, enjoyed the full civil status of wife, should be denied that status under our law, when, after a residence here of almost thirty years with the defendant as her husband, and after acquiring a domicile in this country she seeks against her husband the remedy which our law provides to a wife to claim alimony . . . The implication arising from refusal to recognise the plaintiff's status for the purpose in question are so many and so repellent to one's sense of justice that it is with regret that I come to the conclusion which I am on the authorities as I read them forced to arrive at".

If *Hyde v. Hyde* is regarded as too well established to be judicially reversed, there still remains the question as to whether it ought to be so broadly interpreted as to apply to a *Sowa v. Sowa* situation, where the alternative to relief may be to throw a financial burden upon the public as a whole.

Whatever the common law rule, the answer in Australia depends upon the construction of the words "a party to a marriage" in s. 84 of the Act. It may be relevant to note that s. 83 of the Act defines, for the purposes of Pt. VIII (in which those sections appear) "marriage" to include a purported marriage that is void. And both s. 6 of the Act and *Bamgbose v. Daniel*⁸⁰ go some way to suggest that "children of the marriage" ought, under Pt. VIII, to be construed to include the legitimate children of a polygamous marriage.

Section 86 of the Act empowers the court to order a settlement of property⁸¹. Section 86 (1) provides: "the court may, in proceedings under this Act, by order require the parties to the marriage, or either of them, to make, for the benefit of all or any of the parties to, and the children of, the marriage, such a settlement of property to which the parties are, or either of them is, entitled (whether in possession or reversion) as the court considers just and equitable in the circumstances of the case."

A question may arise as to whether a court can exercise the powers conferred by this provision where the party against whom an order is sought is domiciled and resident outside the jurisdiction of the court. In *Hunter v. Hunter and Waddington*⁸² the husband applied for a settlement of the wife's property for the benefit of the children of the marriage. At the date of the application the wife had remarried and was domiciled and resident in Kenya. She had property in England and the registrar, so far as concerned this property, reported in favour of such a settlement. The husband now sought a confirmation of that report. The wife entered an appearance under protest and, citing *Tallack v.*

⁷⁶ *Coleman v. Shang* [1961] 2 W.L.R. 562. And see *Russ v. Russ* [1962] 2 W.L.R. 708. See also *Estate Mehta v. Acting Master High Court* 1958 (4) S.A. 252 (F.C.) *In re Estate Koshen* 1960 (2) S.A. 174 (S.R.).

⁷⁷ For example, the *Family Allowances and National Insurance Act* (1956) (U.K.).

⁷⁸ [1961] P. 70 at p. 82, *per Holyroyd Pearce L.J.*: "The merits are entirely on the wife's side. The husband has behaved so badly that I fully share the regrets expressed by the Divisional Court at finding itself unable to uphold the magistrate's order. One is inclined to echo the words of *Crew C.J.* in the case of the Earldom of Oxford when he said that there was none but would 'take hold of a twig or twine thread to uphold it'".

⁷⁹ [1948] 2 D.L.R. 353, at pp. 357-358. See also *Sara v. Sara* (1962) 31 D.L.R. (2d) 566 and see *Bartholomew, Recognition of Polygamous Marriages in Canada* (1961) 10 Int. & Comp. Law Quarterly, 305, 318.

⁸⁰ [1955] A.C. 107.

⁸¹ See *Cowen and Mendes da Costa op. cit.* p. 122.

⁸² [1962] P. 1.

*Tallack and Broekema*⁸³, contended that her lack of an English domicile necessarily entailed lack of jurisdiction. *Scarman J.* rejected this contention which he considered "altogether too sweeping a proposition". The learned judge pointed out that in *Tallack v. Tallack and Broekema* the wife had no property in England, and stated⁸⁴: "In my opinion the true principle to be gathered from the judgment of Lord Merrivale P. in *Tallack's* case is that in a case where the wife is neither domiciled nor resident in England the court may, nevertheless, exercise its jurisdiction to order a settlement if the property to be settled is within the jurisdiction so that it may be the subject of an effectual order of the court".

The practical difficulty then arose as to how the settlement could be drafted and executed. The wife contended that the court could not make an effectual order, for attachment was not possible and it would be infringing the authority of the Kenya courts to seek to enforce any order that might be made personally against her. After a consideration of *Style v. Style* and *Keiller*⁸⁵, this contention was also rejected on the basis that even if the court was not empowered to refer to conveyancing counsel of the court the drafting of settlements it orders, the court had power to give directions for the preparation of the instruments it considered to be necessary, and that there was nothing unjust in this procedure. *Scarman J.* stated⁸⁶: It is, however, unnecessary for me to reach a conclusion on the point, as I am of the opinion that the court, even if it cannot of its own motion refer the drafting to conveyancing counsel of the court, has power to give directions for the preparation of the instrument it considers to be necessary. The words of the section seem to me conclusive upon the point: for the court, having power 'if it thinks fit', to order 'such settlement as it thinks reasonable', must have power to give directions as to its drafting and finally to approve a submitted draft. The language is quite clear, requiring the court first to decide whether the case is a fit one for settlement and then to decide and order whatever settlement it considers reasonable".

Finally, the court pointed out that s. 47 of the *Supreme Court of Judicature (Consolidation) Act 1925* enabled the court to ensure the due execution of the deed once so approved.

Hunter v. Hunter and Waddington seems correct in principle, and, it is considered, is equally applicable to the wording of s. 86 of the Act. It may be noted that s. 88 (1) provides that where a person who is directed by an order under Pt. VIII to execute a deed or instrument refuses or neglects to do so, the court may appoint an officer of the court or other person to execute the deed or instrument in his name, and to do all acts and things necessary to give validity and operation to the deed or instrument.

⁸³ [1927] P. 211.

⁸⁴ *Hunter v. Hunter and Waddington* [1962] P. 1, at p. 6.

⁸⁵ [1954] P. 209.

⁸⁶ *Hunter v. Hunter and Waddington* [1962] P. 1, at p. 8.

APPENDIX "59"

DIVORCE—AUSTRALIAN STATUTE ESTABLISHES UNIFORM
FEDERAL LAW FOR MARITAL ACTIONS—MATRIMONIAL
CAUSES ACT 1959, ACT. NO. 104 OF 1959 (AUSTL.)

Harvard Law Review, Vol. 74, No. 2, pp. 424-427, December 1960.
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The Australian Matrimonial Causes Act 1959 is a federal statute, passed pursuant to an explicit enabling provision of the Australian Constitution,¹ and will, when it is proclaimed effective, supersede the marital-actions laws of the several states and establish a uniform law for the whole of Australia. Section 8 preempts the states' powers to legislate concerning divorce, annulment, and matters of maintenance and custody incident to divorce or annulment. Especially noteworthy features are the law's provisions aimed at saving marriages, which enable a trial judge to act as a conciliator and which authorize government subsidization and court use of marriage-guidance organizations, and also its provisions for the recognition of divorces granted by the courts of foreign countries.

The statute does not provide for the establishment of federal domestic-relations courts, but rather follows in section 23 the usual Australian practice of investing the state courts with jurisdiction to hear causes arising under the federal statute. Since the full Supreme Court of one state may be expected out of judicial comity to follow the previous decisions of the full Supreme Court of another state, and since appeals from the full Supreme Courts to the High Court of Australia are available when the High Court gives its leave, a high degree of national uniformity seems obtainable. The most notable advantages that might be derived from such uniformity in the United States would be the elimination of the emigration of litigants from one state to another in search of more favorable substantive law and the alleviation of the problems of interstate recognition of divorces so obtained. In Australia, however, prior to the present statute the laws of the most lenient state were not such as to invite migrants and those of the strictest state did not make divorce so difficult as to induce extensive migration. Thus whatever migratory divorce business there was in Australia seems never to have reached the proportions long prevalent in the United States.² This may be why Australian courts have in the divorce area generally interpreted strictly their country's constitutional and statutory full faith and credit requirements.³ In addition, the dimensions of the interstate recognition problem had been further narrowed by prior federal statutory provision for the recognition of limited classes of divorces.⁴ Thus the fact that the present statute eliminates the differences between the substantive divorce laws of the several states seems to be less important to Australians than the fact that it is a measure of social reform which seeks to improve on the prior laws.

¹ AUSTL. CONST. ch. 1, § 51 (xxii).

² See 23 H. R. DEB. 2233 (1959) (Austl.); Note, 17 U. CHI. L. REV. 134, 143 (1949); Selby, *The Federal Matrimonial Causes Bill* 31 AUSTL. Q. No. 3, at 11, 12 (1959).

³ See Griswold, *Divorce Jurisdiction and Recognition of Divorce Decrees—A Comparative Study* 65, HARV. L. REV. 193, 219-23 (1951).

⁴ Matrimonial Causes Act 1915, Act No. 22 of 1945, § 13 (Aust., Matrimonial Causes Act 1955, Act No. 29 of 1955, § 6 (Austl.)).

Whether a national imposition of reform is appropriate in the area of divorce, which has traditionally been regarded as a matter of local concern, is perhaps questionable. While the differences in grounds for divorce between the Australian states are not so great as those which exist among certain American states, there remain variations which may reflect the cultural or religious sentiments of particular localities. In Queensland, for example, where there is the largest Catholic population, the local statute permits divorces on only five grounds, which include neither habitual cruelty nor habitual criminality.⁵ Because such omissions may lead to collusion⁶ or to the artificial preservation of irretrievably broken marriages, it is arguable that the need for reform outweighs the advisability of deference to local sentiments. On the other hand, it may be both fairer and administratively wiser to delay attempted imposition of more liberal grounds until the argument for local legislative adoption has overcome the resistance of what, though a national minority, is a numerically significant force in the state.

All of the divorce grounds which the act accepts and many of its other substantive features were taken from the prior law of at least one Australian state. However, the machinery for saving marriages established by sections 14-17, which was stressed by proponents of the act and which received little opposition, is new. These sections impose on the court a duty of considering the possibility of reconciliation. If at any time during the trial the judge feels that there is such a possibility, he may adjourn the proceedings and, with the consent of the parties, assume the role of a conciliator; alternatively he may nominate an approved marriage-guidance organization or some other suitable person to try to effect a reconciliation. The Attorney-General is authorized in sections 9-13 to approve and, out of money appropriated by Parliament, to subsidize competent marriage-guidance organizations, which will presumably be available to couples independently as well as on nomination by a judge during a divorce proceeding. The governmental approval, subsidization, and supervision of such organizations will probably enhance both their professional expertise⁷ and their prestige, thereby encouraging couples to visit them before instituting divorce proceedings. Visits to such organizations having the time and the facilities to examine marital problems confidentially and in a non-adversary atmosphere may save a substantial number of marriages. The provisions for conciliation at trial, however, are not likely to prove as efficient as the measures which can be taken by an American family court, where the judge hears only domestic-relations cases and has a trained investigative staff at his disposal.⁸ While the act presumably leaves the states free to establish such courts so long as they apply the act, and while section 85 authorizes use of investigative officers where children are concerned, more positive encouragement of such practices might have been provided. In any event, it would seem desirable to require reports concerning the circumstances of the family in proceedings involving the custody of children. Such a requirement would facilitate application of section 71, a new provision declaring that, absent special circumstances, decrees of divorce shall not become absolute until the court is satisfied that proper arrangements for the welfare of the children have been made.

Although Australian courts have been liberal in their recognition of domestic divorce decrees, Parliament deemed it necessary to broaden the bases on which divorces granted by the courts of foreign countries were to be recognized. Since conflict-of-laws rules are usually formulated by judges rather than by legislatures, the provisions contained in section 95 of the present act constitute

⁵ See 23 H.R. DEB 2233 (1959) (Austl.).

⁶ See Kahn-Freund, *Divorce Law Reform?* 19 MODERN L. REV. 573, 582, (1956).

⁷ See 23 H.R. DEB. 2225 (1959) (Austl.).

⁸ See Chute, *Divorce and the Family Court*, 18 LAW & CONTEMP. PROB. 49 (1958).

one of the first attempts to particularize the grounds for the recognition of foreign divorces.⁹ Section 95 codifies two common-law rules: first, that a divorce granted in accordance with the law of a foreign country or one of its subdivisions shall be recognized in the forum country if the plaintiff was domiciled in the granting country; and second, that a divorce shall be recognized in the forum if it would have been recognized in the country where both parties were domiciled when it was granted.¹⁰ It then creates a special definition of domicile to deal with the problem of wives of persons absent from the granting jurisdiction at the time of divorce, stating first that a wife who has been deserted by her husband shall be deemed to have been domiciled in the granting country if she was domiciled there immediately before either her marriage or the desertion, and second that any wife shall be deemed to have been domiciled in the granting country if she was resident there for the three years immediately preceding the institution of proceedings. This subsection has a tortuous history. The British concept of unitary domicile, that a wife's domicile is always that of her husband, had prevented a wife from suing for divorce unless she bore the expense of following her husband to his new domicile. The Australian states had, in common with England, alleviated this hardship by enacting statutes permitting suit under the circumstances now described in section 95.¹¹ A Victorian court had, however, refused to recognize a divorce so obtained in England;¹² this led to statutory reversal by the Victorian Parliament.¹³ The present statute incorporates in section 24 all bases of divorce jurisdiction under prior state law and, in section 95, ensures nationwide recognition of divorces obtained in a foreign country on a jurisdictional basis like that provided for locally by the present statute.

As a comprehensive codification of recognition law, section 95 provides for continued recognition of divorces which would have been recognized by the common-law rules of conflict of laws. One common-law doctrine specifically perpetuated is that divorces need not be recognized when a party to the marriage has been denied "natural justice." The presence of this provision seems to nullify the one advantage which legislation on recognition could have over the common law, that of predictability. Since, however, it seems necessary to permit courts to deny recognition to unfairly granted divorces in an unforeseeable variety of circumstances, it appears that legislation can be no more definite in this respect than the common law. It might therefore have been preferable for Parliament to have foregone the cumbersome detail of section 95 and to have accomplished its purpose by a simple declaratory statement empowering courts to recognize divorces granted on a jurisdictional basis which they themselves find sufficient.

⁹ But see S. 1960, 80th Cong., 2d Sess. (1948); *Sherrer v. Sherrer*, 334 U.S. 343, 358 n.13 (1948) (Frankfurter, J., dissenting).

¹⁰ See *Le Mesurier v. Le Mesurier*, [1895] A.C. 517, 540 (P.C.); *Armitage v. Attorney General*, [1906] P. 135.

¹¹ See 72, HARV. L. REV. 786 (1959).

¹² *Fenton v. Fenton*, [1957] Vict. L.R. 17, But cf. *Travers v. Holley*, [1953] P. 246 (C.A.); see Griswold, *The Reciprocal Recognition of Divorce Decrees*, 67 HARV. L. REV. 823 (1954).

¹³ Marriage (Amendment) Act 1957, Act No. 6186 of 1957, 4 (Victoria, Austl.), 72 HARV. L. REV. 786 (1959).



First Session—Twenty-seventh Parliament
1966-67

PROCEEDINGS OF
THE SPECIAL JOINT COMMITTEE OF THE SENATE
AND HOUSE OF COMMONS ON
DIVORCE

No. 18

THURSDAY, FEBRUARY 23, 1967

Joint Chairmen

The Honourable A. W. Roebuck, Q.C.
and
A. J. P. Cameron, Q.C., M.P.

WITNESSES:

- (1) *The Anglican Church of Canada*: The Right Reverend E. S. Reed, M.A., D.D., Bishop of Ottawa; Reverend Canon M. P. Wilkinson, M.A., L.Th., General Secretary, Department of Christian Social Service; Reverend A. R. Cuyler, Rector of parish of New Liskeard; and Professor H. R. S. Ryan, Q.C., Faculty of Law, Queen's University.
- (2) Professor C. Gordon Bale, Faculty of Law, Queen's University.
- (3) Professor Bernard L. Adell, Faculty of Law, Queen's University.
- (4) Professor H. R. Stuart Ryan, Q.C., Faculty of Law, Queen's University.

APPENDICES:

- 60.—Brief by the Anglican Church of Canada.
- 61.—Brief by Professor C. Gordon Bale.
- 62.—Brief by Professor Bernard L. Adell.
- 63.—Brief by Professor H. R. Stuart Ryan.
- 64.—Brief by Professor H. R. Stuart Ryan.

ROGER DUHAMEL, F.R.S.C.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1967

MEMBERS OF THE
SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS
ON DIVORCE

FOR THE SENATE

Hon. A. W. Roebuck, Q.C., Joint Chairman

The Honourable Senators

Aseltine	Connolly (<i>Halifax North</i>)	Flynn
Baird	Croll	Gershaw
Belisle	Denis	Haig
Burchill	Fergusson	Roebuck—(12).

FOR THE HOUSE OF COMMONS

A. J. P. Cameron, Q.C. (*High Park*), Joint Chairman

Members of the House of Commons

Aiken	Forest	McQuaid
Baldwin	Goyer	Otto
Brewin	Honey	Peters
Cameron (<i>High Park</i>)	Laflamme	Ryan
Cantin	Langlois (<i>Mégantic</i>)	Stanbury
Choquette	MacEwan	Trudeau
Chrétien	Mandziuk	Wahn
Fairweather	McCleave	Woolliams—(24).

(Quorum 7)

ORDERS OF REFERENCE

Extracts from the Votes and Proceedings of the House of Commons:
March 15, 1966:

"On motion of Mr. McIlraith, seconded by Mr. Hellyer, it was resolved—that a Special Joint Committee of the Senate and the House of Commons be appointed to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either House;

That 24 Members of the House of Commons, to be designated by the House at a later date, be members of the Special Joint Committee, and that Standing Order 67 (1) of the House of Commons be suspended in relation thereto;

That the Committee have power to engage the services of such technical, clerical and other personnel as may be necessary for the purpose of the inquiry;

That the Committee have the power to send for persons, papers and records, to examine witnesses, to report from time to time, and to print such papers and evidence from day to day as may be ordered by the Committee, and that Standing Order 66 be suspended in relation thereto; and

That a Message be sent to the Senate requesting Their Honours to unite with this House for the above purpose, and to select, if the Senate deems it so advisable, some of its Members to act on the proposed Special Joint Committee."

"By unanimous consent, on motion of Mr. McIlraith, seconded by Mr. Hellyer, it was ordered—That the order of the House of Monday, February 21, 1966 referring the subject-matter of the following bills to the Standing Committee on Justice and Legal Affairs, namely:—

Bill C-16, An Act to provide in Canada for the Dissolution of Marriage (Additional Grounds for Divorce).

Bill C-19, an Act to provide in Canada for the Dissolution and the Annulment of Marriage.

Bill C-41, An Act to amend the British North America Acts, 1867 to 1965, (Provincial Marriage and Divorce Laws).

Bill C-44, An Act to provide in Canada for the Dissolution of Marriage.

Bill C-55, An Act to provide in Canada for the Dissolution of Marriage.

Bill C-58, An Act respecting Marriage and Divorce.

Bill C-79, An Act to amend the Dissolution and Annulment of Marriages Act (Additional Grounds for Divorce).

be discharged, and that the subject-matter of the same bills be referred to the Joint Committee of the Senate and the House of Commons on Divorce".

March 16, 1966:

"By unanimous consent, on motion of Mr. Stewart, seconded by Mr. Byrne, it was ordered—That the subject-matter of Bill C-133, An Act to extend the grounds upon which courts now have jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief, be referred to the Special Joint Committee on Divorce".

"By unanimous consent, on motion of Mr. Stewart, seconded by Mr. Byrne, it was ordered—That the subject-matter of Notice of Motion No. 11 be referred to the Special Joint Committee on Divorce."

March 22, 1966:

"On motion of Mr. Pilon, seconded by Mr. McNulty, it was ordered—That a Message be sent to the Senate to acquaint Their Honours that this House will unite with them in the formation of a Joint Committee of both Houses to inquire into and report upon divorce in Canada, and that the Members to serve on the said Committee, on the part of this House, will be as follows: Messrs. Aiken, Baldwin, Brewin, Cameron (*High Park*), Cantin, Choquette, Chrétien, Fairweather, Forest, Goyer, Honey, Laflamme, Langlois (*Mégantic*), MacEwan, Mandziuk, McCleave, McQuaid, Otto, Peters, Ryan, Stanbury, Trudeau, Wahn and Woolliams."

LÉON-J. RAYMOND,
Clerk of the House of Commons.

Extracts from the Minutes of the Proceedings of the Senate:

March 23, 1966:

"Pursuant to the Order of the Day, the Senate proceeded to the consideration of the Message from the House of Commons requesting the appointment of a Special Joint Committee of the Senate and the House of Commons on Divorce.

The Honourable Senator Connolly, P.C., moved, seconded by the Honourable Senator Roebuck:

That the Senate do unite with the House of Commons in the appointment of a Special Joint Committee of both Houses of Parliament to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either House;

That twelve Members of the Senate, to be designated at a later date, act on behalf of the Senate as members of the said Special Joint Committee;

That the Committee have power to engage the services of such technical, clerical and other personnel as may be necessary for the purpose of the inquiry;

That the Committee have the power to send for persons, papers and records, to examine witnesses, to report from time to time, and to print such papers and evidence from day to day as may be ordered by the Committee, and to sit during sittings and adjournments of the Senate; and

That a Message be sent to the House of Commons to inform that House accordingly.

After debate, and—

The question being put on the motion, it was—
Resolved in the affirmative."

March 29, 1966:

"With leave of the Senate,

The Honourable Senator Beaubien (*Provencher*) moved, seconded by the Honourable Senator Inman:

That the following Senators be appointed to act on behalf of the Senate on the Special Joint Committee of the Senate and House of Commons to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, namely, the Honourable Senators Aseltine, Baird, Belisle, Bourget, Burchill, Connolly (*Halifax North*), Croll, Fergusson, Flynn, Gershaw, Haig, and Roebuck; and

That a message be sent to the House of Commons to inform that House accordingly.

The question being put on the motion, it was—
Resolved in the affirmative.”

May 10, 1966:

“Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Roebuck, seconded by the Honourable Senator Croll, for the second reading of the Bill S-19 intituled; “An Act to extend the grounds upon which courts now having jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief”.

The question being put on the motion—

In amendment, the Honourable Senator Connolly, P.C., moved, seconded by the Honourable Senator Hugessen, that the Bill be not now read the second time, but that the subject-matter be referred to the Special Joint Committee on Divorce.

After debate, and—

The question being put on the motion, it was—
Resolved in the affirmative.”

J. F. MACNEILL,
Clerk of the Senate.

MINUTES OF PROCEEDINGS

THURSDAY, February 23, 1967.

Pursuant to adjournment and notice, the Special Joint Committee of the Senate and House of Commons on Divorce met this day at 3:30 p.m.

Present: For the Senate: The Honourable Senators Roebuck (*Joint Chairman*), Aseltine, Belisle, Fergusson, Flynn, Gershaw and Haig—7.

For the House of Commons: Messrs. Cameron (*High Park*) (*Joint Chairman*), Aiken, Baldwin, Brewin, Fairweather, Honey and McCleave—7.

In attendance: Peter J. King, Ph.D., Special Assistant.

The following witnesses were heard:

(1) *The Anglican Church of Canada:*

The Right Reverend E. S. Reed, M.A., D.D., Bishop of Ottawa;
Reverend Canon M. P. Wilkinson, M.A., L.Th., General Secretary;
Department of Christian Social Service;

Reverend A. R. Cuyler, rector of parish of New Liskeard;

Professor H. R. Stuart Ryan, Q.C., Faculty of Law, Queen's University.

(2) Professor C. Gordon Bale, B.A., M.A., LL.B., LL.M., Faculty of Law, Queen's University.

(3) Professor Bernard L. Adell, B.A., LL.B., Faculty of Law, Queen's University.

(4) Professor H. R. Stuart Ryan, Q.C., Faculty of Law, Queen's University.

Briefs submitted by the following are printed as Appendices:

60. The Anglican Church of Canada;

61. Professor C. Gordon Bale;

62. Professor Bernard L. Adell;

63. Professor H. R. Stuart Ryan.

64. Professor H. R. Stuart Ryan.

At 5.45 p.m. the Committee adjourned until Tuesday next, February 28, 1967 at 3:30 p.m.

Attest.

Patrick J. Savoie,
Clerk of the Committee.

THE SENATE
SPECIAL JOINT COMMITTEE OF THE SENATE AND
HOUSE OF COMMONS ON DIVORCE
EVIDENCE

OTTAWA, Thursday, February 23, 1967.

The Special Joint Committee of the Senate and House of Commons on Divorce met this day at 3.30 p.m.

Senator Arthur A. Roebuck and Mr. A. J. P. Cameron (*High Park*), Co-Chairmen.

Co-Chairman Senator ROEBUCK: Ladies and gentlemen, will you please come to order. We have a very distinguished delegation before us today representing the Anglican Church of Canada, and I shall introduce them one at a time as their turn to speak arrives. The first of the delegation to address us is the The Right Reverend E. S. Reed, M.A., D.D., Bishop of Ottawa, and chairman of the committee appointed to prepare the brief.

The Right Reverend E. S. Reed, M.A., D.D., Bishop of Ottawa, The Anglican Church of Canada: Thank you, Mr. Chairman. On behalf of the Anglican Church of Canada I should like to say that we are deeply grateful for this opportunity to present a brief on this very important matter to the joint Parliamentary Committee. Associated with us are those whose names you have before you; they will be speaking to a brief and will also be prepared to answer questions which any of you may wish to address to us. Mr. Chairman, would you like me to read the brief?

Co-Chairman Senator ROEBUCK: I have read the brief. It is concise and I would think that it is the voice of the Anglican Church of Canada. It is very important in every sentence and my thought is that we should hear it read.

Bishop REED: Thank you, Mr. Chairman, I shall be glad to do that. We have tried to keep it brief in recognition of the fact that you have heard a great deal of evidence on suggested changes in what might be a new law on divorce, and also because so much ground has been well covered in other briefs.

Co-Chairman Senator ROEBUCK: May I ask you, sir, would you like us to ask questions as you go along or shall we wait until you have finished your presentation and reading before you receive questions?

Bishop REED: It is immaterial, Mr. Chairman. We do not mind in the least if any member wishes to ask a question as we proceed. However, because it is not a long brief—it is brief in fact as well as in name—it might be better to get the whole brief presented, but I have no feeling about this. Sometimes questions asked at the time may be more meaningful.

Co-Chairman Senator ROEBUCK: Then members are at liberty to ask questions as they see fit.

Bishop REED: On behalf of the Canadian House of Bishops of the Anglican Church of Canada, we appreciate the opportunity of presenting a brief to this Joint Parliamentary Committee on Divorce. In its preparation we have been assisted by other

clergy and laymen specially qualified in moral theology, civil law and pastoral care. Normally the General Synod of the Anglican Church of Canada, composed of the bishops and representative clergy and laity from its twenty-eight dioceses, determines policy at its biennial meetings. As there has been no meeting of the General Synod since this joint parliamentary committee was set up, no action by our General Synod has therefore been possible. In view of this situation the House of Bishops at its last annual meeting passed the following resolution:

That this House of Bishops authorizes the preparation of a brief to be presented to the Joint Parliamentary Committee on Divorce and requests the Primate to set up a committee of this house with invited representatives from the Department of Christian Social Service and the General Synod Commission on Marriage and Related Matters to prepare and present such a brief on our behalf.

This brief has been prepared and is presented on the authority of this resolution of the House of Bishops. I might just interject at this point that Professor Ryan, professor of law at Queen's University, is with us today as one of those selected by our Primate, who serves, as I do, on the General Synod Commission on Marriage and Related Matters. Canon Wilkinson is with us as the General Secretary of the Council for Social Services. The Reverend Robert Cuyler is here as a parish priest. We felt it was important that those various facets of our church life should be represented.

We first record the view of marriage held by the Anglican Church of Canada. This may best be expressed by quoting the following short excerpt from the proposed Canon *On Marriage in the Church* which was passed by the General Synod of the Anglican Church of Canada in 1965, and which will be presented for ratification at the 1967 session:

The Anglican Church of Canada affirms, according to our Lord's teaching as found in Holy Scripture and expressed in the Form of Solemnization of Matrimony in the Book of Common Prayer, that marriage is a lifelong union in faithful love, for better or for worse, to the exclusion of all others on either side. This union is established by God's grace when two duly qualified persons enter into a contract of marriage in which they declare their intention of fulfilling its purposes and exchange vows to be faithful to one another until they are separated by death. The purposes of marriage are mutual fellowship, support, and comfort, the procreation (if it may be) and nurture of children, and the creation of a relationship in which sexuality may serve personal fulfilment in a community of faithful love. This contract is made in the presence of witnesses and of an authorized minister.

In view of the fact that the Anglican Church of Canada affirms the lifelong nature of marriage, why is it presenting a brief on the subject of divorce? Several reasons may be noted.

The church legislates for its own members and claims no right to impose its canonical legislation on others.

Pastoral experience with our own members leads us to recognize that while it is the church's responsibility to do all it can to help and support its members so that they may live in accordance with the principles of marriage as we conceive them, nevertheless failure sometimes occurs. What to do in such circumstances must constantly engage the attention of pastors, counsellors, the church's membership, and the community as a whole.

The experience of the church in ministering to those whose marriages are threatened or have actually broken down indicates that the present divorce law of Canada is inadequate, that it is the cause of unreasonable hardship and that in some cases it is even a factor contributing to the hastening of marriage breakdown.

The church conceives its legislative function as being restricted to its own membership as described above. In fulfilling its responsibility to its members the Anglican

Church of Canada is considering a change in its canon law which in certain circumstances would permit the re-marriage of divorced persons within the church during the lifetime of a former spouse. The grounds for such possible permission are set forth in the proposed canon to which we have made reference. Briefly summarized, the decisions of the church regarding permission for re-marriage will be determined not on the basis of the parties concerned being judged innocent or guilty of a matrimonial offence but on recognition of the breakdown of a first marriage and a belief on substantial grounds that a second marriage as far as possible in keeping with the church's view of the nature of marriage is now possible.

In addition to this legislative function for its own members the church recognizes its obligation to work with other private and public bodies in Canada in promoting the enactment of civil and criminal laws designed to give justice to all citizens, irrespective of their religious affiliation, race or economic status. Such a concept of the church's role in society precludes us from being silent on such an issue as the one before this joint committee. Thus for its own members who have failed in marriage, as well as for other citizens in similar plight, the Anglican Church of Canada, through this committee of the bishops, makes its submission regarding a new divorce law for Canada.

There have been available to us many previous studies on the subject of divorce including notably the book, *Putting Asunder—A Divorce Law for Contemporary Society*, being the report of a group appointed by the Archbishop of Canterbury for the Church of England in January, 1964. It is our understanding that the members of your joint committee, Mr. Chairman, have all had access to this book. We had been considering attaching it to this brief, but we were told that all of you know it and understand it.

Co-Chairman Senator ROEBUCK: That would have been unnecessary.

Bishop REED: In addition to such studies, our committee has the advantage of appearing before you towards the end of your hearings and thus having available the previous briefs presented to this Joint Parliamentary Committee. We are particularly indebted to the brief presented after many years of study, by the United Church of Canada on November 22, 1966. By reason of the ground already covered we feel free to focus our attention on a few central principles.

Any changes made should:

- (a) continue to uphold the ideal intent of marriage as a lifelong union.
- (b) respect the integrity of human personality.
- (c) help to strengthen family life.
- (d) provide for custody and care of children and the protection of any other defenceless victims of divorce.

The present divorce law is based on the principle that a matrimonial offence, for example, adultery, should determine the granting of dissolution. This assumes that a "matrimonial offence" should be unforgivable, whereas we believe that forgiveness is a constant element in marriage relationships. "Matrimonial offence" is often a symptom of deeper trouble rather than a cause of failure in marriage. By adhering to this principle the present law encourages disrespect for honesty and integrity. This is graphically described in the following statement by a person involved in a divorce suit, as stated in a private communication.

Then my lawyer asked the question which must be asked: "Do you forgive your husband this adultery?" and I answered, as I must answer before the law, "No." It was first of all and basically the irrelevancy of the whole business. Adultery was not the cause of our marriage breakup, and therefore all the questions and answers were off the point. The lawyer and judge had to ask and we had to answer questions that had nothing whatsoever to do with why we were there. We denied the possibility of truth and honesty by our very actions in being there. And yet this is what society demands.

For this reason, we do not favour the addition of new grounds for divorce to the present law, but we consider that marriage breakdown should be substituted for matrimonial offence as the basis for divorce in any new legislation.

Since this concept has already been ably set forth in the briefs of The United Church of Canada (Minutes pp. 408-420) and of Messrs. McDonald and Ferrier (Minutes pp. 499-513) as well as in the English Report, *Putting Asunder*, our comments will be brief.

It is our opinion that this concept provides a better basis for dealing effectively with the needs of people whose marriages have failed because it requires that a marriage be dealt with in its total social and moral context.

We therefore recommend that in dealing with divorce petitions the breakdown of marriage should be recognized as a question of fact and that no rules of law defining marriage breakdown should be established, lest the present recriminatory attitudes and procedures continue to be fostered.

We are aware of the objections raised against the principle of marriage breakdown as a basis for divorce. They are discussed on pages 41 to 56 of *Putting Asunder*. We are in agreement with the answers there set forth.

Our conclusion is that the principle of marriage breakdown and the methods necessary to determine it as a matter of fact are basically incompatible with the principle of the matrimonial offence, and that marriage breakdown should replace the existing grounds rather than be added as a further ground for divorce.

Now we have some further considerations and I would request that Professor Ryan might read the brief from there on.

Co-Chairman Senator ROEBUCK: Before Professor Ryan takes over might I say something about him, because it is important, at least in the record.

Professor H. R. Stuart Ryan, Q.C., is of the Faculty of Law of Queen's University, Kingston. He is a B.A. in classics, Toronto 1930; a graduate of Osgoode Hall Law School in 1933, with honours and a bronze medal. He has been in the general practice of law at Port Hope, Ontario, from 1934 to 1940 and again from 1946 to 1957. He has been a member of the Town Council of Port Hope and mayor in 1940. He was solicitor for Northumberland and the United Counties of Northumberland and Durham from 1953 to 1957.

I think it is interesting to know that he has been a member of the John Howard Society of Kingston since 1958, and he is past president of that branch and past vice-president of the John Howard Society of Ontario.

He was Chancellor of the Anglican Diocese of Ontario in 1962, and a member of the General Synod Commission on Marriage and Related Matters of the Anglican Church of Canada since 1962.

As I have already indicated, he is of the Faculty of Law of Queen's University, Kingston. He has published a number of articles, one of which is *Nullity of Marriage*.

I have pleasure in introducing a very distinguished lawyer who comes before us in a representative capacity of the Anglican Church, Professor Ryan.

Professor H. R. Stuart Ryan, Q.C., Queen's University, Kingston, Ontario: Thank you, Mr. Chairman. Going on from where Bishop Reed left off, we are dealing with further considerations. We believe that before proceeding with hearing for divorce on the grounds of marriage breakdown the court should be assured that every effort had been made to achieve reconciliation and that further attempts would be in vain. This would require exploration concerning the availability and use of professional services and the provision of the same when they do not at present exist.

We recognize that the adoption of the principle of marriage breakdown as the sole ground for divorce would necessitate procedural changes. The court will be concerned with investigation of the state of the marriage rather than with determination of guilt.

Every possible means should be explored to ensure that the cost of divorce is not beyond the financial capabilities of those requiring it. It may be possible to deal with divorce cases in lower courts.

While we appreciate that your committee's instructions are specifically related to dissolution of marriage, we suggest that no adequate examination of this subject can omit a study of the nature of marriage as a social and legal institution, the requisites of valid marriages and the defects causing nullity of purported marriages.

As in many areas of social concern, research heretofore conducted into these aspects of marriage in Canadian society and law has been insignificant. We urge therefore that your committee recommend that as soon as possible properly organized and adequately staffed and financed studies in this area be undertaken with governmental authority and support, with a view to establishing a body of knowledge on which a statute embodying a Canadian law of marriage can be based. Here we are referring, not to dissolution of marriage, but to the nature of and entry into marriage and the grounds of a nullity. Such research should include attempts to ascertain the causes and consequences of marriage breakdown.

When we consider the present law of marriage, outside the Province of Quebec, and omitting from consideration solemnization of marriage which is within provincial legislative jurisdiction, we find that some aspects of that law are obscure and others are unsatisfactory. For example, the following areas call for investigation:

- (a) The intention of marriage. At its inception it should be defined clearly as a life-long union. This does not seem to be explicit at present.
- (b) The minimum age for capacity to marry. The study we propose would indicate what the minimum age should be.
- (c) The scope of coercion, duress or fear should be studied and clearly defined.
- (d) The definition of fraud, misrepresentation or concealment should be studied with a view to their extension as grounds of nullity.
- (e) The territorial jurisdiction of the courts should be examined with a view to eliminating some of the hardship caused by the law of domicile.

Co-Chairman Senator ROEBUCK: Professor Ryan, at the end you mentioned the possibility of government investigation and said that at its inception the intention of marriage should be defined clearly as a life-long union and so on. That could easily be inserted in a marriage law, but is not that the duty of a church? Should you not ask for perhaps amendments to your church ritual for the celebration of marriage? Surely that is your function rather than ours.

Professor RYAN: With respect, I do not think I can accept that. We do endeavour to set these principles out in our law and in our pastoral ministry, but what we are discussing now is a law for the whole people of Canada. I intend to deal later in greater detail with what I suggest are defects in the existing law of marriage, or areas of obscurity in which I think there is a great deal of room for improvement. These are not matters for the church; these are matters for the state. Not everybody will be married through the ministry of this church or any church. In fact, in all provinces but two at the present time civil marriage is permitted, and the civil law is concerned with the marriage of not only Christians but non-Christians of other faiths and people of no faith; the law should provide for all of them.

Bishop REED: We understand that the solemnization of matrimony is governed by provincial law, but we also understand that in some provinces when persons are united in a civil ceremony the words used do not contain the expression "a life-long union", and Professor Ryan's contention is that the law should make it clear that this is the intention of people in marriage.

Co-Chairman Senator ROEBUCK: Where do they get the ritual that must necessarily be used in a civil marriage? I have never been present at one.

Professor RYAN: In Ontario it is defined in the Marriage Act.

Co-Chairman Senator ROEBUCK: Which of course is Ontario legislation.

Professor RYAN: That is correct, but the nature of marriage is not a subject for provincial legislation. It is a subject for Canadian legislation.

Co-Chairman Senator ROEBUCK: That is right, but celebration is a matter of provincial law.

Canon Maurice P. Wilkinson, M.A., L.Th., General Secretary, Department of Christian Social Services, Anglican Church of Canada: Could I comment on that, Mr. Chairman?

Co-Chairman Senator ROEBUCK: Before you do, Canon Wilkinson, may I, for the sake of the record more than anything else, say that the next speaker will be the Reverend Canon M. P. Wilkinson, M.A., L.Th., General Secretary, Department of Christian Social Services of the Anglican Church of Canada.

Canon WILKINSON: The comment I would like to add to what has already been said in response to your question, Mr. Chairman, is that we believe quite strongly that the permanence of marriage is a fundamental foundation of stable society. The only body which has responsibility and authority for making pronouncements, rules and regulations about the nature of society is that society's own governing body, and we therefore feel it is important that in enunciating its law of marriage the Canadian parliament should make abundantly clear that it is envisaging a stable society. I think this is a very important aspect of why we make this kind of recommendation. The church law itself for its own people is quite explicit, quite firmly made, and clear to all persons applying to it for marriage. Those who do not agree with what the church upholds have the opportunity of either agreeing with it or going elsewhere. In the state, however, it is a matter of state law and fulfilling requirements, and therefore this kind of principle should be upheld, and upheld clearly.

Bishop REED: The other member of our delegation Mr. Chairman, is a parish priest who has had experience in children's aid work, and he may wish to add something, with your permission, to what has been said before we get into some other discussion. He is the Reverend Robert Cuyler.

Co-Chairman Senator ROEBUCK: The Reverend Cuyler has shared with me some experiences. I lived in the town of New Liskeard for ten years and was editor of the local paper during all that period. I see that the Reverend A. R. Cuyler is the Rector of the parish of New Liskeard, and was formerly a children's aid worker, Metropolitan of Toronto. I hope that your stay in New Liskeard is as happy as mine was. It is, of course, much more recent, because I left that town to engage in the practice of law in Toronto as long ago as 1914. May we hear from you, Mr. Cuyler?

The Reverend A. R. Cuyler, Anglican Church of Canada, Rector of the Parish of New Liskeard: I have no comment which would augment what has already been said by Professor Ryan and Canon Wilkinson on this matter.

Bishop REED: Perhaps we ought to mention, in case it has not been brought to the attention of the members of the committee, that one of the members of our House of Bishops appointed by the Primate to serve on this committee which prepared the brief is the Right Reverend G. N. Luxton, a brief from whose diocese has already been presented to this committee and is found in your records beginning at page 184. It takes a different approach from the one the House of Bishops have now presented, and Bishop Luxton requested us to attach to this brief this comment, which I will read:

This member of the committee records his dissent from the report of this committee because it has not been submitted to the House of Bishops and has

not had sufficient reference and study in the life of the church to be considered as an authoritative opinion of the Anglican Church of Canada.

I thought in fairness I should read that statement, and if anyone wishes to have further clarification of it I should be glad to answer questions.

Professor RYAN: Before we complete our submission I would like to refer to Bill C-264, submitted by Mr. Brewin, which in the main I think sets out the principles on which our brief is founded. I notice that that bill refers to marriage breakdown as the sole ground of divorce, and while it refers to the parties living separate and apart for a period of at least one year, the object is merely to use this as evidence to create a *prima facie* presumption that the marriage has irretrievably broken down. However, I would suggest that in this bill, as I read it, there is no provision for civil jurisdiction of courts in the territories. Clause 7 refers to certain provinces, and I presume it was intended to provide for jurisdiction of territorial courts.

Mr. BREWIN: Perhaps I might interrupt Professor Ryan to tell him that I think that whole clause needs improvement after further consideration, because I intended to include county courts. I thought I had included them, in Ontario at any rate, with superior courts. I am informed that I was wrong in that assumption, so that whole clause needs to be looked at very carefully.

Bishop REED: We studied this proposed bill in our discussions in preparing our own brief and we felt in regard to the explanatory notes on page 2 of the bill—

The bill does not provide for divorce by consent but does provide that the marriage is to be presumed to have broken down when the parties have lived separate and apart for one year—

that something more is required in the determination of marriage breakdown. I think Professor Ryan may like to comment further on that.

Professor RYAN: My comment would be that one would expect that substitution of breakdown for the existing grounds of divorce would result in a greater number of divorces in Canada than are experienced today. The figures that I have are for 1963, and they show a total of 7,681 divorces in Canada at an average rate of 40.4 divorces per 100,000 of the population. That average rate is not evenly distributed across Canada. It is at its lowest in Newfoundland, at 1.7 per 100,000, then comes Prince Edward Island with 7.5, and in Quebec it is 9.0. In the other provinces it rises to a maximum of 90.2 per 100,000 in Alberta.

Experience in Britain would indicate that the rate of divorce would go up considerably as a result of an extension of the grounds of divorce, but my submission—and I think the facts would bear it out—would be that this would not indicate an increase in the breakdown of marriage; it would merely be the result of permitting divorce in a number of cases where marriages have now broken down but where, for one reason or another, divorce does not seem to be available.

One thing that anyone who has practised law for any length of time is aware of is that there are in this country many marriages, or purported marriages, which are not marriages for one reason or another; either the parties have never been married—they are very often living in adultery in what is mistakenly called a common-law union, a common-law marriage—or the union may be the result of a quick trip to Nevada, Idaho or Mexico. Only yesterday I learned of another example of the practice of running across the border for a quick and easy divorce and purported remarriage. On coming back the parties live together, they are known and accepted in society as husband and wife, but the union is not recognized by our law.

There are thousands of such cases in Canada. There are probably hundreds of thousands of unions which are not marriages at all but are adulterous relationships. Many of these would, I think, be terminated and brought into the status of marriage, with I believe desirable results, if we were to substitute breakdown of marriage for the present law. My submission is that although perhaps the rate would appear to double,

or at any rate be more than the present rate, the actual result on marriage should be stabilization.

Senator ASELTINE: Do not you think it would level off when all these cases had been dealt with?

Professor RYAN: There would probably be a rush for a few years and then it would level off at a rate somewhat higher than the present rate.

Co-Chairman Senator ROEBUCK: Would not that be the case if we had breakdown of marriage in addition to the present law, reformed I hope to some extent from as it stands at the present moment? That is, if we added to the present grounds for divorce could we not add what you have said with regard to marriage breakdown?

Professor RYAN: The result would be somewhat similar, I am sure. We do not recommend that. No doubt it would be an improvement over the present situation.

Co-Chairman Senator ROEBUCK: Why do not you recommend it?

Professor RYAN: Because, as we have said, we feel that divorce is not made a sort of vindictive procedure, at least as far as the law is concerned, and yet this is not a real estimation or real understanding of what has happened. I may say that in looking back over my years of practice I have been impressed by the number of times that people have come in and the, say, wife has said, "We have talked it over and he is going to give me a divorce." This is not necessarily a collusive or fraudulent divorce. It means, as I have seen it, that the parties are more civilized than the law. I do not think we should continue with this type of law. I suggest that recognition of the perhaps surgical nature of divorce through dissolution for breakdown would remove this promotion of hostility.

Co-Chairman Senator ROEBUCK: Would not marriage breakdown involve the same disagreement between the parties that is now evident when one or other of them asks the court for a divorce?

Professor RYAN: It would result from that type of disagreement, but I do not think it would tend to promote the type of hostility in the procedure which exists today, nor would it lead to the attitude of suspicion, and almost cynicism, with which divorce is dealt with in the courts.

Bishop REED: I think that those of us who have listened in a pastoral experience to many people who have gone through divorce actions under the present law would feel that, while it would no doubt help to have some extension of grounds, some of the same things would still pertain, and would feel that they have been subjected to procedures that are quite unworthy of human beings.

I can recall many such cases in my pastoral experience, where two people have arrived at the stage where they feel that for the sake of themselves as individuals, for the sake of their children, and many other factors, their marriage should be terminated, and in order to procure a divorce they are subjected to things which are quite dishonest. We feel that a new approach is what is urgently required, that it would really make for stabilization in a way that the present law, even with an extension of grounds, would not do, and further that it would place an emphasis upon social factors which are involved in marriage in our society.

Co-Chairman Senator ROEBUCK: Now Mr. Honey of Durham of the commons has a question in his mind.

Mr. HONEY: I should like to ask Professor Ryan a question about the principle on which a new law might be formulated on the basis of marriage breakdown. Would you not feel that some yardsticks should be defined, some sort of categories within which it could be said that the marriage had broken down if those facts were proved? If you do not define marriage breakdown will you not leave a great looseness in the courts over the first few years, at least until a body of jurisprudence has been built up?

Professor RYAN: I realize that judges and lawyers seek definitions and are happier if they have definitions, and I know both you and I are in that category. However, I feel that by defining you tend to limit, and by limiting you detract from the principle. I think it is possible to define marriage breakdown as a fact and to recognize it as a fact. By attempting to say that it is has not occurred until there has been separation for three, five or seven years is to depart from reality and simply to create arbitrary terms which are not necessarily related to the fact of breakdown.

Mr. HONEY: Maybe you have not said this, but do you think the law would say in essence that a divorce could be granted when the court is satisfied the marriage has broken down?

Professor RYAN: Yes.

Mr. HONEY: And nothing more?

Professor RYAN: That is right.

Mr. HONEY: Carrying it to extremes, although I appreciate that after some years this situation may not exist because over the years the courts could determine what set of facts should be proved before a judge could make a finding, in the initial stages you could have a ridiculous situation where a judge could find a marriage had broken down because the husband ate crackers in bed.

Professor RYAN: The reason why it broke down would be irrelevant. If it broke down because the husband ate crackers in bed, I do not think that would matter as long as the court was satisfied there was no hope of reconciliation.

Bishop REED: I would just add this, if I might, to what Professor Ryan has said in answer to Mr. Honey. It would seem that in order to make court procedures possible in connection with marriage breakdown one has to conceive of a different kind of court procedure one which would be more related to what takes place in family court situations, where there would need to be facilities for the court in terms of social workers, psychiatrists, psychologists and others who would bring in the kind of report which would determine whether there was any hope of reconciliation in the particular case or whether the evidence was such from investigation that the marriage had in fact broken down. I think that if this were written into the procedures, assuming a law such as this were enacted, it would certainly be the way in which to determine the fact of marriage breakdown, which is the point at issue.

I feel that this kind of reporting to the court by a competent service is very important to this whole matter. It also makes recognition of the fact that while marriage is a contract between two persons, it is a different kind of contract from many civil contracts, and the procedures used in courts to determine the legality or otherwise of civil contracts are not applicable to relationships which are so important in regard to marriage.

Canon WILKINSON: I think it is important to realize that this brief has as a basic concept behind it that marriage is a matter of human relationships, positive relationships, into which some sort of breakdown seems to inject itself, but the primary basis is a positive one. This is reflected on page 2, where we talk about the experience of the church in ministering to those whose marriages are threatened or have actually broken down, where in some cases the existing law is not only inadequate but even a factor contributing to the hastening of marriage breakdown.

What is in mind here is the concept which every pastoral counsellor dealing with troubled marriages is so well aware of. People come to him repeatedly and say, "He committed adultery" or "She committed adultery; therefore my marriage is ended," saying that that ended the marriage rather than that it was a symptom of marriage breakdown or otherwise, ruling out any concept that it might be something which could be forgiven or dealt with in any other way.

Again on page 5, the brief states quite specifically that the court will be concerned with investigation of the state of the marriage rather than with determination of guilt. This is the positive aspect of dealing with the healthiness of a relationship and whether or not it is possible to salvage it, to rebuild it, to continue it.

As a parish priest until five or six years ago, and one who still gets involved in this kind of counselling relationship, I can testify quite clearly, as any parish priest can, that this is the church's constant business, the positive building of this kind of relationship. Every one of us knows how difficult it is to overcome the popular concept, "Because the law says certain things are grounds for divorce, if this happens my marriage has broken down and I must have a divorce". This is what I think it is important to realize as a totally new approach, which adoption of the principle of marriage breakdown entails as opposed to a concept of marriage offence. This is why we say these two are incompatible within one law, they are fighting against each other, one saying, "All right, if these things happen your marriage has had it", and the other, "What is the state of health of your marriage relationship. Is it possible to salvage it and keep it alive?"

Mr. BREWIN: I want to preface my question to Professor Ryan by saying that I very much agree with what the Bishop of Ottawa has said, that a new type of inquiry, more along the lines of the family court, into the status of the marriage and so on, with the possibility of reconciliation arising out of that sort of procedure, is important. However, I wanted to ask Professor Ryan about the comments of the Law Reform Commission of the United Kingdom, where they discuss *Putting Asunder* and say they agree in principle with the breakdown approach and a full inquisition into the marriage, but that they are afraid this would be impracticable with the courts we now have because that sort of inquiry would put a tremendous additional burden on the courts which they are not fitted to carry at the present time.

Frankly, it was for that reason that I incorporated in the bill I drafted and presented the idea that a certain period of separation would be prima facie evidence and might in many cases be accepted without a tremendously detailed inquisition.

I wondered if Professor Ryan or some other member of the delegation had examined this practical objection by Mr. Justice Scarman's commission in England in their review for the purpose of reforming the English law, which they apparently found unsatisfactory despite the extension of grounds. Has Professor Ryan looked at that practical problem?

Professor RYAN: Yes. I may say that in commenting on Mr. Brewin's bill I intended to say, and thought I had said, that I realized this was a device which would provide presumptive evidence of a marriage breakdown without defining it, and I thought that was a good way of dealing with it.

I read the report of the Law Reform Commission and noticed that although it professed not to come to a conclusion but merely to set out the arguments for or against the recommendations in *Putting Asunder*, it managed to find more arguments against than for, and the question of practicality was a very important one in the reasoning. However, I think the finding on that ground was based in part on the belief that the judge would have to conduct the investigation.

The type of investigation which I believe would be involved would be very like the type of investigation now carried out on behalf of the Official Guardian of Ontario when infants are concerned in the divorce or annulment. It is done by an investigating officer. In Ontario I think the duty is delegated largely to officers of children's aid societies.

The principle of the pre-trial investigation and the report on which the judge would act, and which he would accept unless it was contested by one or both of the parties, involves a certain departure from our concept of the trial as involving merely the presentation of evidence, largely oral evidence by witnesses who appear before the court. In my suggestion, by extending this type of investigation the court could inform itself through the pre-trial study of the problem by officers whose duty would include

this type of investigation, and I do not see any reason why it should in any way increase the burden of the trial judge.

The difficulty of obtaining a sufficient number of officers to make this type of investigation is a real one. There is a very grave shortage of social workers in Canada at the present time, but I may say that steps are being taken by way of undergraduate training in the field of social work which it is hoped within, say, five years will greatly increase the flow of social workers into the profession. These men and women will not be as fully qualified as a graduate social worker, but they will be adequately qualified for certain functions and I therefore believe that in a reasonably short time there will be available people who can make these investigations and report to the court. For this reason I am not as deeply afraid of the impracticality of the proposal as Mr. Justice Scarman's commission.

Co-Chairman Senator ROEBUCK: What would be the situation in Canada? Nowadays in Canada all these people are provincial employees, and if we adopted a dominion rule with regard to divorce which required the attendance and contributions of a very considerable number of provincial employees, would there be any guarantee of the success of our efforts?

Professor RYAN: Well, one would hope that each province would undertake its responsibility in the administration of justice.

Co-Chairman Senator ROEBUCK: There are ten provinces.

Senator ASELTINE: What about Quebec and Newfoundland?

Professor RYAN: Whether or not you legislate for Quebec is a difficult question. I would like to leave that to parliament. It is quite possible that Quebec is not yet ready to have divorce legislation imposed on it. I say nothing on that point.

Bishop REED: It may be possible, may it not, to establish some form of federal court which would make it possible for those whose domicile is in Quebec to have the opportunity—

Senator ASELTINE: We tried, in 1956 I think, to bring in an amendment giving the Exchequer Court of Canada divorce jurisdiction in so far as Quebec and Newfoundland were concerned, by making a simple amendment to the Exchequer Court Act.

Co-Chairman Senator ROEBUCK: They were not quite ready for it then.

Professor RYAN: In 1921 the late W. F. Nickle introduced a bill which would have given the Exchequer Court of Canada jurisdiction over divorce throughout the whole country. I suppose it got the usual rush and may not have got first reading. I do not know.

Co-Chairman Senator ROEBUCK: It was a private bill, was it not?

Professor RYAN: Yes.

Co-Chairman Senator ROEBUCK: And was talked out.

Professor RYAN: Yes, that is right. The provinces have claimed to exercise—and in the main I think have reasonably efficiently exercised—the duty of providing for the administration of justice.

Senator BELISLE: In view of the last discussion perhaps I should localize myself by saying that I am from Sudbury, Ontario. First I should like to thank his lordship the Bishop for having supplied a French copy of the brief; that kindness is greatly appreciated. Secondly, I was pleased to note from the reference to the Right Reverend Bishop Luxton that the Anglican Church is as much alive as the Roman Church.

Knowing that you have had a very wide experience in counselling, I should like to ask whether you could tell us what percentage of marriages you have saved by your counselling, and whether the counselling should be done by people from the churches or by welfare agencies.

I ask that because last Tuesday, I think it was, the Unitarian Church said, if my memory serves me aright, that it would be preferable to have welfare agencies rather than church people doing the counselling.

Bishop REED: That is a very important question in this field, and I think the answer is both. Often times people go to their pastor when in trouble. Throughout my life as a parish priest, and even since I have been the bishop, I have counselled many people in this situation. Sometimes, because of the nature of the divorce law, people tend to seek legal advice, and while we know that many lawyers also adopt a counselling procedure because they are not anxious to see divorces and try to discover if any reconciliation is possible, they are not there to do that and are under some limitation.

We feel that in addition to the counselling services which churches can provide there should be readily accessible counselling services in communities. There are in some cities across Canada, but in many others people do not have ready access to places where they can go to receive expert help.

Turning to the first part of the question, I am afraid I cannot give statistics on how many marriages one is able to save, but I know that one can look back and think of many such situations. I can think of one from over twenty years ago, when a couple had decided they ought to get a divorce, but they are still living happily married today.

Our contention is that if this new approach were made, surely it is within the competence of Canadian legislators and Canadian jurisprudence to work out the appropriate facilities, so that if these suggestions were adopted people might more readily seek help before reaching the point of considering divorce proceedings. Very often when they get into the accusatorial situation which the present law seems to encourage pride and other things prevent them from seeking reconciliation.

Rev. Mr. CUYLER: I am glad I waited before speaking, because I think the comments I have to make fit in well with the last question. It is fine for people in the large urban and metropolitan areas to suggest that the counselling be done by welfare agencies, but small communities in areas such as that from which I come are completely devoid of any such agencies that could handle anything of this nature, and therefore by its very nature the counselling would fall heavily upon the church people.

Reference has been made to the cost. One thing I have found in social work is the tragedy of our present accusatorial method whereby one discovers, not only as a parish priest but others in different capacities, when visiting the home that something has happened which fits within the present accusatorial system and one partner charges the other, which breaks down the relationship even further and in many cases makes the work of those trying to effect any sort of realistic approach, whether for reconciliation or eventual divorce, much more difficult, it tends to hamper them greatly.

I am sure that if we took the cost across our country in social workers' time in dealing with problems arising from the inability of many people to get a divorce, who are therefore living in common-law or other situations which merely create more and more problems, on an overall basis I do not think adoption of this new approach would result in an increased burden on the taxpayer; I think one would balance the other.

Co-Chairman Senator ROEBUCK: Would it make any difference if we said that marriage breakdown is a ground for divorce but left it to the person applying to supply the court with the necessary evidence or reasons for believing the marriage had broken down, if we left it to the applicant to produce the evidence?

Bishop REED: Would that not really amount to divorce by consent?

Co-Chairman Senator ROEBUCK: Not at all.

Bishop REED: You do not think it would?

Co-Chairman Senator ROEBUCK: No.

Senator GERSHAW: The words "marriage breakdown" are rather indefinite; one judge may look at it one way and another in a different way. There are such things as drug addiction, alcoholism, desertion, insanity, cruelty, adultery and so on. Should not the marriage breakdown be based upon one or more of those particular offences so that there would be a pretty definite guide to what "marriage breakdown" meant?

Bishop REED: Certainly those factors would all be involved in the kind of investigation made and the report which it would be necessary for the court to have, upon which to make a judgment of marriage breakdown. It might involve those kinds of things.

Senator GERSHAW: Should it not be written into the statute of regulations?

Bishop REED: I do not think so, because sometimes those things are the symptom of trouble rather than the cause of it. You mentioned alcoholism and drug addiction. Drug addiction by itself may reveal certain things about the personality, disposition and character of the parties concerned in regard to which they need help. Drug addiction as such would not be written in as a cause of marriage breakdown. I do not know whether I make my point clear.

Co-Chairman Senator ROEBUCK: Mr. Baldwin of the commons has something to ask and then Senator Fergusson, but I should point out that we have another delegation this afternoon so I think those will be the last questions.

Mr. BALDWIN: My question will be brief and will merely invite a statement or comment. I hope I am not disrespectful when I say that marriage breakdown might be compared with intoxication. A certain substance may be said to be intoxicating, but whether or not a man drinking is intoxicated is a question of fact. Mr. Brewin and I have different temperaments and the same consumption of liquor may make me intoxicated but have no effect on Mr. Brewin.

Mr. BREWIN: Can we try it some time?

Mr. BALDWIN: One of Mr. Brewin's colleagues introduced into the house a scientific method of measuring the effect of alcohol by using a breathalyzer, and Mr. Brewin's bill might be a domestic breathalyzer for measuring marriage breakdown. I would invite comment on whether I am justified in saying that this is a question of fact. What might be the cause of marriage breakdown in one case may not be in another. There are millions of sets of different people living together under completely different circumstances. At present in most divorce cases only one party gives evidence. I do not say there would be no real practical difficulty following adoption of the marriage breakdown approach, but much of the difficulty would be overcome after a certain amount of experience, because I would hope the courts would call upon both parties to give evidence. From an examination of husband and wife in court into the factual circumstances in which they were living, supplemented by a report from the type of specialized social service agencies referred to, surely there would be no insuperable difficulty in coming to a decision whether or not there had been a breakdown of the marriage, just as one determines whether or not certain actions by a man indicate whether or not he is intoxicated.

Senator FERGUSON: In view of the time I will be very brief. One suggestion made by Bishop Reed was that perhaps the philosophy adopted in family courts might be adopted in considering applications for divorce. A previous witness suggested that divorce cases should be heard by family courts instead of by the higher courts. Would you agree with this?

Bishop REED: I myself feel that, and I think Professor Ryan does. Perhaps he might like to comment on it more fully.

Professor RYAN: I do not have anything to add. I think perhaps it could be done in family courts. Of course, this might mean that we would have to be more careful in

selecting family court judges than we are in some jurisdictions. Apart from that I do not see any reason why not.

Senator FERGUSSON: I have one other very short question. On page 6 you refer to the fact that there should be some examination of the hardships caused by domicile. Would you suggest that we have a Canadian domicile? Do you think that might be practicable?

Professor RYAN: Professor Bale will shortly make a submission in this respect, so perhaps the question could be raised again then.

Co-Chairman Senator ROEBUCK: It is ten minutes to five and we have another delegation to hear.

I find it difficult to express the gratitude that I and the rest of my committee feel to you for coming here and assisting us in the very difficult task that has been given to us. The Anglican Church of Canada is a very important institution, and to proceed without knowing what your position was was something I could not get over. You have stated your position in the clearest terms, shortly and concisely, and I think we understand each other thoroughly. On behalf of the whole committee I express their view, as I can see in their eyes, when I thank you.

Bishop REED: Thank you, Mr. Chairman. We appreciate it very much.

Co-Chairman Senator ROEBUCK: May I note the fact that the Right Reverend R. K. Maguire, the Bishop of the Diocese of Montreal is not here, as I expected he would be, and also that the Reverend Dr. C. R. Fielding, Professor of Moral Philosophy at Trinity, is not here as we had expected.

Bishop REED: Both these members of the committee were of great assistance to us and they regret that other duties in Montreal and Toronto respectively prevented them from being present at the hearing today. Dr. Fielding, for instance, has for a long time been a member of our General Synod Commission on Marriage and was of great help to us in preparing this brief.

Co-Chairman Senator ROEBUCK: So they are not here because it was impossible for them to be here.

Bishop REED: Yes, sir.

Co-Chairman Senator ROEBUCK: Thank you. I wanted that on the record.

May I present something that I think is very pleasant. We had before us, as you know, Mr. Hogarth, who made a wonderful presentation on behalf of the Mothers Alone Society, All Alone Parents Society, Canadian Single Parents and Parents Without Partners. Honourable members of the committee will all recollect his forceful and very clear presentation. I have now had a letter from him in which he thanks us for the courtesy with which he was heard, and he says:

My clients are extremely grateful for the reception which I received and the helpful assistance offered to me by Mr. Savoie, our secretary.

We now have another distinguished delegation of three professors from Queen's University. They are Professor H. R. Stuart Ryan, Q.C., whom you have already heard in another delegation, Professor Bernard L. Adell and Professor C. Gordon Bale. I think these gentlemen scarcely need any introduction from me, and I will ask Professor Bale to open the presentation.

Professor C. Gordon Bale, Queen's University: I would like to thank you very much for the privilege of presenting a submission to the committee. I appreciate that the committee is concerned primarily with reform with respect to the grounds for divorce. However, I think it would be unfortunate if the opportunity were not taken to reform the jurisdictional rules and also the rules with respect to the recognition of

foreign divorce decrees, so my submission is restricted to the rules for jurisdiction and the recognition of foreign divorce decrees. I am very sorry that the submission did not reach the committee until today, and I must also apologize for the fact that it is only in English.

Co-Chairman Senator ROEBUCK: Is it very long?

Professor BALE: It is a fairly lengthy one.

Co-Chairman Senator ROEBUCK: Would you summarize it and let us read it later?

Professor BALE: That is fine, sir.

I believe that the major problem in this field is the fact that a married woman has the domicile of her husband, and even though she may be living separate and apart, and even though she may be judicially separated in those provinces where there is judicial separation, she still cannot acquire a separate domicile. The common-law basis upon which divorce courts assume jurisdiction is the domicile of the petitioner, or more simply the domicile of the husband.

The Canadian Parliament did in 1930 attempt to alleviate the hardship a married woman encounters when she has grounds for divorce but is not able to bring an action for divorce. However, that act, the Divorce Jurisdiction Act, 1930, has been described as a grudging palliative rather than an effectual remedy. I think that effective reform of the jurisdictional rules entails either giving to the married woman who is living separate and apart the capacity to acquire a separate domicile, or on the other hand permitting the court to assume jurisdiction on the basis of a certain period of residence by the wife.

Co-Chairman Senator ROEBUCK: Would you give us your opinion as to which of those courses we should adopt?

Professor BALE: I would prefer to see parliament adopt the basis of a separate domicile for the wife.

Co-Chairman Senator ROEBUCK: It did that, you know, in the act of 1930.

Professor BALE: But I do not think the act of 1930 is really adequate. There are so many cases where—

Co-Chairman Senator ROEBUCK: Still, it did do something.

Professor BALE: Yes.

Co-Chairman Senator ROEBUCK: It gave to a great many women entrance to the courts that they would not otherwise have. It did not go far enough, I agree with you thoroughly in that; it did not attempt to give a domicile to the woman. What it did was to give access to the courts.

Professor BALE: I believe this is certainly the primary consideration, that she should have access to the courts. I do, however, feel that the best way of giving her access to the courts is to give her the capacity to acquire a separate domicile. I think this would be in accord with social reality. I also think it would be in accord with the Canadian Bill of Rights.

Senator ASELTINE: If the domicile of the husband was Prince Edward Island and the wife went to British Columbia and could start her action for divorce there, do you realize what that might cost in witness fees and everything else?

Professor BALE: Well—

Senator ASELTINE: I do not see how you could cope with it.

Senator FERGUSON: You say she would start her action there. Where do you mean? Prince Edward Island or British Columbia?

Senator ASELTINE: I have considered the question very carefully for a long time, and I would like to give the wife more leverage, but I do not know how it can be done.

Professor BALE: But you are going to encounter the same problem, if you should try to solve this problem by saying that the wife should have access to the courts on the basis of three years' residence in a particular jurisdiction. She may go to British Columbia and live there for three years and then the British Columbia court might assume jurisdiction, if Parliament says that three years' residence is adequate.

Senator ASELTINE: You would have to do something like that, otherwise it might create undue hardship.

Co-Chairman Senator ROEBUCK: Do you not have access to the courts in ordinary law, where you happen to live, where the cause of action arises, or where the defendant lives? You can sue in all those jurisdictions. The same problems would arise.

Senator ASELTINE: In the civil courts you could start your action where the action arose or where the defendant resides.

Co-Chairman Senator ROEBUCK: Or where the plaintiff resides.

Senator ASELTINE: No, not where the plaintiff resides. No, not necessarily. We do not have that law in Saskatchewan.

Co-Chairman Senator ROEBUCK: You certainly can in Ontario. At any rate, I think we should beg the pardon of the witness for that interruption. Will you go ahead, please? That was my fault.

Professor BALE: Not at all, sir. So that it seems to me that there are these two alternatives, either to say that the married woman shall have access to the courts on the basis of three years' residence or any other particular time that Parliament might decide, or to say that she should have the capacity to acquire a separate domicile.

New Zealand, for instance, to solve this problem has given to the wife the capacity to acquire a separate domicile. However, the solution to the problem adopted in Australia and in the United Kingdom is to say that she shall have access to the court on the basis of three years' residence. My feeling is that it would be preferable to permit her to go to the courts on the basis of her own domicile.

I think it is important, if it is decided that domicile shall be the sole basis upon which divorce courts assume jurisdiction, that the rules relating to domicile be reformed.

The Commissioners on Uniformity of Legislation in Canada have drawn up a draft model act to reform and codify the law of domicile. This draft act provides that a person acquires and has a domicile in the state in which he has his principal home and in which he intends to reside indefinitely. It also provides a presumption that unless a contrary intention appears, a person shall be presumed to intend to reside indefinitely in the state where his principal home is situate.

I think with this definition of domicile, together with this presumption—

Co-Chairman Senator ROEBUCK: To what extent does that differ from the law as it stands?

Professor BALE: I think that there is too much rigidity in the concept of domicile at the present time, in that someone can be resident in a jurisdiction for an extended period of time and yet the proof of his intention is so high that he is held to be domiciled in his domicile of origin.

Senator ASELTINE: That is *animus non revertendi*. You have to prove that they are there for good and have cut themselves off from their former domicile.

Professor BALE: Yes. For instance, there were two decisions of the House of Lords—

Senator ASELTINE: You have to prove that their minds are made up not to return.

Professor BALE: The two cases are *Winans v. Attorney General* and *Ramsay v. Liverpool Royal Infirmary*. In these two cases persons had resided in England for

thirty-seven years and thirty-five years respectively, and yet they were still held not to be domiciled in England.

Co-Chairman Senator ROEBUCK: Would you give the references of those cases, please?

Professor BALE: The references to these cases are 1904 Appeal Cases 287 for *Winans v. Attorney General*, and 1930 Appeal Cases 588 for *Ramsay v. Liverpool Royal Infirmary*.

Now, I am not contending that the Canadian courts have required as much proof of intention with respect to domicile, but nevertheless I do feel that it would be of considerable advantage to have a definition of domicile and the presumption that I mentioned which the commissioners on uniformity of legislation have set out in their draft model act.

Co-Chairman Senator ROEBUCK: Have they given any argument along with the bill that we could trace?

Professor BALE: I am not sure that they have. I am sorry, but I would have to look into that, sir.

Co-Chairman Senator ROEBUCK: Let us know, will you?

Professor BALE: Yes, I will, sir.

Senator ASELTINE: Well, we will read your brief on that point.

Professor BALE: Fine. I was just going to make one other submission with respect to a Canadian domicile. If, for instance, Parliament decided to have a uniform divorce code for all of Canada, I think it would be very advantageous to have a Canadian domicile for the purposes of divorce jurisdiction. It is sometimes said that you can have only one domicile, but in a federal country I think that this must be rephrased to read that you can have only one domicile for a particular legal question. So that I think it is quite consistent to have a domicile in Canada for purposes of divorce and yet, for purposes of succession for instance, a domicile within a province of Canada.

This would eliminate many problems. For instance, there was a recent New Brunswick case where a man who had enlisted in Alberta and had been posted to Gagetown, New Brunswick, brought an action for divorce and it was held that he was still domiciled in the jurisdiction in which he was domiciled when he enlisted. Therefore he could not bring his divorce action in New Brunswick and would have to return to Alberta. However, if we had a Canadian domicile, he could bring his action where he is resident. I think that a Canadian domicile is only practical if Parliament should decide that there should be a uniform divorce act applying throughout Canada.

Co-Chairman Senator ROEBUCK: What about the recognition of domicile by other jurisdictions? Do you foresee any difficulty regarding foreign recognition of domicile as we define it?

Professor BALE: At the present time I think the way in which domicile is defined varies widely. In the United States the concept of domicile is very different. For instance as early as 1869 in the case of *Cheever v. Wilson*, Justice Swayne, in delivering the opinion of the Supreme Court of the United States, said: "The rule is that she may acquire a separate domicile whenever it is necessary or proper that she should do so. The right springs from the necessity for its exercise, and endures as long as the necessity continues." So that in the United States it has been recognized for a long time that a woman should have the capacity to acquire a separate domicile for the purposes of divorce jurisdiction.

Senator ASELTINE: Would not that be a domicile of convenience?

Co-Chairman Senator ROEBUCK: Of necessity rather than convenience, I should imagine.

Professor BALE: New Zealand has also declared that a married woman should be able to acquire domicile. Thus the concept of domicile already varies between nations, and I really do not think it would be a serious problem if Parliament decided on a particular definition of its own.

I realize the time is getting late so I will briefly touch on the question of foreign divorce decrees. I deal with this on page 16. To summarize my submission, I submit there should be a statutory enactment providing that, first, the foreign divorce obtained in a country in which the husband was domiciled at the institution of the proceedings should be recognized. This, of course, would only be a statutory enactment of the basic common law rule.

Second: The foreign divorce, although not obtained in the country in which the husband was domiciled, was recognized as valid by the law of that country at the date the decree was granted. So that if the foreign divorce decree, although not granted by the country of the husband's domicile, were recognized as valid, we should recognize this decree. This is simply a statutory enactment of the case of *Armitage v. the Attorney General*.

Third: If the foreign divorce was obtained in a country in which the wife, but not the husband, was domiciled at the institution of proceedings, this would be a statutory enactment of *Travers v. Holley*, if a married woman living separately and apart from her husband were given the capacity to acquire a separate domicile.

Fourth: Recognition should be given if the foreign decree was obtained in a country in which the wife was resident for three years immediately preceding the institution of proceedings. This would be a statutory enactment not based on a common law decision. It would recognize as valid the solution to the problem adopted by the United Kingdom and Australia.

Fifth: The divorce would be recognized as valid under the common law rules of the conflict of laws although not valid under paragraphs 1, 2, 3 or 4. Such a provision would permit the courts some flexibility in evolving new rules of conflict of laws relating to the recognition of foreign divorce decrees. It would enable the courts to work out the scope to be accorded to *Schwebel v. Ungar*. This was a recent Supreme Court of Canada decision.

Senator ASELTINE: Have you considered that these regulations might come within the provincial jurisdiction and not within our jurisdiction at all?

Professor BALE: I would think marriage and divorce would include the recognition of foreign divorce decrees.

Co-Chairman Senator ROEBUCK: I presume it would be covered by "peace, order and good government."

Senator ASELTINE: I have had some trouble with this in my own practice.

Professor BALE: That is the end of my submission.

Senator ASELTINE: There was a very fine article in the *Canadian Bar Review* covering the whole problem a short while ago.

Co-Chairman Senator ROEBUCK: We would now like to hear from Professor Adell, also from Queen's University.

Professor Bernard L. Adell, Queen's University: I realize the main terms of reference of this committee deal with the dissolution of marriage, and that the question of the annulment of marriage is not explicitly referred to. But inasmuch as the questions concerning annulment of marriage are within the jurisdiction of Parliament, except in so far as they relate to the solemnization of marriage, and because to some extent in actual practice although not in theory, annulment and divorce are alternate

remedies, I think it would be unfortunate if this committee did not give at least some consideration to the law of annulment of marriage, and of course a consideration of the law of annulment of marriage requires also a consideration of the law relating to marriage itself.

Co-Chairman Senator ROEBUCK: We consider it within our jurisdiction.

Professor ADELL: My colleague, Professor Ryan, whom you heard earlier, is a man of many parts. You heard him earlier with his ecclesiastical cap on; now you will hear him with his academic cap on.

The major portion of our submission dealing with the law of marriage and the law of annulment has been prepared by Professor Ryan. I have only one point I want to hammer home and I will do it as briefly as I can.

The area of the law of annulment which bothers me is the concept of the totally void marriage, the marriage known as void *ab initio*. For various historical reasons which I do not think we need go into at all there are two different kinds of marriage which our courts will annul; marriages which are totally void or void *ab initio*, and marriages which are merely voidable. Marriages which are void *ab initio* can be annulled by any court of competent jurisdiction at any time at the instance of any interested party. The action for the annulment of a totally void marriage need not be brought by one of the parties to that marriage, and in fact the action need not be brought during the lifetime of the parties to the marriage. It can be brought at any time. Now I feel there are grave dangers involved in the totally void marriage in that the doctrine of approbation which has been applied to voidable marriage does not apply to marriages which are totally void. The doctrine of approbation holds that if one of the parties to a voidable marriage has for a certain period of time so conducted himself to indicate he considers that marriage valid, then that party is not later allowed to come before the courts and have the marriage annulled.

Because void marriages are deemed by the courts never to come into existence at all, the doctrine of approbation is considered to be inapplicable. It applies to merely voidable marriages in that voidable marriages are deemed to exist until they are put an end to by the courts, but totally void marriages are deemed never to come into existence at all and, therefore, the principle of approbation or estoppel, as it is often referred to, is held not to apply.

I feel that the committee should consider recommending that the law of annulment be rationalized to the extent that marriages which are now void *ab initio* be made merely voidable.

My colleague Professor Ryan, in one brief entitled, "Summary of Present Canadian Law of Marriage" and in the other one entitled, "Suggested Basis for a Canadian Statute Governing Marriage" outlines the present grounds for the annulment of marriage, both grounds rendering a marriage void and those rendering a marriage voidable. He also suggests alterations in the present grounds of annulment. Therefore, I need not now go into the details of the grounds for annulment. I merely express my approval of most—not all, but most of the proposed amendments which Professor Ryan is going to suggest.

I will simply conclude by reiterating that my point relates solely to the abolition of the category of totally void marriages. Thank you.

Co-Chairman Senator ROEBUCK: Thank you, sir. Professor Ryan, are you prepared to take over now?

Professor RYAN: Thank you, Mr. Chairman. I have submitted two briefs. One of them is entitled, "Summary of Present Canadian Law of Marriage (excluding law of Quebec)." In looking over that one I find a rather embarrassing typing error on page 5. In paragraph (iii), if you look at the heading it reads, "Consent to enter into the martial relationship"—which was not what I intended at all. It should be "The marital

relationship". My previous submission indicates we have introduced too much of the martial quality into the present law of divorce.

The second brief is entitled, "Suggested Basis for a Canadian Statute Governing Marriage." In this submission I am not dealing at all with the question of dissolution of marriage. I have supported the brief of the House of Bishops of the Anglican Church, and I do not think I have anything to say further on that point, but I would like to emphasize the fact that the existing law of marriage in Canada, outside of the Province of Quebec, is in many areas uncertain, unclear and confused, and in others is unsatisfactory.

I strongly recommend that a study be introduced which would, I hope, lead to a rational law of marriage for the whole of Canada, at least excluding Quebec. The law of Quebec is, of course, a comprehensive and consistent law, not without its elements of uncertainty, but, nevertheless, it stands together. It was enacted before Confederation, so it covers both solemnization and substance, and it may be that no interference should be made with that law. However, my suggestions are at least put forward as a possible basis for a uniform law governing the whole of Canada.

At the present time there are some areas in which the law is not uniform throughout the whole of Canada, and I may mention those very briefly. I am not going to attempt to read either brief in full, but I might mention certain highlights of both of them I think should be drawn to your attention.

For example, on page 2, at the bottom, I note that under the law of all of Canada, except Quebec, the minimum age of capacity for marriage is seven years, but that a marriage entered into before either of the parties attains puberty requires ratification after attaining puberty by consummation or some other affirmative act of gratification. There is no actual definitive rule which defines puberty for these parties and, in fact, puberty is a fact and it is attained by different people at different ages, but it is presumed to be attained by males at 14 and females at 12. This old presumption goes back to Roman law but, in fact the age of puberty has been going downward in recent years, and I am not sure where it is now on the average, but it is lower than it was.

My suggestion is this is entirely too young an age to permit marriage, and I have put forward in my second brief a suggestion that the minimum age for marriage should be 16. In Quebec, under the Civil Code it is 14 for males and 12 for females. In Britain in 1929 the age was fixed at 16 years.

Senator FERGUSON: May I ask Professor Ryan where he gets the seven years?

Professor RYAN: That is the old canon law rule which persists because it has never been changed. There are in some provinces statutes which say you cannot get a licence at this age, and it is possible for a province to say you cannot have a licence below a certain age, and you cannot marry without a licence. Therefore, in effect, you could set a minimum age for the celebration of marriage within that province.

In the first place, not every province has this right. In Ontario there is almost no provision of the Marriage Act which invalidates a marriage. Almost any marriage which is valid at common law or canon law is valid in Ontario even though almost all the provisions of the Marriage Act have been ignored or contravened.

Co-Chairman Senator ROEBUCK: That is, if they get a licence.

Professor RYAN: Even without a licence; it can be done by banns.

Senator BELISLE: The performer of the ceremony, the judge, priest or bishop, must first qualify in Ontario by being approved by the Provincial Secretary?

Professor RYAN: But even in Ontario it has been held in two cases that parties who go through a ceremony of marriage in the province with two witnesses and a celebrant, whom one of them in good faith believes to be qualified, if one of them intends to enter into a valid marriage it is valid in point of form, even without a licence, as long as they cohabit afterwards. This is the case of *Alspector and Alspector*.

Senator BELISLE: You said, "of whom one of them"—is that one of the candidates?

Professor RYAN: One of the parties to the marriage believes the person solemnizing the marriage was qualified to do so. As it happened in this case, he was not. It was a very unusual situation. The parties were Jewish. The husband had said, "We do not want to enter into a civil marriage because we are going to Israel." He told the cantor that, but not his wife to be. She believed she was entering into a valid civil marriage. The cantor went through the appropriate ceremony, they had witnesses, they cohabited and then he died, but they never went to Israel. The court held this was a valid marriage though the cantor was not licensed or registered, and there was no licence or anything of this nature. In Ontario, at least, you may dispense with almost all the formalities. The only formality that I think is required is that there be a celebrant who is, if not qualified, is at least believed to be qualified by one of the parties, and that there are two witnesses, and that words of present intent be exchanged, and that they co-habit.

Professor ADELL: If I might interject for a moment, I am not sure that it is accurate to say on the basis of the *Alspector* case that only one of the parties need have thought that the celebrant was qualified. In that case there was, I think, reasonably clear proof that one of the parties did think that the celebrant was qualified, but there was no proof that the other party, the husband, did not think he was unqualified. I think, if there were clear proof that one or other of the parties did not think that the celebrant was, in fact, unqualified, and the celebrant was really unqualified, that the marriage would be held valid.

Professor RYAN: Well, it may be that that is so, but that is an inference that is drawn. On the other hand, it has not been decided. In any case, my point is that there is nothing to prevent people from marrying at any age above seven in Ontario. The marriage remains inchoate or incomplete until both parties have attained puberty when it may be ratified by some act, usually consummation. My submission is, as a matter of fact, having regard to the state of intellectual, emotional and social development of our young people it may be doubtful whether even sixteen is a sufficient age for marriage. I suggest that Parliament should set a minimum age.

Co-Chairman Senator ROEBUCK: For marriage, or for the recognition of a marriage that has taken place?

Professor RYAN: For marriage.

Co-Chairman Senator ROEBUCK: But not for the recognition of a marriage?

Professor RYAN: No, I would not permit marriage to be entered into before sixteen, and then recognized afterwards.

Co-Chairman Senator ROEBUCK: I do not mean that. You can lay down procedural rules for marriage in which you instruct those who are authorized to celebrate it that they must not celebrate it under sixteen, but then if a marriage does take place under sixteen because of an error or misinformation or something of that kind, how late would you go for recognition of the marriage?

Professor RYAN: Well, I would not go below sixteen at all, for my purposes. That is my submission. I think that it is doubtful whether young people of even sixteen are sufficiently mature to marry in our society.

Co-Chairman Senator ROEBUCK: But what if they have married?

Professor RYAN: I think the marriage is null and void, and if they want to marry after sixteen then they can do so.

Co-Chairman Senator ROEBUCK: And the children are illegitimate?

Professor RYAN: This is true, although I think the distinction between legitimacy and illegitimacy should be abolished as far as possible. But, that is not within the scope

of the jurisdiction of this committee. In many cases of a pregnancy before sixteen, social good would be better done, and social harm would be better avoided, if there were no marriage and the illegitimacy were accepted, because such a marriage is usually unsuccessful. There is usually resentment, fear and everything else which tends to militate against these marriages, particularly those between younger teenagers. That is my submission, Mr. Chairman, with regard to age.

Now, I agree with Professor Adell's submission with regard to the proposal to eliminate the marriage which is void *ab initio* and which the parties may act upon without any—or, at least, may treat as void under the present law without any judgment of any court whatsoever.

If a man and woman go through a ceremony of marriage which by law is null and void—for example, it may be within the prohibited degrees—they may separate and act as though they had never gone through that ceremony. That is the present law. Each of them may go through a ceremony of marriage with another person. As a matter of fact, at the present time, this leads to a number of cases of people believing they were unmarried, because they believed the previous ceremony was null and void, and acting as unmarried, and going through a second marriage ceremony and finding that the first one was valid all the time and the second one is null and void. Therefore, there is the problem of bigamy.

But, I support Professor Adell in that suggestion, and in my proposed basis for a new marriage law I set out the rule that no person who is subject to the law of Canada with regard to capacity to marry may marry if he has gone through a previous marriage ceremony unless the previous marriage, if valid, had been legally terminated, or if invalid has been legally annulled. That is my submission in that particular.

Co-Chairman Senator ROEBUCK: That would be within provincial jurisdiction, would it not?

Professor RYAN: No.

Co-Chairman Senator ROEBUCK: The celebration of marriage?

Professor RYAN: No, this would go to capacity to marry. The proposals that you made with regard to instructing the celebrant not to celebrate certain marriages would be within provincial jurisdiction, but the question of capacity to marry is within the jurisdiction of Parliament and not within the provincial jurisdiction.

Now, the next point I should like to dwell on is the question of error, fraud and mistake. At the present time error, however induced—whether it be by fraud, mistake, accident and so on—does not invalidate a marriage unless it extends to either the nature of the contract being entered into, or the nature of the ceremony. There have been cases of parties believing they were going through betrothals and finding that the ceremony was a ceremony of marriage. There is this sort of thing—identity of the other party. This means in our law the physical identity so far as we can determine it. I am thinking of the case of where you think you are marrying Rachel and then lift the veil to find it is Leah. But, this does not happen any more.

On the other hand, there have been a number of cases where persons have fraudulently adopted false personalities, and it is very doubtful whether this type of deception is a ground of annulment, because the other party intends to marry the person who physically stands beside him or her. There are no decisions in Canada that I can find on this subject, but there are conflicting decisions in the Commonwealth, and the general statement of the text writers is that these marriages are valid. My suggestion is that this form of error should be a ground of annulment.

I suggest also, and here Professor Adell does not go along with me—at least, not all the way—that concealment of certain facts, or misrepresentation of certain facts, which are seriously detrimental to the establishment of the contract, should be a ground of annulment. I suggest some of these—pregnancy, except as a result of intercourse

between the parties; venereal disease except as a result of such intercourse; addiction to drugs or alcohol—

Co-Chairman Senator ROEBUCK: Unknown to the parties?

Professor RYAN: Yes, these would be concealed—prostitution. When I say “venereal disease except as a result of such intercourse” I really should say “not communicated by the other party” because obviously one party might innocently become infected by venereal disease by the other. I have mentioned prostitution of the other party, and then addiction to homosexual practice, sadistic conduct or other abnormal practice endangering the life or health of the other party. This conduct may be cruelty, and where cruelty is a ground for divorce it may be a justification for divorce on the ground of cruelty. It may also lead to incapacity to consummate in the normal fashion, in which case it might lead to an annulment. But, on the other hand, it might not amount to either of these, and there have been cases particularly of husbands imposing these practices on wives, and causing them great mental or physical harm. My suggestion is that addiction to these practices, if it is discovered, should be a ground for annulment.

The other point I wish to make there is that where marriage is intended to be a sham or mere form, under the law of Quebec this marriage can be annulled, but under the law of the rest of Canada, which I take it is the same as the law of England, this is not so—at least, not necessarily so.

In the case of *Silver v. Silver* reported in (1955) 2 All England Reports, at page 614, a woman resident in Germany went through a mock marriage with a man so that she could enter Britain. She did not intend to live with the man, and never did. Her intention was to enter into an adulterous liaison with another man. This marriage was held to be valid. It would appear that the attitude of the court is that the parties are to be punished by being left married to each other. I think it is degrading to marriage, and that in entering into a kind of ceremony like that, the parties should have been found not to have been married.

Co-Chairman Senator ROEBUCK: Usually the medicine is not hard to take.

Professor RYAN: Another point I would like to make is that there is no provision—or if there is it is an obscure one under the Judicature Act in Ontario, and I presume in parallel provisions in some other provinces—for bringing an action for declaration that a marriage is valid. There never was one in the canon law. The only thing you could do was to sue for annulment and hope that you lost. However, in Ontario, for example, in the *Alspector* case an action was brought for a declaration under the Judicature Act that the marriage had been valid, and the action succeeded. However, I think provision should be made by Parliament for such an action so that uniform procedure should be available throughout Canada.

I suggest also that an otherwise valid marriage not consummated within a reasonable time after its solemnization should be capable of being annulled. At the present time in this country incapacity to consummate is a ground of annulment. In England a wilful refusal has been ground for annulment. I would simplify it by saying that if the marriage has not been consummated within a reasonable time the marriage may be annulled.

I have some provisions that I propose with regard to proceedings. At what time do you propose to adjourn, Mr. Chairman?

Co-Chairman Senator ROEBUCK: It is now a quarter to six, and we must adjourn by six o'clock.

Professor RYAN: I will read out the procedural provisions except what may have been mentioned in your earlier *Minutes of Proceedings*.

At the present time there is no jurisdiction in Canada for a court to make a declaration of presumption of death, with the effect that acting on this a party to a

marriage who has obtained such a declaration may safely remarry free of the possibility that the second union will be nullified. If in fact the absent person whose death is presumed is alive, in other words, if Mrs. Arden, in this particular case, had gone say under the Ontario Marriage Act after the end of seven years and had obtained a declaration that you can get under that act, and also under the British Columbia act, and maybe elsewhere, to the effect that Enoch appeared to be dead, and then went through another ceremony of marriage with a man—whose name I have forgotten in this case—at any rate if Enoch had turned up after 20 years the second union would be found to be void, and any children proceeding under it, subject to any provision with regard to legitimation, would be illegitimate.

Now, the provincial legislation cannot validate the second marriage if the absentee is in fact alive and the marriage has not been dissolved, because the provincial legislation may only authorize the solemnization of a marriage. And in Ontario, at any rate, the party obtaining this declaration and getting a licence to remarry has to sign an acknowledge saying, in effect: "I realize that if my absent spouse is in fact alive this union will be invalid and bigamous."

My submission is that Parliament should provide procedure that is uniformly available across Canada for presumption of death of an absentee, and I suggest that it should be provided in three situations. The first is where the absentee is missing and has been continuously absent for at least seven years next preceding the application, and has not been heard of or from during the period of absence by the applicant and by other persons with whom the absentee would probably have been in communication if the absentee were alive.

Of course, that presumption exists only in so far as evidence to the contrary is not produced then or later, and presumption may be rebutted and overcome.

The second case is where the absentee has been reported missing and presumed dead by a military or other government service of which the absentee was a member at the time of commencement of the period of absence.

Here, of course, normally the spouse whose, say husband, is reported dead may safely remarry. But there were two cases not long ago in the United States in which the husband turned up, and the second union which the wife had entered into in each case was null and void. So I suggest in this situation that a judicial presumption of death should be available.

Co-Chairman Senator ROEBUCK: You read something from the law with regard to our own case, where did you get it from?

Professor RYAN: The first one I read states the ordinary common law presumption of death.

Co-Chairman Senator ROEBUCK: No, but you said—

Professor RYAN: The second one reads, if

The absentee has been reported missing and presumed dead by an armed or other government service of which the absentee was a member at the time of commencement of the period of absence.

This is what I would like to see available. The word comes back from the next-of-kin that the person on active service is dead. In two cases he was dead. The second marriages were invalid. I would suggest that in these situations a judicial presumption of death should be made and then there should be remarriage.

Mr. AIKEN: Would you call that a decree of divorce?

Professor RYAN: Well, it is called a declaration of presumption of death in other jurisdictions. But it is provided in the legislation that if the absentee is in fact alive the declaration dissolves the marriage.

The third case where I would allow it would be where the absentee has disappeared and has remained absent in circumstances which make it probable that the absentee is dead.

I had a case referred to me the other day and the facts were that 12 years ago in British Columbia two fishing boats were out. One of them was disabled, and the other was trying to tow it in, but owing to the rough sea it disappeared with all hands. I had another case where a young man and a crew of three set out in an aircraft from Gander for Seven Islands and never arrived. I do not think the spouse should have to wait seven years in such cases. After a reasonable search you can reasonably infer death. In fact, in the second case we were able to take out letters of administration of the estate. But my suggestion is that in all of these cases there should be available a declaration of presumption of death and the other party may then safely remarry; but if in fact the absentee is alive, the declaration will have the effect of dissolving the marriage.

Co-Chairman Senator ROEBUCK: Are you telling us you cannot get such a declaration now from the courts?

Professor RYAN: Not to make it safe to remarry if the absentee is alive.

Now, with regard to jurisdiction of the courts in annulment cases, I have three suggestions. First, that the action for annulment or invalidation of a marriage should be capable of being brought in a superior, territorial, county or district court in any province or territory, if either party to the marriage is, to would be if unmarried and of full age, domiciled within the province or territory.

This would allow for the separate domicile of the woman.

Secondly, if the defendant resides in the province or territory.

Normally jurisdiction is given in annulment proceedings subject to the question whether it will be accepted whether the marriage is only voidable.

The third is an innovation, that the court could have jurisdiction, if the defendant, being domiciled in Canada, appears and recognizes the jurisdiction of the court. And that an application for presumption of death may be brought in any such court in the province or territory in which the applicant resides.

Those are the points I would like to make. Other points in the brief are perhaps not as important. I am not suggesting that what I have said would in this present form be suitable to become a statute.

I am suggesting that it might be the basis on which study could be instituted, and I do recommend study of the marriage law and the social nature of marriage, marriage as an institution and marriage as a legal institution.

If you go through the submissions you have received, you will find that they are made on the basis of a profound ignorance of many of the facts—because no studies have been made in this area in Canada.

Co-Chairman Senator ROEBUCK: Gentlemen, it is difficult for me to phrase the thanks of this committee, under these circumstances. You have come a considerable distance and you have given us the benefit of your thought, of your investigation, and of your enterprise.

I think we should send thanks to Queen's University for having sent us its three wise men. We will read all of your briefs with care and attention.

The committee adjourned.

APPENDIX "60"

BRIEF
OF THE CANADIAN HOUSE OF BISHOPS
OF
THE ANGLICAN CHURCH OF CANADA
TO
THE SPECIAL JOINT COMMITTEE OF
THE SENATE AND HOUSE OF COMMONS
ON
DIVORCE

PRESENTED ON THURSDAY, FEBRUARY 23, 1967

INTRODUCTION

1. On behalf of the Canadian House of Bishops of The Anglican Church of Canada, we appreciate the opportunity of presenting a brief to this Joint Parliamentary Committee on Divorce. In its preparation we have been assisted by other clergy and laymen specially qualified in moral theology, civil law and pastoral care. Normally the General Synod of The Anglican Church of Canada, composed of the bishops and representative clergy and laity from its twenty-eight dioceses, determines policy at its biennial meetings. As there has been no meeting of the General Synod since this Joint Parliamentary Committee was set up, no action by General Synod has been possible. In view of this situation the House of Bishops at its last annual meeting passed the following resolution:

"That this House of Bishops authorizes the preparation of a Brief to be presented to the Joint Parliamentary Committee on Divorce and requests the Primate to set up a Committee of this House with invited representatives from the Department of Christian Social Service and the General Synod Commission on Marriage and Related Matters to prepare and present such a Brief on our behalf."

This Brief has been prepared and is presented on the authority of this resolution of the House of Bishops.

2. We first record the view of marriage held by The Anglican Church of Canada. This may best be expressed by quoting the following short excerpt from the proposed Canon "On Marriage in the Church" which was passed by the General Synod of The Anglican Church of Canada in 1965 and which will be presented for ratification at the 1967 session:

"The Anglican Church of Canada affirms, according to our Lord's teaching as found in Holy Scripture and expressed in the Form of Solemnization of Matrimony in the Book of Common Prayer, that marriage is a lifelong union in faithful love, for better or for worse, to the exclusion of all others on either side. This union is established by God's grace when two duly qualified persons enter into a contract of marriage in which they declare their intention of fulfilling its purposes and exchange vows to be faithful to one another until they are separated by death. The purposes of marriage are mutual fellowship, support, and comfort, the procreation (if it may be) and nurture of children,

and the creation of a relationship in which sexuality may serve personal fulfilment in a community of faithful love. This contract is made in the presence of witnesses and of an authorized minister."

3. In view of the fact that The Anglican Church of Canada affirms the lifelong nature of marriage, why is it presenting a Brief on the subject of Divorce? Several reasons may be noted.

- (a) The Church legislates for its own members and claims no right to impose its canonical legislation on others.
- (b) Pastoral experience with our own members leads us to recognize that while it is the Church's responsibility to do all it can to help and support its members so that they may live in accordance with the principles of marriage as we conceive them, nevertheless failure sometimes occurs. What to do in such circumstances must constantly engage the attention of pastors, counsellors, the Church's membership, and the community as a whole.
- (c) The experience of the Church in ministering to those whose marriages are threatened or have actually broken down indicates that the present divorce law of Canada is inadequate, that it is the cause of unreasonable hardship and that in some cases it is even a factor contributing to the hastening of marriage breakdown.
- (d) The Church conceives its legislative function as being restricted to its own membership as described in (a) above. In fulfilling its responsibility to its members The Anglican Church of Canada is considering a change in its canon law which in certain circumstances would permit the re-marriage of divorced persons within the Church during the lifetime of a former spouse. The grounds for such possible permission are set forth in the proposed Canon to which we have made reference. Briefly summarized, the decisions of the Church regarding permission for re-marriage will be determined not on the basis of the parties concerned being judged innocent or guilty of a matrimonial offence but on recognition of the breakdown of a first marriage and a belief on substantial grounds that a second marriage as far as possible in keeping with the Church's view of the nature of marriage is now possible.
- (e) In addition to this legislative function for its own members the Church recognizes its obligation to work with other private and public bodies in Canada in promoting the enactment of civil and criminal laws designed to give justice to all citizens, irrespective of their religious affiliation, race or economic status. Such a concept of the Church's role in society precludes us from being silent on such an issue as the one before this Joint Committee. Thus for its own members who have failed in marriage as well as for other citizens in similar plight, The Anglican Church of Canada, through this committee of the Bishops, makes its submission regarding a new divorce law for Canada.

4. There have been available to us many previous studies on the subject of divorce including notably the book, *Putting Asunder—A Divorce Law for Contemporary Society* (London, S.P.C.K., 1966), being the report of a group appointed by the Archbishop of Canterbury for the Church of England in January, 1964.

5. In addition to such studies, our committee has the advantage of appearing before you towards the end of your hearings and thus having available the previous briefs presented to this Joint Parliamentary Committee. We are particularly indebted to the brief presented after many years of study, by the United Church of Canada on November 22, 1966. By reason of the ground already covered we feel free to focus our attention on a few central principles.

SOME PRINCIPLES WHICH SHOULD UNDERLIE CHANGES IN LAW CONCERNING MARRIAGE AND DIVORCE

6. Any changes made should:

- (a) continue to uphold the ideal intent of marriage as a lifelong union.
- (b) respect the integrity of human personality.
- (c) help to strengthen family life.
- (d) provide for custody and care of children and the protection of any other defenceless victims of divorce.

WHY WE FAVOUR A NEW APPROACH

7. The present divorce law is based on the principle that a matrimonial offence, for example, adultery, should determine the granting of dissolution. This assumes that a "matrimonial offence" should be unforgivable, whereas we believe that forgiveness is a constant element in marriage relationships. "Matrimonial offence" is often a symptom of deeper trouble rather than a cause of failure in marriage. By adhering to this principle the present law encourages disrespect for honesty and integrity. This is graphically described in the following statement by a person involved in a divorce suit:

"Then my lawyer asked the question which must be asked: "Do you forgive your husband this adultery?" and I answered, as I must answer before the law, "No."...

It was first of all and basically the *irrelevancy* of the whole business. Adultery was not the cause of our marriage breakup, and therefore all the questions and answers were off the point. The lawyer and judge had to ask and we had to answer questions that had nothing whatsoever to do with why we were there. We denied the possibility of truth and honesty by our very actions in being there. And yet this is what society demands." (quoted from a private communication)

8. For this reason, we do not favour the addition of new grounds for divorce to the present law, but we consider that marriage breakdown should be substituted for matrimonial offence as the basis for divorce in any new legislation.

THE CONCEPT OF MARRIAGE BREAKDOWN

9. Since this concept has already been ably set forth in the briefs of The United Church of Canada (Minutes pp. 408-420) and of Messrs. McDonald and Ferrier (Minutes pp. 499-573) as well as in the English Report, *Putting Asunder*, our comments will be brief.

10. It is our opinion that this concept provides a better basis for dealing effectively with the needs of people whose marriages have failed because it requires that a marriage be dealt with in its total social and moral context.

11. We therefore recommend that in dealing with divorce petitions the breakdown of marriage should be recognized as a question of fact and that no rules of law defining marriage breakdown should be established, lest the present recriminatory attitudes and procedures continue to be fostered.

12. We are aware of the objections raised against the principle of marriage breakdown as a basis for divorce. They are discussed on pages 41-56 of *Putting Asunder*. We are in agreement with the answers there set forth.

13. Our conclusion is that the principle of marriage breakdown and the methods necessary to determine it as a matter of fact are basically incompatible with the principle of the matrimonial offence, and that marriage breakdown should replace the existing grounds rather than be added as a further ground for divorce.

FURTHER CONSIDERATIONS

14. Before proceeding with hearing for divorce on the grounds of marriage breakdown the court should be assured that every effort had been made to achieve reconciliation and that further attempts would be in vain. This would require exploration concerning the availability and use of professional services and the provision of the same when they do not at present exist.

15. We recognize that the adoption of the principle of marriage breakdown as the sole ground for divorce would necessitate procedural changes. The court will be concerned with investigation of the state of the marriage rather than with determination of guilt.

16. Every possible means should be explored to ensure that the cost of divorce is not beyond the financial capabilities of those requiring it. It may be possible to deal with divorce cases in lower courts.

17. While we appreciate that your Committee's instructions are specifically related to dissolution of marriage, we suggest that no adequate examination of this subject can omit a study of the nature of marriage as a social and legal institution, the requisites of valid marriages and the defects causing nullity of purported marriages.

18. As in many areas of social concern, research heretofore conducted into these aspects of marriage in Canadian society and law has been insignificant. We urge therefore that your Committee recommend that as soon as possible properly organized and adequately staffed and financed studies in this area be undertaken with governmental authority and support, with a view to establishing a body of knowledge on which a statute embodying a Canadian law of marriage can be based. Such research should include attempts to ascertain the causes and consequences of marriage breakdown.

19. When we consider the present law of marriage, outside the Province of Quebec, and omitting from consideration solemnization of marriage which is within provincial legislative jurisdiction, we find that some aspects of that law are obscure and others are unsatisfactory. For example, the following areas call for investigation:

- (a) The intention of marriage. At its inception it should be defined clearly as a life-long union. This does not seem to be explicit at present.
- (b) The minimum age for capacity to marry. The study we propose would indicate what the minimum age should be.
- (c) The scope of coercion, duress or fear should be studied and clearly defined.
- (d) The definition of fraud, misrepresentation or concealment should be studied with a view to their extension as grounds of nullity.
- (e) The territorial jurisdiction of the courts should be examined with a view to eliminating some of the hardship caused by the law of domicile.

The following is the Committee appointed by the Primate of the Anglican Church of Canada, Most Reverend H. H. Clark:

From the House of Bishops:

The Right Reverend G. N. Luxton, Bishop of Huron
The Right Reverend R. K. Maguire, Bishop of Montreal
The Right Reverend E. S. Reed, Bishop of Ottawa, Chairman
The Right Reverend E. W. Scott, Bishop of Kootenay
The Right Reverend S. C. Steer, Bishop of Saskatoon

From the Commission on Marriage and Related Matters:

The Reverend Dr. C. R. Feilding
Professor S. Ryan

From the Department of Christian Social Service

Reverend A. R. Cuyler

Reverend Canon Maurice P. Wilkinson, Secretary

The Right Reverend G. N. Luxton, Bishop of Huron requests the following to be attached herewith:

“This member of the Committee records his dissent from the report of this Committee because it has not been submitted to the House of Bishops and has not had sufficient reference and study in the life of the Church to be considered as an authoritative opinion of the Anglican Church of Canada.”

APPENDIX "61"

Brief submitted to the Special Joint Committee
of the Senate and House of Commons on Divorce

by

Professor C. Gordon Bale, Faculty of Law, Queen's University,
Kingston, Ontario.

1. Jurisdiction Of The Courts In Relation To Divorce

a) *Common Law Position*

The basis upon which courts in Canada, having the power to grant a divorce "a vinculo matrimonii", assume jurisdiction to grant a divorce is the domicile of the petitioner. The domicile of a man has been defined as the place "in which he has voluntarily fixed the habitation of himself and his family, not for a mere special and temporary purpose, but with a present intention of making it his permanent home, unless and until something (which is unexpected or the happening of which is uncertain) shall occur to induce him to adopt some other permanent home."¹

The domicile of a married woman is that of her husband. This is so even though the husband and wife are living separately and apart and even though they may have been judicially separated.² This was authoritatively established by the Privy Council in *Attorney-General of Alberta v. Cook*.³ The Privy Council with remorseless logic utilized the medieval conception of the unity of husband and wife to hold that married persons could have but one domicile and that was the husband's domicile. Lord Denning has described the attributing of the husband's domicile to the wife as "the last barbarous relic of a wife's servitude."⁴

One of the factors which influenced the Privy Council in deciding that a married woman could not have a separate domicile was that it would avoid confusion. There would be only one jurisdiction which was competent to dissolve a marriage. The situation in which a man and a woman are considered to be married in one country and divorced in another is avoided. However, equating the domicile of a married woman to that of her husband has given rise to intolerable hardship and injustice for the married woman with grounds for divorce. An example of this hardship is the case of an adulterous husband who deserts his wife by leaving the country of his domicile. Before the Divorce Jurisdiction Act, 1930, the wife could only obtain a divorce in the courts of the husband's new domicile. This would be impossible if the husband's new domicile was in a jurisdiction such as Erie or Italy where divorce is unobtainable. As a practical matter the deserted wife might find that she could not obtain a divorce because she lacked funds necessary to go to the husband's new domicile and commence an action for divorce there.

b) *Divorce Jurisdiction Act of 1930*

To alleviate the difficult position of a deserted wife who had grounds for divorce, the Divorce Jurisdiction Act of 1930, was passed. This Act provides that a married woman who has been deserted and has been living separately and apart from her husband for two years may commence an action for divorce in the Canadian province in which the husband was domiciled immediately prior to the desertion if the court of that province has jurisdiction to grant a divorce "a vinculo matrimonii."

This Act has been described as a "grudging palliative rather than an effectual remedy."⁵ Why should a deserted wife whose husband has committed adultery have to wait two years if her husband after deserting her acquires a different domicile before she can commence an action in the former domicile. If a husband domiciled, for example, in Ontario, commits adultery and deserts his wife but remains domiciled in

Ontario, the married woman may commence divorce proceedings immediately. It would seem preferable to provide that a deserted wife who was domiciled in a province of Canada immediately prior to the desertion shall for the purposes of divorce jurisdiction be deemed to continue to be domiciled in that province. This would mean that the wife with grounds for divorce who was domiciled in Ontario immediately prior to the desertion would be able to commence divorce proceedings immediately whether or not her husband remained domiciled in Ontario after the desertion.

Such an amendment would only amount to patching a palliative. There are too many cases in which the Divorce Jurisdiction Act does not provide a remedy. To illustrate this contention two examples can be given.

Firstly, a woman domiciled in Ontario immediately prior to her marriage might marry a foreign domiciliary. Although they might reside in Ontario, if the husband did not intend to continue to reside in Ontario, he would not acquire an Ontario domicile. If her husband committed adultery and deserted her, the woman could not obtain a divorce in Ontario as on marriage she acquires his domicile. She would have to obtain the divorce from the jurisdiction in which her husband is domiciled. This might be impossible if the husband's domicile is in a jurisdiction where divorces are not granted. It might also be impossible if the courts of the husband's domicile refuse to assume jurisdiction solely on the basis of the domicile of the husband. Even if the foreign court would assume jurisdiction on the basis of the husband's domicile, the foreign court might define domicile differently. Although an Ontario court might say the husband was domiciled in the foreign jurisdiction, the courts of the foreign jurisdiction might decide otherwise and refuse to assume jurisdiction. Even if the foreign court would assume jurisdiction, it might as a practical matter be impossible for the wife to travel to the husband's jurisdiction to undertake divorce proceedings there.

Secondly, a woman domiciled in Ontario immediately prior to her marriage might marry a foreign domiciliary and reside with him in the foreign country. If her husband committed adultery and deserted her, she might return to Ontario. She could not obtain a divorce in Ontario and would have to return to the foreign domicile where it might be difficult or impossible to obtain a divorce.

(c) *Effective Reform of the Jurisdictional Rules*

To provide a married woman with an effectual remedy in the matter of divorce it is necessary that either the wife should be permitted to acquire a separate domicile for the purpose of divorce jurisdiction or the courts should be empowered to assume divorce jurisdiction on the basis of the wife's residence within the province for a stipulated period of time. In the United States, the courts themselves have been able to redefine the concept of domicile in relation to the married woman so that intolerable hardship is avoided. As early as 1869, Justice Swayne, in delivering the opinion of the Supreme Court of the United States, in *Cheever v. Wilson*, refuted the contention that the wife's domicile must be that of her husband's. He said. "The rule is that she may acquire a separate domicile whenever it is necessary or proper that she should do so. The right springs from the necessity for its exercise, and endures as long as the necessity continues."⁶ In the United States, the married woman with grounds for divorce has not encountered difficulty with respect to divorce jurisdiction because of judicial reinterpretation of the concept of domicile.

The solution to this problem has been the same in New Zealand. The mode of achieving the solution to the problem has been different. Instead of a judicial reinterpretation of domicile, the New Zealand parliament enacted:

3. Domicile—(1) For the purposes of this Act, the domicile of a married woman, wherever she was married, shall be determined as if she were unmarried and (if she is a minor) as if she were adult.⁷

The English Royal Commission on Marriage and Divorce appointed in 1951, has recommended that a married woman living separately and apart should have the

capacity to acquire a separate domicile for the purpose of divorce jurisdiction. The Report of the Royal Commission states:

We recommend, therefore, that a wife who is living separate and apart from her husband should be entitled to claim a separate English or Scottish domicile for the purpose of establishing the jurisdiction of the English or Scottish court to entertain divorce proceedings by her, notwithstanding that her husband is not domiciled in England or Scotland, as the case may be. The burden of proof should be on the wife to establish that the circumstances are such that, had she been a single woman, she would be held to have acquired an English or Scottish domicile. Where, however, the wife was domiciled in England or Scotland immediately before the marriage, or immediately before the separation, and is resident in England or Scotland at the commencement of the proceedings, she should be deemed to have acquired an English or Scottish domicile, unless there is evidence to the contrary.⁸

It is my submission that the best way to provide an effectual remedy for the hardship which a married woman encounters with respect to divorce jurisdiction is to give her the capacity to acquire a separate domicile for that purpose. This solution is, I think, preferable in that it attacks the problem at its root. It is also in accord with modern ideas with respect to sex equality.

(d) *Canadian Domicile for Purposes of Divorce*

If a uniform Divorce Act is passed for Canada, it is submitted that the concept of a Canadian domicile should be created for divorce matters in substitution for a domicile in a Canadian province. It is often categorically stated that a person can have only one domicile. This is certainly true if the person is domiciled in a unitary state. However, in a federal state the principle should be stated in the form that for a particular legal question, a person can have only one domicile. For instance, the Australian Parliament in 1959 passed the Matrimonial Causes Act, a uniform Act for all of Australia. It substituted an Australian domicile for a domicile in a state for the purpose of matrimonial causes. This means that although a person might be domiciled in Western Australia for some legal questions, such as succession, for the purpose of divorce he is considered to be domiciled in Australia. Consequently, if he were resident in New South Wales he could bring an action for divorce in New South Wales because for the purpose of divorce he is domiciled in Australia although for other legal questions he is domiciled in Western Australia.

The concept of a Canadian domicile for divorce matters provided that there was uniform divorce legislation would be very advantageous. With the vast geographical distance between some of the provinces and the considerable amount of mobility of persons between provinces, it would be of much convenience to be able to bring a divorce action based on a Canadian domicile for divorce in the province in which you are resident even though you are domiciled in another province for matters other than divorce.

e) *Reform of the Concept of Domicile*

If Canada is to rely on domicile as the sole basis for divorce jurisdiction, serious consideration should be given to modifying the concept of domicile, at least for the purposes of divorce. This would be particularly important if uniform divorce legislation for all of Canada were not passed and a concept of a Canadian domicile were not adopted. The concept of domicile as a result of a series of English decisions has tended to become technical, rigid and artificial. The intention required in order to acquire a new domicile and thereby to displace the domicile of origin has at times been an intention to remain in the jurisdiction forever. As a result of the tenacity of the domicile of origin, a person's domicile may not be the country in which he is resident for an extended period of time. The House of Lords in *Vinans v. Attorney-General*⁹ and in *Ramsay v. Liverpool Royal Infirmary*¹⁰ held that persons who had resided in England

for thirty-seven years and thirty-five years respectively were not domiciled in England. Canadian courts have generally not required such a high degree of proof of intention in order to find that the person has acquired a domicile of choice. The intention required appears to be the intention of remaining in jurisdiction indefinitely rather than forever.

The Commissioners on Uniformity of Legislation in Canada drew up a Draft Model Act to Reform and Codify the Law of Domicile. I submit that the provisions in this Draft Act might be utilized to reform the concept of domicile for the purposes of divorce jurisdiction. The Draft Act provides: Section 5 (1).....a person acquires and has a domicile in the state.....in which he has his principal home and in which he intends to reside indefinitely. 5 (2) Unless a contrary intention appears, (a) a person shall be presumed to intend to reside indefinitely in the state..... where his principal home is situate.

This definition and this presumption would have the effect of making the concept of domicile less rigid and artificial. Domicile would more often indicate the jurisdiction in which the married persons live and the jurisdiction which has the greatest interest in their status. Fewer persons would find themselves in the situation of having been resident in a jurisdiction for some time but considered to be domiciled elsewhere. This can be a very inconvenient situation for persons seeking a divorce particularly if the domicile is geographically distant from the jurisdiction in which they reside.

f) Alternative Reform of the Jurisdictional Rules

In the United Kingdom and in Australia, the wife who has been living separately and apart has not been given the capacity to acquire a separate domicile. To cope with the problem, the U. K. Parliament has provided additional bases for jurisdiction in proceedings instituted by a wife. Section 18 (1) (a) of the Matrimonial Causes Act 1950, provides that where the wife has been deserted or the husband deported, the wife can bring an action if immediately before the desertion or deportation the husband was domiciled in England. This is analogous to our Divorce Jurisdiction Act. There are two basic differences. There is no requirement in the U.K. provision that the wife should live separately and apart for two years after the desertion. In addition, the U.K. provision covers deportation and not just desertion. The major way in which the U.K. has coped with the problem is found in Section 18 (1) (b) of the Matrimonial Causes Act, 1950. This section provides that the court has jurisdiction:

- (b) in the case of proceedings for divorce or nullity of marriage, if the wife is resident in England and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings, and the husband is not domiciled in any other part of the United Kingdom or in the Channel Islands or the Isle of Man.

The Parliament of Australia has dealt with the problem in basically the same way. However, the Australian Matrimonial Causes Act, 1959, has resorted to statutory fictions. Section 24 (4) of the Act provides that proceedings for divorce shall not be instituted except by a person domiciled in Australia. This is simply a statement of the basic common law position. The problem which would result from the exclusive jurisdiction based on domicile is solved by statutory fiction contained in section 24. It provides:

- (1) For the purposes of this Act, a deserted wife who was domiciled in Australia either immediately before her marriage or immediately before desertion shall be deemed to be domiciled in Australia.

- (2) For the purpose of this Act, a wife who is resident in Australia at the date of instituting proceedings under this Act and has been so resident for the period of three years immediately preceding that date shall be deemed to be domiciled in Australia at that date.

Section 24 does not give a married woman the capacity to acquire a separate domicile for the purpose of divorce jurisdiction. Instead it deems the married woman to

be domiciled in Australia in certain situations. Section 24 (1) goes much beyond our Divorce Jurisdiction Act and Section 18 (1) (a) of the English Matrimonial Causes Act, 1950. If the ante-nuptial domicile of the deserted wife was in Australia, no matter where she was domiciled at the time of the desertion she is deemed to be domiciled in Australia. Section 24 (1) would provide a remedy for the two examples cited above to indicate situations in which the Divorce Jurisdiction Act does not provide a remedy. Section 24 (2) of the Australian Act has the same effect as Section 18 (1) (b) of the United Kingdom Act. The court has jurisdiction to hear a wife's petition for divorce on the basis of three years residence immediately preceding the instituting of proceedings. The United Kingdom and Australian provision do much to alleviate the difficulties imposed on the wife by the concept of the unity of the domicile of married persons. However, it is submitted that the New Zealand approach of giving the married woman the capacity to acquire a separate domicile is superior. It goes to the root of the problem and is in greater accord with social realities.

II. Recognition of Foreign Divorce Decrees

(a) *Common Law Position*

The basic rule with regard to a foreign divorce decree is that if it is granted by the law of the domicile of parties, it will be recognized by our courts. After the Privy Council decision in *Le Mesurier v. Le Mesurier*¹¹, it was thought that the courts of the domicile had exclusive jurisdiction and that a divorce decree granted by any other court would not be recognized. However, a number of exceptions to the basic rule have been developed by the courts. In *Armitage v. Attorney-General*¹², a South Dakota divorce decree was recognized in England although the husband was not domiciled in South Dakota. The divorce decree was recognized on the basis that the decree would be recognized by the law of New York, the domicile of the husband at the date of granting of the decree. This exception to the general rule is in accord with the principle that the status of persons should be determined by the law of the domicile. If the law of domicile recognized the decree as dissolving the marriage, other jurisdictions should also recognize the divorce.

After the Privy Council decision in *A-G for Alberta v. Cook*, the Divorce Jurisdiction Act 1930 was passed in Canada and a somewhat similar provision was enacted in England in 1937. These statutes extended the jurisdiction of divorce courts but did not deal with the problem of the recognition of foreign decrees granted by other jurisdictions on similar grounds. Until *Travers v. Holley*¹³, an English Court of Appeal decision in 1953, most writers considered that divorces granted under such statutes would not receive recognition outside the country in which they were granted unless they could be recognized under the exception enunciated in *Armitage v. Attorney-General*. In *Travers v. Holley*, the English Court of Appeal was confronted with the problem of whether a divorce granted by the courts of New South Wales under legislation similar to our Divorce Jurisdiction Act should be recognized. England had similar legislation and Hodson, J.A. held that it would be "contrary to principle and inconsistent with comity if the courts of this country were to refuse to recognize a jurisdiction which "mutatis mutandis" they claim for themselves.¹⁴ *Travers v. Holley* did not make it clear whether it was essential that the statute conferring jurisdiction on the foreign court should be substantially similar to the legislation of the forum or whether it was sufficient that the facts were such that the court of the forum could have assumed jurisdiction. In *Robinson-Scott v. Robinson-Scott*, Karminski, J., held that, "It is sufficient that facts exist which would enable the English courts to assume jurisdiction."¹⁵

Canadian courts have, in general, followed the English approach to the recognition of foreign divorces. The general rule is that only decrees granted by the domicile of the parties will be recognized. With only one possible exception, *Armitage v. Attorney-General*, has been consistently applied in Canada so that a non-domiciliary divorce

decree is recognized if it is valid according to the law of the domicile of the husband at the date of the granting of the decree.¹⁶ The status of the exception established by *Travers v. Holley* and *Robinson-Scott v. Robinson-Scott* is not yet as firmly settled as is *Armitage v. Attorney-General*. *Travers v. Holley* has been agreed with and applied in *Re Solemnization of Marriage Act, B. and B. v. Deputy Registrar General of Vital Statistics*,¹⁷ *Re Allarie's Marriage Licence Application*, *Allairie v. Director of Vital Statistics* and *Januszkiewicz v. Januszkiewicz*¹⁹. It was mentioned with apparent approval in *Buehler v. Buehler*²⁰. However, in *La Pierre v. Walter*²¹, Mr. J. Riley disapproved of *Travers v. Holley* and said he preferred the reasoning in *Fenton v. Fenton*, a decision of the Victorian Full Court and *Warden v. Warden*, a decision of the Court of Session of Scotland. This was, however, obiter dictum in that the doctrine of *Travers v. Holley* was inapplicable to the facts of the case. *Travers v. Holley* was also considered in *Re Needham v. Needham*. M. J. Moorehouse noted that in *La Pierre v. Walter* the reasoning in *Fenton v. Fenton* was preferred to that in *Travers v. Holley*. Again, however, the doctrine of *Travers v. Holley* was inapplicable. These were all trial court decisions. The first and to date only appellate court to consider the doctrine of *Travers v. Holley* is the Ontario Court of Appeal. The case did not deal with the recognition of a foreign divorce but with a foreign nullity decree. Schroeder, J.A., in *Re Capon* said:

"I have formed the view that the Courts of Ontario would be entitled to assume jurisdiction on the ground that the petitioner alone is domiciled in this Province whether the marriage was celebrated here or not. To deny the equivalent right to a foreign Court would be inconsistent and contrary to well-recognized principles. In *Travers v. Holley* [1953] P. 246, the Court of Appeal gave effect to the rule that what entitles an English Court to assume jurisdiction is equally effective in the case of a foreign court."²³

It would appear that the doctrine of *Travers v. Holley* and *Robinson-Scott v. Robinson-Scott* will probably be accepted by Canadian courts.

A new exception to the general rule regarding the recognition of foreign divorce decrees may have been evolved by the courts in *Schwebel v. Ungar*.²⁴ One writer, although admitting that his conclusion must remain tentative, says that *Schwebel v. Ungar* establishes that "a divorce will be recognized by our law if it is recognized by the law of a country in which the parties (or, probably, the husband alone) become domiciled at any subsequent time."²⁵ This is an extension of the doctrine in *Armitage v. Attorney-General* and its precise scope has not yet been clearly defined.

(b) *Statutory Enactment of the Common Law Rules*

It might be argued that the problem about recognition of foreign divorce decrees has been solved by the doctrine of *Travers v. Holley*. If, for instance, a married woman living separately and apart is given the capacity to acquire a separate domicile for the purpose of divorce jurisdiction, then on the basis of *Travers v. Holley*, our courts should recognize a decree granted by the domicile of the wife. Our courts should recognize that what entitles a Canadian court to assume jurisdiction should be equally effective in the case of a foreign court. What constitutes domicile would of course, be determined solely by reference to our own law and not the foreign law. If there were no doubt that *Travers v. Holley* would be applied, little would be gained by giving statutory effect to this case. However, in order to eliminate any doubt, it would appear desirable to legislate with respect to the recognition of foreign divorce decrees. Australia and New Zealand have both given statutory effect to *Armitage v. Attorney-General* and *Travers v. Holley*.²⁶

Giving the married woman who is living separately and apart from her husband the capacity to acquire a domicile for the purpose of divorce jurisdiction is merely an alternative to providing that the court has jurisdiction on the basis of the wife's three years residence. For this reason, it would seem that our courts should recognize a divorce decree granted by either the domicile of the wife or by the residence of the wife for three years. Domicile is a concept which is always defined by the law of the forum. Consequently, it would appear that if a married woman is permitted to acquire a separate domicile, our courts would on the basis of *Travers v. Holley* and *Robinson-Scott v. Robinson-Scott* recognize divorces granted by the residence of the wife for three years provided that in the view of our courts the wife was herself domiciled where she was resident. In most cases, therefore, although the foreign court assumed jurisdiction on the basis of the wife's three years residence, our courts would recognize the divorce decree as one granted by what is regarded as the separate domicile of the wife. In order to eliminate any doubt and to cover those cases where the wife's three years residence is not considered by our courts as being her domicile, it is submitted that a specific provision should be enacted stipulating that a decree granted by a court which assumed jurisdiction on the basis of the wife's three years residence be recognized.

It is submitted that recognition should be given if

1. the foreign divorce was obtained in a country in which the husband was domiciled at the institution of proceedings. (This would be a statutory enactment of the basic common law rule.)
2. the foreign divorce, although not obtained in the country in which the husband was domiciled was recognized as valid by the law of that country at the date the decree was granted. (This would be a statutory enactment of *Armitage v. Attorney-General*.)
3. the foreign divorce was obtained in a country in which the wife, but not the husband, was domiciled at the institution of proceedings. (This would be a statutory enactment of *Travers v. Holley*, if a married woman living separately and apart from her husband were given the capacity to acquire a separate domicile.)
4. the foreign decree was obtained in a country in which the wife was resident for three years immediately preceding the institution of proceedings. (This would be a statutory enactment not based on a common law decision. It would recognize as valid the solution to the problem adopted by the United Kingdom and Australia.)
5. the divorce would be recognized as valid under the common law rules of the conflict of laws although not valid under Para. 1, 2, 3 or 4. (Such a provision would permit the courts some flexibility in evolving new rules of conflict of laws relating to the recognition of foreign divorce decrees. It would enable the courts to work out the scope to be accorded to *Schwebel v. Ungar*.)

1. (1859), 4 Drew 366, at p. 376.
2. The Domestic Relations Act, 1927, S.A. 1927, c. 5, s. 10, now R.S.A. 1955, c. 89, s. 11, purported to reverse the decision in *Attorney-General of Alberta v. Cook* and to give the judicially separated married woman the capacity to acquire a separate domicile. This section might be ultra vires the Alberta legislature to the extent that it attempts to alter the jurisdiction of the Alberta courts in the matter of divorce jurisdiction.
3. [1926] A.C. 444. [1926] 2 D.L.R. 762 (P.C.).
4. *Gray (or se. Formosa) v. Formosa* [1962] 3 All E.R. 419 at p. 422; [1962] 3 W.L.R. 1246 at p. 1250 (C.A.).
5. Raphael Tuck, Let no Court Put Asunder (1944), 22 Can. Bar Rev. 681 at p. 683.
6. 9 Wall. (U.S.) 108 at p. 123-124. It is quoted in H. E. Read, Recognition and Enforcement of Foreign Judgments (1938) at p. 204.
7. Matrimonial Proceedings Act 1963, S.N.Z. 1963, No. 71.
8. Royal Commission on Marriage and Divorce, Report 1951-1955, Cmnd. 9678, p. 218.
9. [1904] A.C. 287. 73 L.J.K.B. 613 (H.L.).
10. [1930] A.C. 588; 99 L.J.P.C. 134 (H.L.).
11. [1895] A.C. 517; 64 L.J.P.C. 97 (P.C.).
12. [1906] P. 135; 75 L.J.P. 42 (C.A.).
13. [1953] P. 246; [1953] 2 All E.R. 794 (C.A.).
14. *Ibid.*, p. 257 (P.); p. 300 (All, E.R.).
15. [1958] P. 71 at p. 88; [1957] 3 All E.R. 473 at p. 478 (P.A.D. Div.).
16. Power on Divorce, (2nd ed. by J. D. Payne 1964) at p. 173.
17. (1960), 31 W.W.R. 40; (1960), 24 D.L.R. (2d) 238 (Alta. S.C.).
18. (1963), 44 W.W.R. 568; (1964), 41 D.L.R. (2d) 553 (Alta. S.C.).
19. (1966), 55 W.W.R. 73; (1966), 55 D.L.R. (2d) 727 (Man. Q.B.).
20. (1956), 18 W.W.R. 97; (1956), 4 D.L.R. (2d) 326 (Sask. Q.B.).
21. (1960), 31 W.W.R. 26; (1960), 24 D.L.R. (2d) 483 (Alta. S.C.).
22. [1964] 1 O.R. 645; (1964), 43 D.L.R. (2d) 405, (Ont. H.C.).
23. [1965] 2 O.R. 83 at p. 96; (1965), 49 D.L.R. (2d) 675 at p. 688 (Ont. C.A.).
24. [1964] 1 O.R. 430; (1964), 42 D.L.R. (2d) (Ont. C.A.). It was affirmed on appeal by the Supreme Court of Canada [1965] S.C.R. 148; (1965), 48 D.L.R. (2d) 644.
25. T. C. Hartley, The Recognition of Foreign Divorce: *Schwebel v. Ungar* (Or *Schwebel*) (1965), 4 West. L. Rev. 99 at p. 111.
26. Matrimonial Causes Act 1959, S.A. 1959, No. 104, s. 95. Matrimonial Proceedings Act 1963, S.N.Z. 1963, No. 71, s. 82.

APPENDIX "62"

"VOID" MARRIAGES

Submission to the Special Joint Committee of the Senate and House of Commons on Divorce by

Professor Bernard L. Adell, Faculty of Law, Queens University, Kingston, Ontario.

It is to be hoped that an overhaul of the grounds for divorce will, in itself, make it less necessary for Canadian courts to resort to the use of annulment and to the accompanying fiction that a particular marriage never existed. However, because the grounds for annulment, except insofar as they relate to defects in the solemnization of marriage, are within the legislative competence of Parliament, it would be unfortunate if the Committee did not give some consideration to recommending the abandonment of what is perhaps the most anachronistic concept still to be found in the law of annulment—the concept of the absolutely void marriage.

For historical reasons which need not be discussed here, Canadian and English courts recognize two types of invalid marriages—those which are void (or absolutely void, or void *ab initio*), on the one hand, and those which are merely voidable, on the other hand. The grounds upon which marriages will be held void or voidable in the various Canadian jurisdictions are set out in some detail in the "Summary of Present Canadian Law of Marriage" prepared for the Committee by Professor H. R. S. Ryan. The classic statement of the distinction between void and voidable marriages is that of Lord Greene M.R. in *De Reneville v. de Reneville*:

... (A) void marriage is one that will be regarded by every court in any case in which the existence of the marriage is in issue as never having taken place and can be so treated by both parties to it without the necessity of any decree annulling it: a voidable marriage is one that will be regarded by every court as a valid subsisting marriage until a decree annulling it has been pronounced by a court of competent jurisdiction.¹

A voidable marriage must be treated by everyone, including the two parties to it, as completely valid unless and until one of those two parties goes before the court of the matrimonial domicile and secures a decree of nullity. That decree, if granted, does provide that the marriage was void from its inception and has never existed, but such a provision is now correctly looked upon by the courts as little more than a matter of form. The courts do not generally consider transactions completed during the currency of a voidable marriage to be wiped out by the decree of nullity.² nor (and this is even more significant) do they allow a party who, through his conduct after the marriage ceremony, has shown a certain degree of acceptance (or "approbation") of a voidable marriage, to later impugn the validity of that marriage.³ As a result, a party to a voidable marriage who has been led by the other party's conduct to stake his future on the continuance of the marriage cannot later have his expectations destroyed, either through a change of heart by the other party or through intervention by an outsider. In the case of voidable marriages, the law has thus achieved something of a rough balance between the interest of one of the parties to a defective marriage in having that marriage ended and the contrary interest of one of the parties (and conceivably, in particular cases, of society as a whole) in the continuance of the marriage.

No such balance has, however, been achieved in the case of absolutely void marriages.⁴ If a marriage is defective in any of the respects which lead to absolute nullity, no degree of ostensible acceptance by either party appears sufficient to prevent anyone with any interest whatever in the marriage from treating that marriage as totally non-existent and from obtaining a judicial declaration of such non-existence. In the case of a void marriage, the courts take virtually no account of any interests in the

continuance of the marriage which may have arisen through the effluxion of time or through the conduct of one or both of the parties to the marriage; they look only to the legal forms, and will declare the marriage a nullity even after the death of the parties to it. Severe injustice can result, and undoubtedly has resulted, from the attitude of the courts toward void marriages.

The simplest and most practical remedy would appear to be the enactment of a statutory provision imposing upon absolutely void marriages what is referred to above as the rough balance of interests worked out by the courts in their handling of voidable marriages. Such statutory provision would have to do little more than to decree that most of the categories of absolutely void marriages would thenceforth be voidable.⁵ By according significant legal effect to *de facto* marriages, it would bring our law of annulment more closely into accord with the expectations of the parties, and would be an appropriate complement to enlightened divorce legislation.

NOTES

1. [1948] p. 100, at 111.
2. See, *e.g.* *Re Eaves*, [1940] 1 Ch. 109 (U.K.C.A.).
3. *B. v. B.*, [1935] S.C.R. 23; *Pettit v. Pettit*, [1962] 3 All E.R. 37 (U.K.C.A.). For a critical appraisal of the attitude of English courts toward approbation, see, Lasok, "Approbation of Marriage in English Law and the Doctrine of Validation," (1963) 26 Mod L. Rev. 249.
4. The only significant statutory reform in this area involves the legitimation of the children of void marriages, a matter within provincial jurisdiction. See The Legitimacy Act, S. Ont. 1961-62, c. 71, s. 4.
5. Such a provision would obviously be incapable of application to bigamous marriages, and should probably not be applied to certain categories of consanguineous marriages.

APPENDIX "63"

Submission to the Special Joint Committee of the Senate and House of Commons on Divorce by

Professor H. R. Stuart Ryan, Faculty of Law, Queen's University, Kingston, Ontario.

Summary of Present Canadian Law of Marriage (excluding Law of Quebec)

1. *Sources of Present Law*

- (a) Canon Law of Western (Roman Catholic) Church as developed to 1532 but modified in later development in the English Ecclesiastical Courts by influence of Common Law thinking.
- (b) English Statutes, commencing in 1532, and up to the years below mentioned:
 - N.S. }
N.B. } 1758
P.E.I. }
 - Nfld. 1832
 - B.C. 1858
 - Remainder } 1870.
of Canada {

The most important of these statutes from our point of view are these of HENRY VIII, Edward VI, Elizabeth I, Lord Hardwicke's Act, 1735, Lord Lyndhurst's Act, 1835, and the Matrimonial Causes Acts, 1857-1868.

- (c) English Common Law court decisions relating to marriage
 - (i) a Common Law
 - (ii) under statutes relating to marriage and annulment.
- (d) Pre-confederation provincial legislation, where applicable.
- (e) Post-confederation Canadian national legislation relating to marriage and annulment.
- (f) Post-confederation provincial legislation relating to solemnization of marriage.
- (g) Canadian court decisions.
- (h) This note does not discuss dissolution of valid marriages.

2. *Marriage defined*

("Christian marriage", so called but not specifically Christian)

The consensual union of one man and one woman as husband and wife for life to the exclusion of all others, for the society, comfort and services that each may afford to the other, for sexual relations and the procreation of children, but marriage may be validly entered into upon condition that there shall be no children, or that there shall be no intercourse without contraceptives, or that, for reasons of age or health, there shall be no intercourse (the *tamquam soror* rule). The fact that marriage may be terminated by divorce does not deprive it of its potentially lifelong character. A condition that marriage shall be for a trial period or last for a certain time or shall be terminated on consent or on a certain condition is void, and the marriage is generally considered to be valid, but solutions to the problems raised by such conditions have not been worked out. Marriage is completed by consent, even without consummation.

3. Capacity to marry requires

- (a) *Minimum age*—7 years, but marriage before puberty requires ratification after attaining puberty by consummation or other act of affirmation. Puberty is a fact and its occurrence may be proved, but it is presumed to be reached by males at 14 and females at 12. The actual age of puberty has moved downward in recent years.
- (b) *Capacity to consummate*—fertility is not required; nor is emission of semen; penetration of the female organ by the male organ is sufficient. Incapacity may be physical or psychological, and *quoad hunc (hanc)* or general. Refusal to consummate may raise an inference of incapacity, but is not in itself a defect. Sodomistic or other deviant acts may raise such an inference if “normal” consummation is refused. Marriages of aged persons do not require such capacity.
- (c) *Mental capacity*—ability to understand the nature of the union and the rights and obligations arising from it. No very high standard of intelligence or understanding is required—if it were, few marriages would be valid. Mental illness, gross drunkenness or the effect of a drug may deprive an otherwise capable person of such capacity, either permanently or temporarily.
- (d) *Being unmarried*—not being a party to a valid, subsisting marriage. Annulment by a court of a previous purported marriage which can be proved later to be “null and void *ab initio* and *ipso jure*” (see below) is not required. Death of a former spouse need not be formally certified, declared or proved before remarriage if it can be proved later as a fact by direct evidence, inference or presumption based on long absence. No procedure for judicial declaration of presumption of death of an absentee exists under the law of Canada. Provincial legislation authorizing such declarations cannot assure validity of remarriage of the other partner if the absentee is in fact alive. A previous purported marriage that is “voidable” (see below) must, it seems, be annulled by a court before remarriage. It is possible that if annulled *after* a second ceremony, it may have retroactive effect and validate the second union *ex post facto*, but the trend of decisions is in the other direction. Dissolution of a prior marriage by legislative, judicial or other appropriate procedure must be final before the second ceremony.
- (e) *Consent to marry*, which requires
 - (i) *Free will*—absence of coercion, duress, threats, “force and fear”, or similar undue influence. The pressure must be improper. It must go beyond persuasion or even strong persuasion. Prosecution or threats of prosecution may be coercive. The will must be overcome. Age, health, filial respect and similar factors may render a party particularly vulnerable to coercion. Fear of extraneous harm has been regarded as vitiating consent, as where a Hungarian girl went through a form of marriage with an alien in order to escape from Hungary, for fear of Russian soldiers, but this is not a precedent of wide application.
 - (ii) *Understanding the nature of the contract*—including absence of fraud or mistake. Error, however, induced, is not a defect unless it extends to the nature of the ceremony (e.g. mistaking marriage for betrothal) or the identity of the other party (e.g. mistaking Leah for Rachel). It is doubtful whether fraudulent adoption of a false personality or concealment of real identity or history is a defect as long as there is no error concerning the physical person. Concealment of imprisonment, crime, prostitution, disease, pregnancy, bankruptcy, citizenship, race, family, etc., does not create a defect.

- (iii) *Consent to enter into the marital relationship*—The intention to marry must be expressed. However, sham marriages, not brought about by duress or fear, with intent to gain admission to a country or avoid deportation, or for similar purposes, are held valid. Secret or subjective and unexpressed withholding of consent (the “internal forum”) is ineffective. (e.g. Henry VIII’s alleged withholding of consent to marry Ann of Cleves).

The consent may be expressed to be subject to a condition precedent (e.g. that the man does not suffer from V.D. or that the woman is not pregnant), and if this is proved and if the condition is not satisfied the marriage should be held void. Such conditions are rare. A condition subsequent, (e.g. that the man will change his religion after marriage or allow the woman to bring up any children in hers), will not be a defect if it is not satisfied.

5. Marriage within the prohibited degrees is generally regarded as defective for “incapacity”, but this categorization does not seem accurate. The parties are not incapable of marrying; they are forbidden by law to marry each other. “Illegality” would be a better category of defect.

No Canadian statute authoritatively defines the prohibited degrees. Provincial statutes may purport to do so, but if they are intended to do more than convey information they are to that extent invalid. Our prohibited degrees are those recognized by the English courts on the basis of lists published in the Canons of 1604 of the Church of England, as amended or clarified by Lord Hardwicke’s Act of 1735 and by R.S.C. 1952, c. 176, secs. 2 and 3.

The list appears to be as follows:

- Parent and child
- Step-parent and step-child
- Parent-in-law and child-in-law
- Grandparent and grandchild
- Grandparent and grandchild’s wife or husband
- Grandchild and grandparent’s wife or husband
- Party and husband’s or wife’s grandchild
- Party and husband’s or wife’s grandparent
- Brother and sister
- Uncle or aunt and niece or nephew, by blood or marriage
- Party and wife’s aunt or husband’s uncle (by blood) (Apparently retained by inadvertence when marriages with deceased wife’s niece and deceased husband’s nephew were being authorized.)

Relationship of the half blood has the same effect as of the whole blood. “Natural” or illegitimate relationship by blood has the same effect as legitimate relationship. Betrothal (“precontract”) no longer creates an impediment.

In Ontario, it has been held that a man may marry his divorced wife’s sister, during the lifetime of his divorced wife, as if his divorced wife were dead. Not doubt the same rule would apply to other relationships mentioned in secs. 2 and 3 of R.S.C. 1952 c. 176. In British Columbia, the Court has held that a man and his divorced wife’s sister are still within the prohibited degrees, and the same would probably be held in respect of the other relationship mentioned in those sections. It is not clear what rule will be followed in other provinces.

6. Solemnization

- (a) Except in Quebec, it is *probable* that so much of Lord Hardwicke’s Act, 1735, as requires a marriage to be solemnized in the presence of an authorized (or in some provinces, apparently authorized) officiant, other than one of the parties, and of two other witnesses, is in effect *proprio*

vigore, and that a purported "common law marriage" *per verba de praesenti*, without that minimum formality, is null and void *ab initio* and *ipso jure*. The rule in Ontario seems clear. Otherwise, procedures and formalities are primarily governed by provincial pre- or post-confederation statutes of the province where solemnization occurs. In our theory, the *lex loci celebrationis* governs formalities (solemnization), and these include preliminary matters such as consent of parents, when required, medical examination where demanded and licence or banns, as well as qualification and civil authority of the officiant, witnesses, and time and place of solemnization, as well as the ceremony, registration, and so on. The law of each province determines not only the required procedure but also its effect, i.e., whether a marriage is valid if some prescribed formality has been omitted or improperly carried out. E.g. in Ontario, as long as one party in good faith believes he or she is entering into a valid marriage and that the officiant is qualified, a marriage ceremony in the presence of a purported officiant and two other witnesses is valid in point of formalities, at least if the parties cohabit afterwards. Other provinces have different rules, and, in some, non-compliance with certain formalities leads to nullity. In Quebec, it appears that want of consent of a parent or other authorized person deprives a person under 21 of capacity to marry. Hence, a marriage of a person under that age domiciled in Quebec, celebrated out of the province, without consent, is voidable.

- (b) A post-confederation provincial statute may fix a minimum age for obtaining a licence to marry and may make marriage without a licence or under a licence obtained by fraud or perjury invalid. In that way, a minimum age for marriages celebrated within the province may be set. The parties may, however, marry in some place outside the province where these rules do not apply and there is no similar local rule. If so, (unless a party domiciled in Quebec is below the minimum age set by the Civil Code), the marriage is valid in respect of age. A post-confederation provincial statute purporting to create incapacity to marry below a given age is invalid.

7. Void and voidable marriages

(Note—this distinction seems to be unknown to the law of Quebec by which all invalid marriages appear to be voidable in our use of the term.)

- (a) A "void marriage" (null and void *ab initio* and *ipso jure*) can for most purposes be treated by anybody, one of the parties or third person, as never having occurred, without any legislative or judicial act. A court may declare it to be null and void, either in annulment proceedings or in other civil or criminal litigation in which its validity is called in question, but no annulment is required to set it aside.
- (b) A "voidable" marriage is one which must be treated by the parties and everybody else as valid until it is annulled by a competent court, and then, except in N.S., N.B. and P.E.I., it must be treated for most purposes as if it had never occurred. In these three provinces, the court may or may not make annulment retroactive; if not made retroactive, the so-called annulment resembles a divorce.
- (c) Marriages invalid for impotence (incapacity to consummate) are voidable throughout Canada. (Mere non-consummation or even wilful refusal to consummate are not grounds of nullity.). Marriages within the prohibited degrees appear to be voidable in Nfld., N.S. N.B. and P.E.I. Elsewhere in Canada, they are void. Other defects are generally regarded as rendering marriages void. There is some uncertainty with respect to the consequences of coercion, fraud or mistake. Where one party to a marriage is impotent, the other may "approbate" the marriage by affirmatively deciding to treat it

as valid. There is some suggestion that a similar rule might apply where the defect is coercion, fraud or error, but the current view appears to be that the marriage in such a case is simply void. Lapse of a long time or what is called "insincerity" are described as bars to annulment of voidable marriages, but the real bar appears to be "approbation". A voidable marriage may not be questioned after the death of one of the parties. It is not clear whether one can be attacked by any third person during the lifetime of both. The general opinion is to the effect that only a party to the marriage may question it for impotence. A void marriage may be questioned by any person who has an interest, such as being a party to a second ceremony involving a party to the first, or a claim to property, and so on, in showing the marriage to be invalid.

8. *Jurisdiction of Courts*

- (a) Superior Courts of all provinces and territories have jurisdiction to "annul" marriages or declare marriages void, where the parties in each case are subject to the jurisdiction of the court.
- (b) The domicile of either party within the province or territory is generally regarded as enough to support jurisdiction, where the marriage is alleged to be void. Where it is attacked as voidable, the domicile of the "husband" within the jurisdiction is enough.
- (c) The residence of the respondent within the jurisdiction appears to be enough for this purpose.
- (d) Perhaps, celebration of the marriage within the jurisdiction will be enough in some cases—at any rate, in B.C.

9. *Recognition of foreign judgments*

Canadian courts, in general, recognize foreign annulments where foreign court exercised jurisdiction on a basis on which a Canadian court would do so, and refuse to recognize other foreign judgments in this area.

10. Alimony, maintenance, custody of children and judicial separation, are generally dealt with under provincial laws.

11. The Committee will, of course, understand that what is commonly called a "common law" marriage is not a marriage at all, in substance, form or intent. It is simply concubinage, often but not necessarily adulterous. The numbers of such unions is uncertain, but is undoubtedly large.

12. A considerable number of "limping marriages" exist, as the result of the practice of slipping across the border to Idaho, Nevada or Alabama or a Mexican state, and going through the formality of a quick and easy "divorce" and "remarriage", after complying with the easy residential rules of the foreign state. Since the parties to these junkets do not, as a rule, give up domicile in Canada, the new unions, while valid where celebrated and sometimes throughout the United States, are usually invalid in Canada. In some cases, the crime of bigamy is committed, although few people are prosecuted for it. These people do not wish to live in concubinage or adultery. They wish to be married to their new partners and to continue to be Canadians. They seek "respectability" and are usually acknowledged in Canadian society as "respectable". Their unions are regarded by their neighbours as marital, or at least "quasimarital". It is not easy to devise a formula that will make their positions regular unless all control over marriage is surrendered. A national divorce law will, however, reduce the number of persons who believe themselves to be obliged to seek relief from intolerable situations in this irregular fashion.

APPENDIX "64"

Submission to the Special Joint Committee of the
Senate and House of Commons on Divorce

by

Professor H. R. Stuart Ryan, Faculty of Law,
Queen's University, Kingston, Ontario.*Suggested Basis for a Canadian
Statute Governing Marriage*1. *Definition*

- (1) Marriage is the consensual union of one man and one woman, as husband and wife, to the exclusion of all others, for mutual fellowship, support and comfort, for sexual relations, and for the procreation, if it may be, and nurture of children.
- (2) At the time of inception, and until legal termination, marriage is potentially a lifelong union. A condition that marriage shall be for a trial period or shall last for a certain time or until the happening of a certain event, or shall be terminable on consent, is void, but a marriage entered into upon such a condition is valid. A marriage may, however, be terminated by dissolution according to the law properly applicable thereto at the time of dissolution.
- (3) Marriage is effected by consent but is completed by consummation, subject to the following provisions. Consummation is effected by sexual intercourse which for this purpose is completed by penetration of the female sexual organ by the male sexual organ, with or without the employment of a contraceptive device or agency, and with or without the emission of semen.
- (4) A marriage may be entered into upon a condition restricting or providing against sexual intercourse or the procreation of children.

2. *Capacity to Marry*

The following provisions apply to all persons who by reason of domicile in Canada are subject to the law of Canada in respect of capacity to marry and to all persons who go through ceremonies of marriage in Canada.

- (1) A person under the age of 16 years is incapable of marrying.
- (2) A person who is not capable of consummating a marriage is incapable of marrying. Incapacity for this purpose may be physical or psychological and may be general or confined to with reference to an individual.
- (3) A person who by reason of mental defect or disease, alcoholic intoxication or the effect of a drug is substantially incapable at the time of the ceremony of understanding the nature of the ceremony, or the nature of marriage and the mutual rights and obligations of the parties, is incapable of marrying.
- (4) A person who is a party to a marriage or has gone through a ceremony of marriage with a person still living is incapable of marrying unless the former marriage, if valid, has been legally terminated by dissolution, or, if invalid has been legally annulled or declared to be null and void.

3. *Forbidden Marriages*

The following provisions apply to all persons who by reason of Canadian domicile are subject to the law of Canada in respect to marriage and to all persons who go through ceremonies of marriage in Canada.

- (1) Marriages between persons related in the following blood relationships with each other, in whole blood or half blood, whether legitimate or illegitimate (or natural), and in the following relationships by marriage with each other, respectively, are prohibited:
 - Parent and child
 - Step-parent and step-child
 - Parent-in-law and child-in-law
 - Grandparent and grandchild
 - Grandparent and grandchild's wife or husband
 - Grandchild and grandparent's wife or husband
 - Brother and sister, by blood
 - Uncle or aunt and niece or nephew, by blood
- (2) No other relationships create or constitute impediments to marriage of persons who by reason of domicile are subject to the law of Canada.
- (3) Nothing herein contained shall validate a marriage of a person by whose personal law the marriage is forbidden by reason of kindred or affinity.

4. Consent

- (1) The contract of marriage requires the free and voluntary consent of the parties to enter into the union described in section 1, based upon adequate understanding by each of them of the nature of the contract.
- (2) Consent to marry is not present where:—
 - (a) One of the parties is at the time of the contract of marriage incapable by reason of mental defect, mental disease, alcoholic intoxication or the influence of a drug incapable of having the necessary understanding or giving the necessary consent.
 - (b) One of the parties has been induced to consent by coercion or by fear.
 - (c) One of the parties is at the time of the contract of marriage mistaken with respect of the nature of the contract or of the union, or with respect to the identity of the other party.
 - (d) One of the parties is at the time of the contract of marriage deceived by misrepresentation or concealment of facts seriously detrimental to the establishment of the contract, including among other things misrepresentation or concealment of:—
 - (i) Pregnancy, except as a result of intercourse between the parties.
 - (ii) Venereal disease, except as a result of such intercourse.
 - (iii) Addiction to drugs or alcohol.
 - (iv) Prostitution
 - (v) Addiction to homosexual practice, sadistic conduct or other abnormal practice endangering the life or health of the other party.
 - (e) The marriage is intended to be a sham or mere form.
 - (f) Consent is given subject to a condition precedent relating to a grave matter, if the condition is not satisfied
- (3) A party coerced, mistaken, deceived or otherwise imposed upon by an act referred to in subsection (2) paragraphs (b), (c), (d) or (f), may by an affirmative act of will approbate the marriage and continue to cohabit with the other party when free to cease cohabitation after being freed from coercion or fear or after learning of the mistake, deception, concealment or other circumstance constituting the defect. What constitutes approbation is a question of fact in each case. The effect of approbation is to validate the marriage.

5. Proceedings with respect to validity or nullity of marriage

- (1) The following proceedings may be brought under this Act in respect of a marriage or purported marriage:
 - (a) An action for declaration of its validity,
 - (b) An action for declaration of its nullity,
 - (c) An action for annulment of an otherwise valid marriage which has not been consummated within a reasonable time after its solemnization.
- (2)
 - (a) Where the alleged defect in a marriage relates to incapacity to marry of the prohibited degrees, an action under subsection (1), paragraph (a) or (b), may be brought by a party to the marriage against the other party, or by another person who has a legal interest that is dependent on the validity or nullity of the marriage.
 - (b) Where the action is brought by a person who is not a party to the marriage, the parties thereto or the survivor of them shall be made defendants or a defendant but shall not be ordered to pay costs.
 - (c) In cases not mentioned in paragraph (a), an action under subsection (1) may be brought by a party to the marriage against the other party.
 - (d) Where the defect relates to consent, the action shall be brought within one year after solemnization of the marriage.

6. (1) An application for declaration of presumption of death of an absent party to a marriage may be made by the other party thereto, where:—
 - (a) The absentee is missing and has been continuously absent for at least seven years next preceding the application and has not been heard of or from during the period of absence by the applicant and by other persons with whom the absentee would probably have been in communication if the absentee were alive, or
 - (b) The absentee has been reported missing and presumed dead by an armed or other government service of which the absentee was a member at the time of commencement of the period of absence, or
 - (c) The absentee has disappeared and has remained absent in circumstances which make it probable that the absentee is dead.
- (2) Notice of the application shall be given by advertisement or otherwise as directed by the court, unless notice is dispensed with by the court as unnecessary in the circumstances.
- (3) On being satisfied that death of the absentee is the most probable explanation of the circumstances, the court shall make a declaration of presumption of death of the absentee.
- (4) On such declaration being made the other party to the marriage may marry or otherwise act as if death of the absentee had been conclusively proved. If the absentee is alive at the time of the making of the declaration, the marriage is dissolved by the declaration.

7. Jurisdiction of Courts

- (1) An action under section 5 may be brought in a superior, territorial, county or district court in any province or territory, if:—
 - (a) Either party to the marriage is, or would be if unmarried and of full age, domiciled within the province or territory, or
 - (b) The defendant resides in the province or territory, or

- (c) The defendant, being domiciled in Canada, appears and recognizes the jurisdiction of the court.
- (2) An application under section 6 may be brought in a provincial, territorial, county or district court in the province or territory in which the applicant resides.

8. *Incidental Powers of the Court*

The court in which an action under section 5 is brought may make provision for the maintenance of a female partner to a marriage or purported marriage, by way of settlement of property, alimony or maintenance, and for the custody and maintenance of children, as could be made in or in conjunction with an action for the dissolution of marriage.



First Session—Twenty-seventh Parliament
1966-67

PROCEEDINGS OF
THE SPECIAL JOINT COMMITTEE OF THE SENATE
AND HOUSE OF COMMONS ON
DIVORCE

No. 19

TUESDAY, FEBRUARY 28, 1967

Joint Chairmen

The Honourable A. W. Roebuck, Q.C.

and

A. J. P. Cameron, Q.C., M.P.

WITNESS:

Howard Hilton Spellman, Attorney and Counsellor at Law,
New York, U.S.A.

APPENDICES:

- 65.—Committee report of the Special Committee on Matrimonial Law—(*Statement of Howard Hilton Spellman, Chairman, before the New York State Joint Legislative Committee on Matrimonial and Family Law*).
- 66.—Chapter 254 of the Laws of 1966—(*Domestic Relations—Matrimonial Actions*) (State of New York, U.S.A.)
- 67.—Report on Recommended Amendments to the Divorce Reform Law of 1966 (*Chapter 254 of the Laws of 1966*). (State of New York, U.S.A.)
- 68.—Proposed Act to amend *Chapter 254 of the Laws of 1966*. (State of New York, U.S.A.)

ROGER DUHAMEL, F.R.S.C.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1967

MEMBERS OF THE
SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS
ON DIVORCE

FOR THE SENATE

Hon. A. W. Roebuck, Q.C., Joint Chairman

The Honourable Senators

Aseltine	Connolly (<i>Halifax North</i>)	Flynn
Baird	Croll	Gershaw
Belisle	Denis	Haig
Burchill	Fergusson	Roebuck—(12).

FOR THE HOUSE OF COMMONS

A. J. P. Cameron, Q.C. (*High Park*), Joint Chairman

Members of the House of Commons

Aiken	Forest	McQuaid
Baldwin	Goyer	Otto
Brewin	Honey	Peters
Cameron (<i>High Park</i>)	Laflamme	Ryan
Cantin	Langlois (<i>Mégantic</i>)	Stanbury
Choquette	MacEwan	Trudeau
Chrétien	Mandziuk	Wahn
Fairweather	McCleave	Woolliams—(24).

(Quorum 7)

ORDERS OF REFERENCE

Extracts from the Votes and Proceedings of the House of Commons:

March 15, 1966:

"On motion of Mr. McIlraith, seconded by Mr. Hellyer, it was resolved—that a Special Joint Committee of the Senate and the House of Commons be appointed to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either House;

That 24 Members of the House of Commons, to be designated by the House at a later date, be members of the Special Joint Committee, and that Standing Order 67(1) of the House of Commons be suspended in relation thereto;

That the Committee have power to engage the services of such technical, clerical and other personnel as may be necessary for the purpose of the inquiry;

That the Committee have the power to send for persons, papers and records, to examine witnesses, to report from time to time, and to print such papers and evidence from day to day as may be ordered by the Committee, and that Standing Order 66 be suspended in relation thereto; and

That a Message be sent to the Senate requesting Their Honours to unite with this House for the above purpose, and to select, if the Senate deems it so advisable, some of its Members to act on the proposed Special Joint Committee."

"By unanimous consent, on motion of Mr. McIlraith, seconded by Mr. Hellyer, it was ordered—That the order of the House of Monday, February 21, 1966 referring the subject-matter of the following bills to the Standing Committee on Justice and Legal Affairs, namely:—

Bill C-16, An Act to provide in Canada for the Dissolution of Marriage (Additional Grounds for Divorce).

Bill C-19, an Act to provide in Canada for the Dissolution and the Annulment of Marriage.

Bill C-41, An Act to amend the British North America Acts, 1867 to 1965, (Provincial Marriage and Divorce Laws).

Bill C-44, An Act to provide in Canada for the Dissolution of Marriage.

Bil C-55, An Act to provide in Canada for the Dissolution of Marriage.

Bill C-58, An Act respecting Marriage and Divorce.

Bill C-79, An Act to amend the Dissolution and Annulment of Marriages Act (Additional Grounds for Divorce).

be discharged, and that the subject-matter of the same bills be referred to the Joint Committee of the Senate and the House of Commons on Divorce".

March 16, 1966:

"By unanimous consent, on motion of Mr. Stewart, seconded by Mr. Byrne, it was ordered—That the subject-matter of Bill C-133, An Act to extend the grounds upon which courts now have jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief, be referred to the Special Joint Committee on Divorce".

"By unanimous consent, on motion of Mr. Stewart, seconded by Mr. Byrne, it was ordered—That the subject-matter of Notice of Motion No. 11 be referred to the Special Joint Committee on Divorce."

March 22, 1966:

"On motion of Mr. Pilon, seconded by Mr. McNulty, it was ordered—That a Message be sent to the Senate to acquaint Their Honours that this House will unite with them in the formation of a Joint Committee of both Houses to inquire into and report upon divorce in Canada, and that the Members to serve on the said Committee, on the part of this House, will be as follows: Messrs. Aiken, Baldwin, Brewin, Cameron (*High Park*), Cantin, Choquette, Chrétien, Fairweather, Forest, Goyer, Honey, Laflamme, Langlois (*Mégantic*), MacEwan, Mandziuk, McCleave, McQuaid, Otto, Peters, Ryan, Stanbury, Trudeau, Wahn and Woolliams."

February 24, 1967:

By unanimous consent, it was ordered—That the subject-matter of Bill C-264, Divorce Act 1967, be referred to the Special Joint Committee on Divorce.

LÉON-J. RAYMOND,
Clerk of the House of Commons

Extracts from the Minutes of the Proceedings of the Senate:

March 23, 1966:

"Pursuant to the Order of the Day, the Senate proceeded to the consideration of the Message from the House of Commons requesting the appointment of a Special Joint Committee of the Senate and the House of Commons on Divorce.

The Honourable Senator Connolly, P.C., moved, seconded by the Honourable Senator Roebuck:

That the Senate do unite with the House of Commons in the appointment of a Special Joint Committee of both Houses of Parliament to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either House;

That twelve Members of the Senate, to be designated at a later date, act on behalf of the Senate as members of the said Special Joint Committee;

That the Committee have power to engage the services of such technical, clerical and other personnel as may be necessary for the purpose of the inquiry;

That the Committee have the power to send for persons, papers and records, to examine witnesses, to report from time to time, and to print such papers and evidence from day to day as may be ordered by the Committee, and to sit during sittings and adjournments of the Senate; and

That a Message be sent to the House of Commons to inform that House accordingly.

After debate, and—

The question being put on the motion, it was—

Resolved in the affirmative."

March 29, 1966:

"With leave of the Senate,

The Honourable Senator Beaubien (*Provencher*) moved, seconded by the Honourable Senator Inman:

That the following Senators be appointed to act on behalf of the Senate on the Special Joint Committee of the Senate and House of Commons to inquire into and

report upon divorce in Canada and the social and legal problems relating thereto, namely, the Honourable Senators Aseltine, Baird, Belisle, Bourget, Burchill, Connolly (*Halifax North*), Croll, Fergusson, Flynn, Gershaw, Haig, and Roebuck; and

That a message be sent to the House of Commons to inform that House accordingly.

The question being put on the motion, it was—

Resolved in the affirmative.”

May 10, 1966:

“Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Roebuck, seconded by the Honourable Senator Croll, for the second reading of the Bill S-19 intituled: “An Act to extend the grounds upon which courts now having jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief”.

The question being put on the motion—

In amendment, the Honourable Senator Connolly, P.C., moved, seconded by the Honourable Senator Hugessen, that the Bill be not now read the second time, but that the subject-matter be referred to the Special Joint Committee on Divorce.

After debate, and—

The question being put on the motion, it was—

Resolved in the affirmative.”

J. F. MACNEILL,
Clerk of the Senate.

MINUTES OF PROCEEDINGS

TUESDAY, February 28, 1967.

Pursuant to adjournment and notice, the Special Joint Committee of the Senate and House of Commons on Divorce met this day at 3:30 p.m.

Present: For the Senate: The Honourable Senators Roebuck (*Joint Chairman*), Aseltine, Belisle, Burchill, Fergusson, Gershaw and Haig—7.

For the House of Commons: Messrs. Cameron (*High Park*) (*Joint Chairman*), Baldwin, MacEwan, McCleave, Peters, Ryan, Stanbury and Wahn—8.

In attendance: E. Russell Hopkins, Law Clerk and Parliamentary Counsel, and Peter J. King, Ph.D., Special Assistant.

The Following witness was heard:

Howard Hilton Spellman, Attorney and Counsellor at law, New York, U.S.A.

The Following are printed as Appendices:

65. Committee report of the Special Committee on Matrimonial Law—(*Statement of Howard Hilton Spellman, Chairman, before the New York State Joint Legislative Committee on Matrimonial and Family Law*).
66. Chapter 254 of the Laws of 1966—(*Domestic Relations-Matrimonial Actions*). (State of New York, U.S.A.).
67. Report on Recommended Amendments to the Divorce Reform Law of 1966 (*Chapter 254 of the Laws of 1966*). (State of New York, U.S.A.).
68. Proposed Act to amend (*Chapter 254 of the Laws of 1966*). (State of New York, U.S.A.).

At 5.10 p.m. the Committee adjourned until Thursday next, March 2, 1967 at 3:30 p.m.

Attest:

Patrick J. Savoie,
Clerk of the Committee.

THE SENATE

SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS ON DIVORCE

EVIDENCE

OTTAWA, Tuesday, February 28, 1967.

The Special Joint Committee of the Senate and House of Commons on Divorce met this day at 3.30 p.m.

Co-Chairman Mr. CAMERON: The committee will come to order.

Senator HAIG: Mr. Chairman, before you commence the proceedings today, I wish to speak on behalf of all members of the committee in extending our very best wishes and congratulations to your co-chairman, Senator Roebuck.

MEMBERS OF THE COMMITTEE: Hear, hear.

Senator HAIG: He is entering his ninetieth year today. He seems to be as bright and as cheery as when I met him six or seven years ago. The reports he presents in the Senate and the work he does on the several committees certainly speak well for his health, vigour and vitality. We extend to you, sir, our heartiest congratulations on entering your ninetieth year.

MEMBERS OF THE COMMITTEE: Hear, hear.

Mr. McCLEAVE: Mr. Chairman, before Senator Roebuck replies, the junior side of Parliament would also like to express its best wishes—although we are not supposed to refer to “the other place” by name, shape or deed. One of our members, Mr. Howard of Skeena, who has had a certain amount to say on Parliament Hill about the Senate, was good enough to extend our congratulations. Mr. Hellyer followed, and this was warmly echoed by all members of the House of Commons. I thought I would pass this message along to this particular meeting. I promise I will not sing “Happy Birthday To You,” although I did show up at the senator’s door earlier this morning to do so, but my voice was perhaps better then than it is now. Happy Birthday, senator!

Co-Chairman Senator ROEBUCK: I have a stock reply to anybody who asks me how I have got to be this old, and how I have kept such good health over the years, and it is always that it is because of the nice company I keep. That applies to this occasion as well as the others.

I thank you all for your good wishes. We have spent many an hour together. Everyone present has been with me for a long time on either the Standing Committee of the Senate on Divorce or on this Joint Committee of both Houses. We have never had any differences of opinion that we could not resolve, and it has all been very pleasant. I thank you all for your good wishes, your kindness and your friendship.

Co-Chairman Mr. CAMERON: Members of the committee, I really did not get an opportunity of saying anything. However, I do want to say that having known Senator Roebuck for a great many years I can endorse the sentiments that have been so ably expressed today. Indeed, I am deeply indebted to him in one respect. During a certain game of golf he explained to me the technique of properly putting the ball. The senator’s instruction was: “Line up the ball with the cup, make your stroke, and do not lift your head until you hear the ball drop into the cup”. I found that to be very, very effective.

I am, of course, indebted to him for many other things, and I join with you all in expressing my best wishes to Senator Roebuck on this very happy occasion.

Co-Chairman Senator ROEBUCK: Thank you. I have a short announcement to make, if we can come back to earth.

I want to tell you that the presence of our distinguished witness at this session of the committee was arranged by Mr. Jarvis, the secretary of the Benchers of the Law Society of Upper Canada. I am a Bencher. I asked him if he could put me in touch with somebody who could bring us the news from the state of New York. I need go no further in that respect, because we have somebody present who can tell us what that news is. We have had a good deal of correspondence, and the result is that we have before us today a very distinguished member of the bar of the State of New York who will tell us the history of what has happened down there.

I asked Mr. Jarvis to be present this afternoon. I saw the Treasurer of the Law Society—he is, by the way, the president although he is called the Treasurer—and asked that Mr. Jarvis be given freedom to come. That was agreed on. Mr. Jarvis has written me, as one of the Benchers, saying that he has been instructed to summon a special meeting of Convocation to be held on Tuesday, February 28, 1967, at the hour of 10:30 in the forenoon, and consequently he is not here today.

However, I should like to acknowledge the assistance I have received from Mr. Jarvis, and express my thanks to him and to the Law Society for their co-operation.

Co-Chairman Mr. CAMERON: Members of the committee, it is now my pleasure and honour to introduce our witness today in the person of Mr. Howard Hilton Spellman. He is an attorney and counselor at law of the State of New York since November, 1922, and has actively practised his profession in New York City from that date to the present time. He was graduated from Yale College in 1920 with the degree of Bachelor of Arts, and from Columbia University Law School in 1922 with the degree of Bachelor of Laws.

He has served as an assistant district attorney of New York County, as an elected member of the New York City Council, and as special counsel to the Governor of the State of New York.

He is the author of eight standard legal text books, including *Successful Management of Matrimonial Cases*.

He has been active in the divorce reform effort since 1925, and has been referred to in the press as "the father of divorce reform."

Mr. Spellman is presently chairman of the Special Committee on Matrimonial Law of the Association of the Bar of the City of New York, through the efforts of which Committee, to a major degree, the New York State Divorce Reform Law of 1966 was enacted.

He was appointed by the New York State Legislature in 1966 as a member of the Council to assist the Joint Legislative Committee on Matrimonial Laws of the Senate and Assembly of the State of New York.

He has served on every committee of the Association of the Bar of the City of New York concerned with matrimonial law for the last three decades, including the Committee on the Domestic Relations Court, the Committee on the Family Court and the Special Committee on Divorce Reform (a predecessor to the existing Special committee on Matrimonial Law.) He has been a member of the board of directors of the New York County Lawyers Association (the largest local bar association in the United States) and, while serving as such director, has been liaison officer from the board of directors to the Special Committee on Matrimonial Law of the New York County Lawyers Association.

Mr. Spellman was chairman of the Joint Committee of the Association of the Bar of the City of New York and, the Community Service Society of New York in the preparation of the Family Court Act of the State of New York and, subsequently, of the rules of that newly-created court.

Members of the committee, I have great pleasure in introducing to you Howard Hilton Spellman, our guest this afternoon.

Mr. Howard Hilton Spellman, Attorney and Counselor at Law, New York City, U.S.A.: Mr. Chairman, in reading the Minutes—in New York we would call them the transcript—of your earlier hearings I noticed that the first witness said that as he was the lead-off witness it was his duty only to get on base; he did not have any other function. Now, that is a reference to the national pastime in the United States, and something at which you people so often beat us. You are now nearing the end of your inquiry and, judging from your previous hearings, I would think that your bases are full right now. I am somewhat in the position of a person, such as a player from one of the southern minor leagues, who is brought up in the hope that he will make a sacrifice hit and thus bring someone else in. I hope the sacrifice will not be entirely mine.

I have prepared no brief because I am not here to urge that you do anything. If I may say so, with great respect, having regard to the fact that I have no vote, you, acting in common with our national legislators in the United States, would not care what I urged you to do anyway. What I hope to do is to lay myself open to questions so that you may get from me anything you might wish to know about the law in the United States, and, particularly, about the most recent study of matrimonial law in the United States that we went through in the State of New York, and through which you are going today.

My I make a few things clear? In the United States the federal government has absolutely no jurisdiction over divorce. Under our constitution there is reserved to the fifty individual states all powers that are not by our constitution specifically entrusted to the national government.

Now, the power with respect to divorce, separation and annulment has never been specifically entrusted to our national government; so that (a) we have no power to grant divorces in the national government, and (b) no federal court can do anything about changing status in matrimonial matter. A federal court in the United States, and by that I mean a United States court, cannot even decide whether it will recognize a foreign divorce. Just mention divorce, separation or annulment in a federal court, and the judge immediately lets you know he is not appointed by the President of the United States for the purpose of considering such status matters, but is bound by the determination of the state courts.

Co-Chairman Senator ROEBUCK: And is there no appeal from the state courts?

Mr. SPELLMAN: There are appeals within the state courts, and there could be an appeal to the Supreme Court of the United States by an individual to protect his personal constitutional rights. We do not require, for example, denial under oath of an allegation of adultery made in a complaint. If we struck out an answer because it was not under oath the matter could go to a federal court. Not in connection with the matrimonial matter, itself, but in connection with the requirement that a defendant was being penalized for refusing to incriminate himself.

The next thing I should like to tell you here, because I want us to speak, so far as it is within my power in a common language, there is no parliamentary divorce in the United States, none whatsoever. No state legislative body can exercise any of the powers that your senators now have had since the 1963 act. The legislatures have no such powers.

Finally, I think I should tell you that we have only three words in the United States for a matrimonial decree, namely: "divorce," which you call divorce; "separation," which you sometimes call limited divorce; and "annulment," which you sometimes call nullification and sometimes annulment.

We do have two other ways in which matrimonial situations can be dealt with. One is the so-called Enoch Arden decree, where a man has been absent for a certain number

of years and the marriage may be declared for all practical purposes at an end. In answer to one of the questions that was put to this committee at an earlier hearing, if such a declaration is made and the absent party shows up later, it does not do him any good, because he is not declared civilly dead; the reciprocal marriage rights have been dissolved because he has been missing, say five or seven years, but this is not a declaration that he is presumed dead.

Another thing we have is a series of local courts which take care of incidents of the marriage without having anything to do with the status. These are, for example, the family court in the State of New York, the special family court in the State of California, and a few others. They do not pass on the status of the marriage, they have nothing to do with divorce, separation or annulment, but they do pass on certain incidents that come to light. No one is seeking to change the status. For example, non-support not connected with a matrimonial case.

When I speak of a matrimonial case, forgive me if I repeat, I am speaking of divorce, separation and annulment.

Co-Chairman Senator ROEBUCK: May I ask in passing if the Enoch Arden law is in all states of the union?

Mr. SPELLMAN: No, it is in over two-thirds of the states. In some of the states it is regarded as ground for annulment, but in two-thirds as dissolution of the marriage on the ground of permanent disappearance. That is the best way I can state it. It is not abandonment, not divorce, it is simply that this man disappeared on a certain day and after a certain number of years his wife believes he is dead, and then the court can declare that, as far as the law is concerned, he does not exist any more. It is usually sufficient for the wife to believe that he is dead but even if she does not, he does not exist any more in law, provided she makes proof of diligent inquiry satisfactory to the court.

Of course, we have other things. For example, if a man is sentenced to life imprisonment in New York, or in the old days to capital punishment, he was simply dead from that moment. In fact, one of our courts once held that where a wife had remarried on the theory that the husband was dead because he was sentenced to death, even though the case was reversed, and the wife had remarried, the man was still "dead." I thought she was in quite a hurry, because the appeal only took four months. However, that is a freak case, and I will not pursue that line further.

Now, you want to hear about the New York experience. First of all, until September 1st of this year, 1967, adultery is the only ground for divorce in the State of New York. I think it should be told to you that this happened purely by accident. Originally, New York, as a colony, and somewhat later as a state, had what you have, that is, divorce by legislature, and they introduced special bills of divorce, or bills of divorcement, and the legislature used to pass on it, and that is the way a person got a divorce.

Approximately 170 odd years ago we had a politician in New York, Alexander Hamilton, who was a member of the New York State Assembly. All of a sudden a number of ladies in New York—in those days they used to do this through a trustee—petitioned the New York State Assembly for a divorce on the ground that their husbands had committed adultery. Well, this was not very good politically for Hamilton, because a lot of these fellows were concerned with their status as politicians. So he put through a bill that said that where the ground for divorce is adultery the courts should have the power to try that case. Whether the ladies got the divorces is unreported history. However, Hamilton was off the hook on that account. But after that the New York State legislature still granted divorces on many other grounds, and, until about 1840, this situation continued.

By the second or third decade of the 19th century somebody discovered in New York that certain political figures were stealing money from the New York treasury, and when they were stealing the money they would get what they called special bills put

through the legislature—a bill to pay Mr. Jones for damage, or something of that kind, and the treasurer of the state would pay him the money, and that was fine. The law-makers decided to do away with that abuse and passed a statute, which is now an amendment to our New York constitution, that thereafter no special bills could be passed by the legislature. A divorce, as I have told you, was a special bill. Therefore, one could no longer get a divorce through the legislature. As a result of that, since the only ground on which courts could grant a divorce was adultery, and since the legislature now could not grant one at all, adultery became the only ground for divorce in New York. We were the only State in the Union with this medieval limitation.

Now, we had a lot of trouble with this. First of all, legislative committees were appointed from time to time, but it was very carefully worked out that they would never have any power to inquire into substantive law. All they could inquire into was procedure at law. All our New York divorce and separation statutes were contained in what was then called the Civil Practice Act, a procedural statute. Of course, these committees would meet, but if a matter of substantive law came up, they said, "This is not procedural," and they never did anything about it. They passed a lot of laws which had nothing to do with the subject we are talking about.

Finally, fortunately, two years ago, we were able to put a bill through our legislature for a joint legislative committee to inquire into substantive law as well as procedural law, and under the brilliant and aggressive chairmanship of Senator Jerome Wilson, this committee went to work in New York and did what you are now doing and held hearings all over the state.

It was interesting to me, as I read your proceedings, to see how closely your hearings paralleled the ones in New York. It was interesting, too, that there was a big discussion in New York about a church opposition to increased divorce. However, interestingly enough, when testimony was taken, no representative of any church—and there were many representatives of the Catholic church who testified—testified that the existing divorce laws were enough to take care of the social problems we had.

When these hearings were held before the New York State legislature—and I happened to be appointed by the legislature to assist that committee as an adviser—I testified on the final day on recommendations of our bar association. A copy of my testimony has been circulated to the members of your committee as the first report of our committee.

Now, all sorts of tricks were tried to stop us from getting a real divorce reform bill through the legislature. One of the things the opposition did say was that everybody was in favour of divorce reform but they were in favour of different kinds of divorce reform. As a result there were 30 bills in the Senate and 20 in the Assembly, and there was never a majority for one of them. Everyone wanted his own bill. Typically, one said "I am in favour of divorce reform and I think it is horrible that we have only one ground at present for divorce, but that one in paragraph 9 is one that, if you are smart enough, you can see makes no difference between the two different ways, so I cannot vote for that one."

Finally, the leaders of the legislature put up a bill—the leaders of the Senate and the leaders of the Assembly—and this was a really bad one. They used to say about monthly magazines that you could take two magazines and combine the best parts of each. But the leaders in this case took 50 bills and combined the worst features of each. I am not even suggesting it was English, but it would not work. There were a multitude grounds for divorce but the procedures were utterly unworkable.

A group of us got together and said: "Either you mean this or you do not. You have been wasting time, we know, for 40 years." We finally put through a draft of a bill, that everybody agreed to. By everybody, I mean the leaders agreed to it. Between the two houses of the legislature we had about 30 sponsors. Even at the last minute we almost lost out, because one group in the Assembly wanted one special bill. If the Senate passed one bill and the Assembly passed another bill with a miniscule difference

in it, it would not be possible to get the job completed, because the legislature was going to adjourn in two days.

However, a consensus bill was finally passed.

We knew when that bill passed that there were some things in it that just would not work. They had a conciliation procedure in it, and I shall speak about that in a few minutes, with your permission. That procedure was so complicated that you never could get a lawyer to take a matrimonial case, because you could spend a year going through the conciliation proceedings, and while you were doing so everybody would rush to Reno if they could spare the 42 days, or to Mexico if they had the \$500 and get a divorce.

When the bill passed, we knew it was not a completely workable bill but, as often happens when you make a general law codification a 67-page statute or a 30-page statute, you do not make it effective until later, so that you can work in between to straighten it out. We believe we have done that.

You also have had circulated to you—if you will forgive me for referring to my own work—our bar association special committee report on the bill as passed. That is the one I am talking about. It suggests the reform that we want now.

I hope you will print this as an appendix to the proceedings of the committee. Whether or not you do so, I have brought to you the actual law passed last year, which I think you might want to have. You will notice in looking at it that there are certain things crossed out and certain other things in italics. This is the way we print amendments to laws in the State of New York. If a thing is crossed out, it is part of an old statute. If it is in italics, it has been added. This is the bill as passed last year.

I should like also to make public for the first time—and I got permission last night from our legislative committee, through its chairman, Senator Delwin J. Niles, to do this—something that even many of our legislators do not know about, because this was “dropped into the box” last night. This is the new bill introduced, as of this morning, in the New York State Legislature, which we hope will clear up the troubles in the existing statute. May I have permission to have this printed also as an appendix?

I think this will show to you how we had to make our way out of our difficulties. I am not saying that you should do the same thing. I do not think we should suggest legislative methods to you. But I feel this illustrates the things we had to overcome.

I noticed—and I suppose this is what you want from me—I noticed you had some inquiry and frankly some exaggeration about what the grounds for divorce are in the United States of America. One of your witnesses said you do not want to be like “our neighbours, the great Republic to the south,” where they have 40 grounds for divorce”. Of course, with all due respect, he just did not know what he was talking about. There are 40 or even 50 grounds for divorce, but we have 50 separate jurisdictions and no state has more than six or seven grounds. The reason there are all these various grounds is because some states express the same ground one way and other states express it in another way. For example, New York State now provides for divorce on the ground of “cruelty such as will impair the health of a person, mentally or physically.” Other states call it “intolerable cruelty”. Other states call it something else.

Some states speak of leaving the husband by a wife, or vice versa, as “abandonment”. Other states call it “desertion”. It is still the same thing.

Incidentally, I think this may interest you. On pages 19 through 22 of your proceedings, when Mr. Hopkins was testifying, he was asked whether the law of England has been largely incorporated into your, you might say, domestic relations law; and he was asked about English decisions. He gave a very excellent summary of the English law on various subjects—when it is “cruelty”, when it is “desertion”.

When I read that through, I realized immediately that I did not have to bring to you any American judicial citations on the subject, because they are substantially the same.

There seems to be less decisional law here on the subject. There does not seem to be much difference.

Co-Chairman Senator ROEBUCK: May I interrupt, to tell you that Mr. Hopkins is sitting on your right?

Mr. E. Russell Hopkins, Senate Law Clerk and Parliamentary Counsel: I would like to thank you for the unsolicited testimonial.

Mr. SPELLMAN: In any event, the decisions on the many statutes are about the same to a great extent in all jurisdictions. For example, a person is not guilty of actionable cruelty because he reads a newspaper in the morning instead of listening to his wife tell how the dry cleaning machine did not work the night before. Even if he swats her once or twice, provided he does not hurt her too much, that is not a ground for divorce.

Even looking at the Scotch decisions, which I thought might be a little different, I found that the decisions were substantially the same thing in regard to the marital relationship. An ordinary matrimonial squabble is something like an industrial hazard—she takes on an industrial hazard by being married—and this is not enough to create a ground for divorce.

Likewise, in regard to desertion, he gets up one morning and has an argument with his wife and loses his temper—he does not like her mother, anyhow—he goes off and stays in a hotel. The next day he is sorry and he comes back. That is not desertion.

As I have stated, the reason it is said there are so many grounds is because we call it by different names.

You are lucky here because you have one Parliament to do the deciding, which is nationally, if you are going to do it; so you are only going to call one thing one thing.

May I give you this—and I do not expect every one to sit and read this chart now—this is a chart which shows you the grounds for matrimonial action in every state in the Union. On the top, there is every ground for divorce, separation or annulment. Here you can see duplications. For instance, you find one ground, “physical incapacity” to complete the marital act. You find another ground, “malformation” so that one cannot do it. The same thing is merely put differently in different places. They call these things by different names in different states.

On the chart, the grounds are followed out opposite each state, and in that way you will find the remedies—whether a given thing is a ground for annulment, divorce, separation, or more than one remedy.

I would like for your information to offer you this. Whether you care to have it printed or not, I do not know. I could not have it reproduced except by making a large chart. It is extremely valuable. It is only accurate up through 1965. I do not think it makes much difference to you whether it is technically accurate as of the present second, as you want to see what is the “grasp” of language that we use for divorce, annulment, separation.

Another thing which I think may be of interest to you deals with one of our difficulties in the United States. That is to find out what the law is in a given jurisdiction. I know this sounds peculiar. One calls the Secretary of State of a given state—I did, when I was writing one of my books—and asking “Would you please be good enough to give me the numbers of your statutes, and I will look them up here.” In some cases they replied that they did not know what we were talking about. Some wrote and said: “This is our law, but there are others we have not used for years.” That is the difficulty in some jurisdictions.

I have one other thing to mention and then I shall have finished. There is no common law of divorce or separation in the United States of America. None. Although our statutes often provide, with regard, for example, for some right to jury trial, that

that right shall be as it existed on such and such a date in 1787, there is no such a thing about divorce or separation. It is all statutory with two exceptions. One of them is in the State of Louisiana, where they follow the French law to a certain extent. There are certain rights for the division of community property which are taken care of as a matter of, you might say, "common law-equity," if that is not a contradiction in terms. In a few states they have somewhat similar provisions, but that is the only community property state we have.

However, I did not mention annulment when I said there was no common law ground. Annulment based on fraud is a ground for vitiating any contract, whether it is a marriage contract or any other contract, and so, if you have an actionable fraud, that can give rise to an annulment. Let me give you an example. One spouse makes the representation in advance of marriage that such and such is the fact. The other spouse marries on that representation but discovers that it is false—usually this would be shortly after marriage, but it might be at the end of seven years, when the "seven year itch" sets in. At any rate, the one discovering the fraud leaves the other. Those are the elements of simple fraud. In some states we still do have what you might call "common law-equity" grounds for annulment of marriage; otherwise it is entirely statutory.

I am going to cover now a rather tender subject, and I hope in my saying this you will understand that I am not expressing any opinion. I have one, but I am not expressing it.

We ordinarily assume that a divorce is given to a wronged spouse against one who commits a wrong. I suppose the most common thing that exists in all the fifty states of this United States is adultery. I do not mean that adultery exists in every one of the fifty, but what I mean is that it is a ground for divorce in every one of the fifty. It is a classical injunction, practically a biblical injunction. If a woman is wronged by her husband committing adultery, she may sue for divorce. But for some years in certain jurisdictions in Canada, a wife could not sue for divorce unless her husband actually kept his mistress in her house. That was the law here until 1833. I think I am right about the year. That was true for certain jurisdictions here.

Aside from that, however, other grounds for divorce in the United States are cruelty, desertion, imprisonment over a period of time and, in some states, for example, addiction to narcotics and habitual drunkenness. These things are wrongs committed by wrongdoers, and the wronged spouse gets the divorce because of the wrong.

But I earnestly ask you to consider the case where there is not any wrongdoer in a marriage but the marriage just plain does not work. I am not talking about a couple of kids who get angry with each other and break up the marriage and the girl goes home to mother after two weeks. I am talking about people who, in good faith, have tried to make a marriage work. Perhaps you can explain the chemistry to me; I cannot explain it to you. It just does not work. These people are unhappy, miserable. The dissolution of such a marriage is what has been labelled divorce by consent.

For example, we have provided in New York now that where there is a separation judgment between the parties and that judgment goes on for three years and the parties live apart under this judgment—and we are about to reduce it to two years, in fact to a year and six months—they can be divorced at the suit of either party who has complied with the judgment.

Senator ASELTINE: You do not have that in New York now?

Mr. SPELLMAN: We have it now, and on September 1, 1967 it will be effective, and we hope it is going to be reduced to a year and six months. Now where there is a judgment of separation between the parties—and at the end it is going to be a separation of a year and a half—even the person who was the wrongdoer in the separation action may then get a divorce. The theory is that there is no sense in perpetuating a paper marriage when the marriage itself is dead.

We have got one other new ground: Where the parties have entered into a separation agreement in writing and have lived apart under that agreement for three

years either party may get a divorce, even though at the time the agreement was entered into, there was no wrongdoing or at least nothing was said about wrongdoing.

People have said this is divorce by consent, but what are the facts? I daresay you have had in Canada, just as we have had in New York—and we have taken testimony of this from judges—the situation where two people really want a divorce and so frame up a case. Until a short time ago there were no grounds in New York except adultery. So if two people really wanted to get out of their marriage because it was miserable, what did they do? They probably framed up a case of adultery.

One judge testified how embarrassed he was to hear these undefended cases, and that is where the curse always is, in the undefended cases. If a case is fought on both sides, you can be pretty sure you are going to get some resolution of the facts. At any rate, the judge in question, a man 83 years old, who had since he was 70 been staying on the bench by reason of a permissive statute, said, “Why is it that, in all the 50 years that I have tried divorce cases, the co-respondent was always a brunette with a pink nightgown. Why was she not just once a blonde with a blue nightgown?”

Then we had the phoney annulment cases. A woman would come in to court; she and her husband could not stand the marriage any more and she would say that he promised to give her a religious ceremony after they got married down at city hall. “He promised to give me a religious ceremony and after three years I found out that he was not going to do it.” That was a fraud and the courts granted the annulment. Why? Because it was ridiculous to keep the marriage going.

Now, if you are going to have the type of divorce that I am talking about, you may remove, and I say this with the greatest of respect and from the depths of ignorance, you may remove some of the dishonesty in your own courts. And you cannot tell me that your judges and your parliamentary committees and now your Senate are not just as embarrassed about this sort of nonsense as the courts of New York were, because you must know that when you have all these hundreds of applications, particularly when they are accompanied by written separation agreements, that these people have it all worked out what they are going to do.

But in New York, and I think this will be of interest to you, to make sure that it is not a whim type of divorce we have provided for conciliation proceedings. No divorce may be granted in New York at all now unless the parties first go through a conciliation proceeding.

I think most of us agree that the term compulsory conciliation is nonsense. If two people do not want to reconcile they will not. But we make them at least once come to court and face each other. We have not seen it work out yet, because our statute is not in effect. But it is interesting to see how it has worked out in California and how it has worked out in Michigan. When these people come before what we call the conciliation bureau—that is a commissioner or councillor or a judge in some states—when they come before this officer of the court one element is removed. They may have wanted to get together but each one was too embarrassed to say he was the one who wanted to come back. I know this sounds funny.

Co-Chairman Senator ROEBUCK: Have you any law with regard to collusion as we have here?

Mr. SPELLMAN: May I come to that in a minute?

Co-Chairman Senator ROEBUCK: Yes.

Mr. SPELLMAN: It was found, if you did bring them to court, that the element of embarrassment was removed and, if you could do something with a marriage counselor, you did it. And this has worked out in some states. How it will work in New York, I do not know.

It is fair to say that if you have these consensual divorces at least you ought to have some proceeding where the state can assure itself that this is not one of these paper marriages and paper divorces.

Now, coming to the question of defences. We have a statute in New York which we are going to repeal under this new bill, I hope. You have a copy of that before you. We have a statute in New York which makes equal guilt a ground for denying a divorce; it makes collusion a ground for denying a divorce or connivance or privity a ground for denying divorce. Since there are courts of equity handling these cases—and in the United States we have some distinction between law and equity—we do not think there is any need for collusion and connivance provisions, simply because a court will not grant a divorce as a matter of justice with such proof. But, on the other hand, the equal guilt theory and recrimination theory seemed to us wrong.

I am going to take what I hope is an extreme case. Let us assume a man is guilty of adultery constantly and the wife is guilty of adultery constantly. If you have the recrimination provision, the court says to them both: "You are so terrible, both of you, that we think you ought to continue to live together. We will not give you a divorce." Then, if you have a conciliation statute and if they go back together for the purpose of trying to reconcile but cannot work it out and if you also have a condonation statute at the same time then, the first time they retire together, they wipe out the ground for divorce. As one of our wits in New York said, it results in a situation where you have copulation at night and conciliation during the day. We hope to repeal that entire statute.

I would like to say one thing more, and then with your permission I would like to answer any questions that members may want to ask. Many people say we should hold marriages together because of the children. This is a standard statement—"We cannot break up this home because of the children." The studies that have been done, and I am not suggesting that they are the final almighty word, indicate that children are liable to fare less well in a disturbed home which is not a broken home than they are in a broken home where they are under the aegis of one parent with visitation rights in the other.

This leads to our most important point: If a separation agreement is going to be recognized—and we in the United States do not recognize an agreement whereby they agree to live apart, but if they are already living apart and file an agreement to settle custody and property rights, we give recognition to that and now allow it as basis for a divorce. Also in the United States, if children are involved, the court may say "I don't care what you agree about with regard to the children, this is what is going to happen." Because an agreement may give custody to a wife even if she is a drunk. So the court reserves the right to decide this matter. As far as the husband and wife are concerned they can agree on property rights. But this is something that should be seriously considered; this is a suggestion. If children are involved and if the parties have entered into a separation agreement, before the court makes its decree of divorce incorporating that separation agreement, it may be wise for the purposes of this case for the court to appoint a special guardian to inquire on behalf of the children how far that agreement is fair to them, because the childrens' lawyer was not around when it was being drawn up. We all know that you can get situations like this. A man may say "Look, I will give you \$50 extra a week if you let me see the kids every second weekend." This is the man who has been so bad that the wife cannot live with him any more. And for the extra \$50 she says "Sure, you can see them." Or you can have the situation where a man with a well-to-do wife will be told "Don't give me any alimony, but don't ever come to see the children. Put in the agreement that you can see them once every six months, but don't come to see them at all."

The suggestion has been made and I think it is probably worthy of your consideration that the rights of the children be guarded in any proceedings such as this. There is one other thing—and then at long last I shall have finished—divorce in the United States, as I told you, is a purely statutory proceeding with the exception of annulment on the ground of fraud. Now in the United States, and this is true in every state, the body which has the right to grant a divorce, separation or annulment—and when I say "body" it is always some court, usually the highest court of original

jurisdiction has the right to do this—they have the right to deal with all ancillary things, custody of children, rights of visitation, alimony. You divide alimony into two parts here, alimony before the trial and maintenance after that. To us it is alimony all the time. The court can consider the question of the support of the children, and where there is a dispute about who owns property, it can straighten the property rights out. We don't have any property division as such except in Louisiana.

I realize the quandary you are in, and, after reading the testimony given by some of the witnesses, it appears that nobody is certain what the power of the Senate actually is with regard to these ancillary things. I don't know what the law of attrition is in Canada. In any event it is absolutely necessary that whatever body is going to take care of the dissolution of marital situations, it is necessary that that body should have the right and the duty, I think, of disposing of these other things. You cannot provide that people should be divorced where there are young children without providing what is going to happen to the children, and you cannot do that unless you decide who is going to support them in some way that can be enforced. You cannot provide for any of these things under our system—and I imagine it is worse here with the possible exception of the power of the Senate—without having some statute saying so. There cannot be any doubt among the judges of various jurisdictions as to what powers they have. I don't say that out of any disrespect for your judges, because, heaven knows, coming from the United States, I would have no right to do so in view of the things that the Supreme Court has been doing in recent months. The story is told that recently the faculty of law at Harvard University asked that the course in constitutional law should be renamed a course in current events. If you are going to give the power to act in this respect, give them the whole power and do not have this division which leads to the unhappy family with the happy ex-husband and wife.

Co-Chairman Mr. CAMERON: Before we start the questioning period, if there is no objection I am going to ask Mr. Hopkins to ask any questions he may wish of Mr. Spellman. I also have Mr. Ryan's name down.

Mr. RYAN: After Mr. Hopkins.

LAW CLERK OF THE SENATE: I have some questions to ask, but please go ahead and I shall ask them later.

Co-Chairman Mr. CAMERON: We will regard you as an ordinary member, Mr. Hopkins, and you can ask any question you wish.

Mr. RYAN: When you made the statement that separation agreements could not be entered into whereby the people would agree to live apart—is this true of all the states in the union?

Mr. SPELLMAN: No, that is not true of all the states. In Connecticut and Massachusetts and, I think, in Michigan—I am not sure of that—they have not held illegal an agreement that the parties shall live separate and apart. In most of the states they would say it is illegal if you put it that they shall live apart, but you can say they may live apart, or if they have have lived apart for a certain time it would be legal. An agreement to live apart in the future like a written agreement to get a divorce is absolutely illegal in all states.

Mr. RYAN: What about a trial separation?

Mr. SPELLMAN: It could be in some states for example, we have a provision in section 200 of the New York Domestic Relations Laws which says that a party may sue the other for separation from bed and board either permanently or for a limited time. We don't have it very much in actual fact because the separation agreements ordinarily terminate in some sort of court proceedings.

Mr. RYAN: On the question of the failure in Canada to be able to lump together the divorce action with support for the children and alimony—this, of course, is due to the divided jurisdiction between the federal Government and the provinces. I wonder if

you don't have the same problem in the United States between the federal Government and the states?

Mr. SPELLMAN: We have no problem as far as the federal Government is concerned because it has no power in divorce matters. But they can do this: If I live in New York and I go to Nevada to get a divorce, presumably under our full faith and credit clause in our federal Constitution, New York would have to give credence to that Nevada decree even though it is based on a ground not recognized in New York. However, New York could assail it on the ground that the person who went to Nevada did not have a bona fide residence in Nevada.

There the federal courts come into it, because the United States Supreme Court has held two things which I think are interesting. Firstly, however good your ground for attack on the divorce in the granting state—not the home state—a person who appears in that state by Notice of Appearance, or goes there to initiate it, is estopped from attacking the validity of that divorce. Secondly, unless the granting state gives permission for a given outsider to attack the divorce, the home state will not grant permission for such an attack. To that extent, the federal Government has control of what you must recognize, by reason of the provision in the United States Constitution that says that each state shall give full faith and credit to a judgment of other states.

LAW CLERK OF THE SENATE: I would like, if I may, to ask Mr. Spellman whether the State of New York has paid any particular attention to the disability under which women labour with regard to domicile?

Mr. SPELLMAN: We do not have that any more in New York.

LAW CLERK OF THE SENATE: Why is that?

Mr. SPELLMAN: Because we have a statute which says they can live where they want. In other words, the old rule was that a woman's domicile followed that of her husband, unless the husband left her in a position where she did not know where he lived or without any means of following. We in New York permit women to have separate domicile from husbands in all matters.

LAW CLERK OF THE SENATE: In all matters, or in all matrimonial matters?

Mr. SPELLMAN: In all matters of all sorts. For instance, we have the county situation. A husband can live in Albany County and his wife can live in New York County, and her will can be probated in New York County. We have tried to give women equality.

Senator ASELTINE: Is that a statutory right?

Mr. SPELLMAN: Yes, that is a statutory right.

LAW CLERK OF THE SENATE: Is this emancipation recent?

Mr. SPELLMAN: The emancipation of all women in New York goes back to about 1870 in most situations. Now, finally, we do not even give up our seats in the subway.

LAW CLERK OF THE SENATE: Is this emancipation from domicile restriction general throughout the United States?

Mr. SPELLMAN: No, by no means. As a matter of fact, I have not studied it precisely, but I would say this exists in much less than half the states, except most states recognize that where a wrongful act of the husband has created the inability of the wife to live with him, her domicile can be that where it originally was.

LAW CLERK OF THE SENATE: Is the residence then the test and not domicile?

Mr. SPELLMAN: Residence is the primary test within the granting state which sets up a residence requirement; but from the point of view of inter-state recognition, domicile is the test—not only actually living there, but intention to return and remain there. So, constitutionally, where you can attack it in another state residence is not enough; domicile is required.

LAW CLERK OF THE SENATE: Did I understand you to say that in New York State a woman, although married, is capable of establishing a separate domicile?

Mr. SPELLMAN: Definitely, even though not divorced, even though, also I may add, she is not without fault herself. In other words, she is just like a man, in some respects.

LAW CLERK OF THE SENATE: As in the old English expression *feme sole*—unmarried?

Mr. SPELLMAN: I think it goes beyond that, because even there certain things had to be done under trustee. In other words, a woman, except for obvious things, is a man in the State of New York.

LAW CLERK OF THE SENATE: And this is not universal throughout the United States?

Mr. SPELLMAN: By no means—I would say in less than half the states.

Co-Chairman Senator ROEBUCK: Before we pass on, I have a subsidiary question. You have given certain rights to women in New York State that have really abolished the old principle of domicile. Have you had any experience with regard to the recognition of the woman's rights internationally?

LAW CLERK OF THE SENATE: Outside of New York State?

Mr. SPELLMAN: Yes, we have had three types of experience. First, with respect to the division of property in a state which permits it—and not necessarily New York State—another state will recognize that as a matter of full faith and credit under the Constitution, even if it gives the woman individual rights.

With respect to guardianship or custody of children, no state has to recognize what another state did if the children are then within this state, because the court says, in effect, "What have you done for them lately? What have you done for them today? Never mind what happened six months ago."

With respect to property rights, you have to divide it into real property and personal property. With regard to the ownership and easements of real property, there is no question that that can only be governed by the state where the real property is.

With regard to personalty you have two divisions. One court has held that if the personalty was in New York at the time the decree was granted, for example in Michigan the New York law will control it. There are other decisions which say that since the parties were there it does not make any difference where the personalty is.

There is one final thing, the question of the case of a corporation and the question of where the transfer books are kept in a certain building, whether the determination of the rights to that personal property represented by shares of stock must be in accordance with the state where the corporation is incorporated. I will not enlarge upon this, because it could take all night, and even then we would have no answer because there are so many decisions. We have one volume in New York, the New York Supplement, and you can find any decision you want on any subject in the New York Supplement, and this is one of them.

LAW CLERK OF THE SENATE: Suppose the Parliament of Canada were to enact that for the purposes of divorce and such other matters as this committee is dealing with, a woman should be as competent as a man, though married, to acquire domicile in any province of Canada, if she is living there with the intention of remaining, and so on, and a divorce were granted in a province other than the province of her husband's domicile, what sort of recognition do you suppose would be given to that sort of divorce in the United States?

Mr. SPELLMAN: I can tell you about New York.

LAW CLERK OF THE SENATE: Well, New York particularly.

Mr. SPELLMAN: I am going on the general assumption I know to be the fact that we are at least as friendly with Canada as we are with Mexico; and in New York State we recognize a Mexican divorce, if the person was domiciled there or if the parties simply consented to submit to the jurisdiction of the court. There are two ways of getting a divorce in Mexico: one by signing a certificate of residence; and the other by both parties submitting themselves to the jurisdiction of the court. There are two cases on this I would like to mention, *Woods* and *Rosensteil*. In one case they had submitted to the jurisdiction of the court; and in the other they signed a certificate of residence. The New York Court of Appeals held they were both good, and the United States Supreme Court has not revised either of them.

LAW CLERK OF THE SENATE: With due deference to Alexander Hamilton, is Massachusetts as enlightened as New York?

Mr. SPELLMAN: I think Massachusetts has a slightly different view about it, because it applies local concepts; and New Jersey does practically nothing about recognizing them.

LAW CLERK OF THE SENATE: New Jersey was not in favour of the American Revolution!

Mr. SPELLMAN: I do not know about that.

Mr. WAHN: Mr. Chairman, I have a number of questions to put to Mr. Spellman. There has been some evidence presented to this committee that might help solve the problems of divorce, about being more careful about legislation permitting marriage. In other words, has your committee given any thought to the possibility that the two problems might be coupled—legislation permitting marriage, and divorce? Take couples who are not happily married. If there were legislation requiring, for example, a medical examination, including mental examination, before marriage, and perhaps counselling by qualified counsellors before the issuance of the marriage licence—can anything be done long these lines?

Mr. SPELLMAN: Yes, this was considered at great length by the state legislature committee. That is not my committee. My committee was the Bar Association Committee. Many people, mostly clergymen, testified that the difficulty with American marriages was that people were not prepared enough in advance for marriage. There were suggestions made for advance counselling, and of the necessity of getting a certificate other than a health certificate which we have to get now in the United States, unless it is waived by a judge. There were suggestions that there be a long period of waiting between the issuance of the marriage licence and the marriage itself, unless again that period was waived by a judge.

The legislative committee made no recommendation on it. Our Bar Association Committee felt that this should be a community activity, actively engaged in by people instead of having people just saying good words about it. But, we did not think the people would stand for a statute on it.

There were all sorts of crackpot ideas on it. One fellow recommended that there ought to be sex education in the high schools; not only instruction on hygiene but on the whole works. One of the senators said that then there would be no difficulty in getting the kids to do their homework.

A great deal was said on this matter, as I gather has been said during your hearings. I just wish somebody were ingenious enough to be able to do something practical about it. If they cannot marry in Montreal they will go to Buffalo, and if they cannot marry in Buffalo then they will go to Maryland.

As I understand your law, the question of the ability to marry and so forth is peculiar to your provinces, and not the country as a whole.

LAW CLERK OF THE SENATE: That is right. The celebration of marriage is within provincial jurisdiction.

Mr. SPELLMAN: If they cannot marry in one province they will go to another. I know of no practical solution to this. Some priests or rabbis will not marry anybody until they have talked things over with them first. I do not know of any church where that is a requirement. That was really the reason for the posting of banns years ago; it gave them a chance to think it over.

Senator FERGUSON: My question follows Mr. Hopkins' question regarding domicile. Mr. Spellman, you said that you had emancipation of women back in the eighteen hundreds in New York, and that gave women, whether married or not, the same right to establish a domicile as a man.

Mr. SPELLMAN: I am sorry; I am afraid I said that our emancipation statutes started in 1870, but all the rights did not come about until fairly recently—in 1917 or 1920.

Senator FERGUSON: My question is: Was the right of a woman to establish her own domicile enacted by statute, and if so can you give me the citation?

Mr. SPELLMAN: It was established in this way; it was not a statute that gave a woman the right to have her own domicile, but it was a statute that removed her disability to set up her own domicile. This was not an absolute statement that a woman could establish her own domicile. This is under our Domestic Relations Law. I am afraid I cannot now give you the citation, but I will send it to you. There is something that says a woman may set up her own domicile for certain purposes, but the other things were statutes for the removal of disabilities.

I do not know whether you know it, but in New York State today if a woman is injured by reason of somebody's negligence, and her husband runs up doctors' bills, he sues the person who negligently injured his wife in an action called "an action for loss of services", which is actually the same kind of action you sue under if your horse gets hurt.

Senator HAIG: In New York State is a divorce final immediately upon the granting of the decree, or is there a period of waiting?

Mr. SPELLMAN: There is a three-month interlocutory period. At the present time after three months the clerk of the court enters the divorce as final. He simply puts a stamp on it and says it is final. Years ago you had to make a new application to the court, but that is not so anymore.

Senator HAIG: With regard to these conciliation procedures I notice in this statement that the plaintiff in the divorce action would apply to the court, and then a supervising justice would handle the problem. Does the judge do it himself, or does he have officers such as social welfare workers to do this?

Mr. SPELLMAN: In the statute as it was passed that is just what it was, and that is pretty ridiculous. In the new statute—we have introduced this recent document that I have brought up here, but the New York legislature will know about it by tonight—and in that document we get rid of all that nonsense.

We do not have a bureau set up in each judicial district. We have one set up in each of the four judicial departments of our state. The courts will have charge of the administration of the bureau, but they will appoint people to work on conciliations. We will not have a judge working on them.

For example, if somebody proves an annulment on the ground that a defendant has another husband living then there would not be a conciliation proceeding. You could get a certificate of no need for conciliation. However, it will not be administered in the clumsy way that is in the present statute.

Mr. BALDWIN: I was interested, Mr. Chairman, in a statement made by Mr. Spellman to the effect that there is in the present law in New York State a provision that where there has been a separation agreement for a period of three years—you can

correct me if I am wrong in that—and the parties have lived separate for that period of three years, then this provides a basis for the dissolution of the marriage.

Mr. SPELLMAN: Yes.

Mr. BALDWIN: Is this a rebuttal of presumption? In other words, is it only necessary for the plaintiff to establish the existence of the written agreement, and that the parties have lived separate and apart for that period, whereupon the dissolution is immediately granted?

Mr. SPELLMAN: It is not automatic. In the first place, the agreement must have been signed and must have been acknowledged before a notary or a commissioner and filed with the county clerk within thirty days after it was signed. The reason for that is to prevent persons coming forward and saying: "We have been living separate for three years under a separation agreement". Here we have the written proof of it. But, even if that is done a person seeking a divorce must prove to the satisfaction of the court that he has lived up to the terms of the agreement for three years. If he has not, then he has not got a chance. I think that answers your questions.

Mr. BALDWIN: I raised this question because we had presented to us recently suggestions in regard to the breakdown theory, which has been the subject of discussion in the United Kingdom and here. We had a bill presented by two of our members which included a provision that where a period of a year has elapsed, this would constitute a presumption of breakdown. I should like to go one step further—

Mr. SPELLMAN: Excuse me, but in our case, it is not a case of creating a presumption of breakdown. This is a ground for divorce.

Mr. BALDWIN: I know that, but there is a resemblance between that and what is advocated here in this theory of condonation. In other words, is it necessary for a plaintiff affirmatively to establish that there has been no condonation during all this—

Mr. SPELLMAN: The very question you raise—

Mr. BALDWIN: —or that there has been no condonation of any matrimonial offence, for that matter.

Mr. SPELLMAN: The very question you raise was raised after this statute was passed, and as a result of that, in this, what I call, secret bill, section 171 of our Domestic Relations Law is going to be repealed. That is the section that covers condonation. We are going to take condonation out altogether, mainly because we think it is ridiculous.

Mr. BALDWIN: Dealing with the matter of domicile, has there been any great outcry in New York by people who have secured a divorce in a jurisdiction where an individual is entitled to her own domicile against the failure of other states or foreign countries to give recognition to the validity of that divorce?

Mr. SPELLMAN: We do not have any trouble in the United States with respect to other states. We may have difficulty with regard to other countries. But, the furthest we go in regard to other countries is to recognize a Mexican divorce which, as I explained, is not based on domicile at all, and certain types of French decrees that are given. We have recognized those French decrees because it happens that in those cases both the husband and wife were living in France when the decree was granted. But please understand that the recognition of a divorce in a sister state is a constitutional requirement, whereas the other is simply a matter of comity.

LAW CLERK OF THE SENATE: We have no such constitutional requirement in Canada. We have no bill of rights.

Mr. SPELLMAN: One of the things which interested me in the Canadian law, and what I was curious about, is what would happen if a person got a divorce in one province and the other party got an annulment in another province. I am not asking you what would happen, but I was just curious about that.

Senator BURCHILL: I am curious to know if Mr. Spellman can tell us if the legislation follows the recommendations of the committee.

Mr. SPELLMAN: Of our committee, do you mean?

Senator BURCHILL: Yes.

Mr. SPELLMAN: I think so. I think there will be a few things where they will not agree with us, but as a whole I am happy to say that the legislation seems to be pretty well in accord with what we want. I think "as a matter of principle" no legislative body ever follows verbatim what is sought by a bar association.

Senator GERSHAW: Mr. Spellman, you enumerated some grounds for divorce aside from adultery. I wonder if you would enlarge a little on insanity.

Mr. SPELLMAN: Insanity is not a ground for divorce under our act, but we do have a procedure whereby if either spouse is shown to be permanently insane—and it is pretty difficult to get a doctor to say so—the marriage may be dissolved; but provision has to be made for the upkeep of that person. In other words, the other spouse can remarry, but upkeep of the permanently insane person is mandatory. That is not a divorce proceeding, and not technically an annulment proceeding. It is one of the two side issues I spoke about earlier. That is under our mental hygiene laws.

Mr. MACEWAN: I want to ask Mr. Spellman if in New York State certain justices of the Supreme Court are appointed to deal entirely with divorce, separation and annulment cases.

Mr. SPELLMAN: Yes, but it depends on the part of the state. In New York, in the first judicial department, we have a special Part, and I am speaking of "Part" with a capital P. In New York we have what is called Part 12, which takes care of matrimonial cases. Special judges are assigned to that during the course of a year. We have about eight different judges in there at different times. If they get overburdened they can send the cases out.

In Kings County they have what is known as Part 5, where they have only matrimonial matters and all things pertaining to matrimonial matters, such as *habeas corpus* proceedings in regard to children, custody, and so on. Upstate that is not true, because they do not have enough of these matters, frankly, to make any difference.

In the original bill in New York it was provided that there should be a conciliation bureau for every judicial district. We pointed out how ridiculous that is, because in one of the judicial districts there were 36 matrimonial matters a year. They wanted us to set up the same machinery, and with the greatest patronage that you ever saw in the world.

Mr. RYAN: Mr. Spellman, I was wondering what degree of resumption of marital relations would prevent the three-year separation period from running.

Mr. SPELLMAN: At the present moment the presumption would arise from a rule of evidence and that is that where a husband and wife had been available to each other—and "available" depends on what the individual judge thinks that means, and it would vary a great deal—neither party is in a position to testify that the other person did not have relations with the other. It is a sort of reverse confidentiality. Under the statute as drawn now, I do not think there would be any difficulty as to whether or not there was a condonation, because I think condonation is going to be abolished altogether. If it is not abolished, the most recent definitions of condonation are not merely getting together once, but it is a question of getting together in the belief that the marriage is saved. We do have this in common, too, that if a man has beaten his wife over a number of years so that she could get a separation, and now a divorce, from him, and takes him back some evening—perhaps she starts crying and he returns and remains over the night—the law in New York says that is not condonation but simply resuming relationship for one night. We are rather peculiar in New York about that, because in many states you hit the bull's eye and you get the cigar, and that is the end of it.

Co-Chairman Mr. CAMERON: Any more questions before calling on Senator Roebuck, I suggest that the committee might like to have printed as appendices the New York City Bar Association Report of Recommended Amendments to the divorce reform law of 1966, of the State of New York, which is chapter 254 of the 189th session of the laws approved on April 30, 1966.

Then, if we have your permission, Mr. Spellman, and I understand we have, I would also include the new proposed law which was introduced into the state legislature today.

If that is agreeable, perhaps someone will so move. Senator Aseltine signifies that he will so move, and I recognize Mr. Stanbury who has not participated thus far, as seconding the motion. Is there any discussion? Then that is agreed.

We also have this other large document, which I hold in my hand, and which I suggest we file as an exhibit so that it will be available for the use of the committee. Is that agreed?

Co-Chairman Senator ROEBUCK: Yes, but not to be part of the record.

Co-Chairman Mr. CAMERON: Just to be an exhibit.

Co-Chairman Senator ROEBUCK: Yes. This document may be very useful. For instance, supposing we take one of the subjects and advise that our law be changed similarly, it will be of great benefit for us to be able to say that certain states of the union have adopted that particular idea. In that way this document would be of great value, but I do not think it will be of very much use just on the record. It would be very difficult indeed to condense it to the size of a record.

Mr. RYAN: If it is filed as an exhibit, Mr. Chairman, would there be only one copy, or would each of us be provided with a copy?

Co-Chairman Senator ROEBUCK: We could supply each member with a photostat of it. I do not want the Printing Bureau to be under the obligation of printing it.

Mr. RYAN: I suggest that each member be given a photostatic copy.

Senator FERGUSON: I agree with that, Mr. Chairman. I realize that printing would be almost impossible, but I think the members should have it in their hands.

Co-Chairman Senator ROEBUCK: Very well.

Co-Chairman Mr. CAMERON: Then is it agreed that this document be an exhibit and that members be provided with a photostatic copy for their use?

Hon. MEMBERS: Agreed.

Mr. SPELLMAN: May I have permission to say one thing more before I finish?

I explained to you that in the United States, on the status question, divorce, separation and annulment are taken care of in each state by the highest court of original jurisdiction. I merely touched on one thing, which I think I should have explained more fully.

In a number of the states we have special courts which pass on incidents of the marriage without passing on the marriage status itself. May I give one short example? In New York State we have what is called the Family Court of the State of New York. It has no power to decree a divorce, a separation, or an annulment, but where such remedy is not sought it has power to provide for support of the children or an order for the protection of the children; for example, if the father is disorderly, breaks down a door, or something of that kind. It is a social court. It also has charge of juvenile delinquency. It handles family problems, and even some quasi criminal problems, such as assaults in the family, but with no power to give criminal judgments. It is a social court. We have done pretty well with it, but strange things have happened. A case was brought before the Supreme Court, which is our highest trial court of original jurisdiction, where a mother sought to get support for her children, but she did not sue for a divorce, or a separation or an annulment. The Court of Appeals, the highest court

in New York State, held that although the Supreme Court was a superior court it had no jurisdiction for support of the children except as an incident to a matrimonial action. The Supreme Court had granted \$350 a month to this mother for the children. This was reversed and the matter went to the Family Court. The Family Court usually awards \$15 to \$18 a week. Here it awarded more than had the Supreme Court. So the husband certainly did not win in this case.

Co-Chairman Mr. CAMERON: May I call on you Senator Roebuck as a distinguished witness?

Co-Chairman Senator ROEBUCK: Yes. I want to ask a question before I say anything about that, before I close these proceedings.

I am interested in what you say about condonation, because you said that you expect to abolish that in this new act, as it is ridiculous.

We have had that here for many years. The purpose of the rule is that when the parties come together, after one has committed an offence, and the innocent party takes the other party back and they live together again, that wipes out the past. The innocent party cannot hold it over the head of the other party, so as to make a continued cohabitation difficult and perhaps utterly impossible.

If you abolish that rule—you may modify it slightly, but if you abolish it—are you prepared to allow the innocent party to keep the right of action against the other party indefinitely—or is there any end to the right to re-commence the battle on the old ground?

Mr. SPELLMAN: Leaving out the question of the Statute of Limitations, because that is not worth talking about, I think any court would hold that, if there has been condonation, with or without a statute, unless the wronging spouse, wrongdoer in the first instance weve to pick up his wrongdoing again, that the mere fact that they were together would not give the wife a ground—the wife could not continue that with this thing hanging over her head. This is a matter equity law. As I said earlier, collusion is in fact not privity. No one is going to create a divorce where the husband and wife set out to frame it up. The abolition of the statute has the effect that condonation is not going to create a situation where the Sword of Damocles is hanging over one's head.

You will find this in the court decisions. In states where they do not have a right of condonation, the statutory removal of the right of condonation, that if the wrongdoer should again pick up his wrongdoing with the condonation—it could be defined as a conditional thing, provided he behaves himself in the future.

You are talking about a man who commits adultery and then goes back to his wife, does that wipe out the act of adultery? I think it is better to look at the physical action. A man beats his wife, and finally she has to start an action against him. He goes back and pleads with her and says he will never do it again. She takes him back. A month later he starts it again. I do not think any court would hold that she was forever estopped by reason of condonation from ever bringing that action. In other words, she does not revive the previous action. What she does is cancel a wrongdoing because of the husband's misconduct. I think there are many decisions on this in many states. We have not any in New York, because we have condonation in the statute.

Co-Chairman Senator ROEBUCK: That is our law. If the guilty party who has been forgiven does not behave himself or herself, it revives the previous difficulties. That is clear enough.

Mr. Spellman, my duty now is to say to you that your adress to us has been simply wonderful. It has been full of material. For instance, take what you said about the Enoch Arden decision, where you actually dissolve the marriage, but one of the parties has been away for a certain length of time, long enough. Here our law is that if one of the spouses is away for seven years, and the one that stays at home remarries, the Criminal Code will not provide a bigamy charge against him.

Mr. SPELLMAN: We have that, too. That is the presumption of death.

Co-Chairman Senator ROEBUCK: On the other hand, if the first husband returns, he is the husband; and the second marriage is a nullity.

Mr. SPELLMAN: Even though the decree has been got? Do they not have a decree?

Co-Chairman Senator ROEBUCK: We do not have a decree.

Mr. SPELLMAN: In other words, in common law cases, where the disappearance exists for seven years, under conditions in which it is reasonable to presume that the person is dead—unless after that the other fellow shows up?

Co-Chairman Senator ROEBUCK: It frees him to a certain extent.

Mr. SPELLMAN: It creates a rebuttal.

Co-Chairman Senator ROEBUCK: It only relieves him from the possibility of a charge of bigamy.

Mr. SPELLMAN: Do you allow the will of the disappeared man to be probated as though he were dead. We have this problem.

Suppose you do, and suppose you have distribution—then suppose he shows up the next day?

Co-Chairman Senator ROEBUCK: This is the law with regard to probate of wills. An application is made to the court for a declaration that the man is dead. If the declaration is made by the court, then the will can be admitted to probate.

Mr. SPELLMAN: In New York we had a different situation, a crazy situation. With regard to personal property, if no distribution was made until seven months after the declaration of death by the surrogate court, that was all right, and the executor or administrator was not in any trouble, as long as he paid the taxes. But, as far as real property is concerned—since real property never goes through the executor but devolves directly as a result of the will—if the man came back later, he could get the property back. Please do not ask me what the law is in the State of New York. Most of us do not know.

Co-Chairman Senator ROEBUCK: You said something about the difficulty the lawyers had with this Enoch Arden situation. Of course, it was a terrible situation, if the husband ever returned.

I am reminded of a story from the English law courts, where some woman said that she had so much trouble with the lawyers since her husband died, and they were probating the estate and that sort of thing, that she almost wished her husband had not died.

Mr. SPELLMAN: It was reported the other day that the son of a very famous man, who thought his father's principles in life were being traduced by what was happening, in an organization to which he belonged, said that if his father came back to life that day he would turn over in his grave.

Co-Chairman Senator ROEBUCK: Mr. Spellman, it is my duty to try to put into words how grateful we are to you for coming here, such a great distance, to give us the benefit of your most mature long-established and thorough knowledge of the law of New York—and in very great measure the law of the whole of the United States.

You have touched upon point after point that we are thinking about here and wondering what we are going to do with it.

Your remarks will be studied most carefully by this committee and I can assure you that we will gain great benefit from them.

I say, on behalf of everyone here, most enthusiastically that we thank you for coming.

Mr. SPELLMAN: I am very grateful that you permitted me to come. I am especially grateful for the opportunity to come in this centennial year, and you will notice that I wear the decoration here.

Co-Chairman Senator ROEBUCK: May I explain for the record that the witness has on his lapel the Canadian Centennial insignia, which was given to him by the Canadian Secretary of State, the Honourable Judy LaMarsh.

The committee adjourned.

APPENDIX "65"

Committee Report
Special Committee on Matrimonial Law

Statement of Howard Hilton Spellman, Chairman,
before the New York State Joint Legislative Committee
on Matrimonial and Family Law.

On behalf of the Special Committee on Matrimonial Law of the Association of the Bar of the City of New York, for which Committee I speak as its Chairman, I thank your Committee for this opportunity to present, at your invitation, recommendations for changes in the Matrimonial statutes of the State of New York. Our expression of thanks should not be regarded by you as a perfunctory introduction to my statement; *because this is the first time in the history of New York State that a legislative committee has been authorized to consider changes in SUBSTANTIVE matrimonial law.* As you know, there have previously been legislative committees dealing with the subject of matrimonial law; but these committees have been confined by the resolutions creating them to study of *procedural* law. To put it mildly, the creation of the previous legislative committees should be regarded, at most, as an idle gesture giving lip-service to the proposition that there must be some legislative answer to the public demand for change in our matrimonial statutes.

For almost half a Century the Association of the Bar of the City of New York, through various committees appointed for that purpose, has vainly tried to impress upon the legislature the desirability of modernizing the divorce law of New York, which has remained virtually unchanged since its passage in 1787. The report of our Special Committee to the Association for 1964-1965 succinctly stated the problem as follows:

"New York's medieval divorce statutes, which, for one hundred fifty years, have without change provided only one ground (adultery) for divorce, have been the subject of adverse criticism for many decades. It is significant that New York is the *only* State in the Union which has this absurd statutory restriction. All attempts at realistic amendment have failed. The Association of the Bar through various special committees has vainly attempted to ameliorate the situation, which, as has been repeatedly stated, has led to disrespect for law and the substantial probability of recurrent fraudulent practices. The legislature has heretofore turned a deaf ear to every plea. Indeed, it has been virtually impossible to get any legislator even to introduce a bill covering this subject. There has been a Joint Legislative Committee on Matrimonial Law, but that Committee was confined by the resolution of its creation to a study of *procedure* and was denied the power to consider substantive changes in the law."

Happily, the situation has now been changed through the courageous act of the New York State Legislature during its 1965 session. The following further excerpt from the report of our Committee to the Association is, we believe, of more than passing historical interest:

"As the result of its research during the summer and fall of 1964, your Committee determined that an effort should be made, forthwith, to create a New York State Temporary Commission on Matrimonial Law with full power to consider all substantive questions in the field and to be charged with the duty of reporting its recommendations to the legislature for action. The Commission

approach had recently been demonstrated to be the soundest method of obtaining substantive broad amendments to the law (for example, the Commission on Ethics and the Commission on Revision of the Penal Law). In addition to the problem of grounds for divorce, many other situations needed reconsideration in the light of amendments made to statutes when the matrimonial law provisions were transferred from the Civil Practice Act to the Domestic Relations Law in the course of court reorganization. Other substantive problems (for example: the effect of the decision of the Court of Appeals in *Viles v. Viles*, 14 N.Y. 2d 365, casting doubt on the validity of separation agreements made in contemplation of divorce; and the matter of the validity to be afforded to Mexican divorces, granted upon the personal attendance of one party in Mexico and the appearance of the other party through a duly authorized Mexican attorney) cried for legislative action. However, individual bills to cover each problem probably would be bogged down in the legislative machinery; but it was believed by your Committee that a Commission could consider all of the problems and make a comprehensive recommendation for legislative action.

"In collaboration with New York State Senator Jerome L. Wilson of the 22nd Senatorial District, a bill was prepared by your Committee for the creation of a Temporary State Commission on Matrimonial Law. Senator Wilson introduced this bill in the Senate and an identical bill was introduced by Assemblyman Percy E. Sutton in the Assembly. Your Committee then undertook a broad program of public education in support of the bill. Numerous television and radio programs were devoted to this subject. The New York Times gave the bill its strong and repeated editorial support. A meeting of representatives of other bar associations and of social service agencies was held at the House of the Association on April 26, 1965 and this meeting was addressed by the President of the Association and by your chairman and methods were devised for enlisting support for the Wilson-Sutton bills.—Instead of passing the bill for the creation of a Temporary Commission, a concurrent resolution was passed unanimously by the Senate and all but unanimously by the Assembly creating a new Joint Legislative Committee with full power to consider all substantive as well as procedural aspects of matrimonial law and with the duty of reporting to the legislature on December 15, 1965. The concurrent resolution also provided for the creation of an Advisory Committee of ten members to assist the Joint Legislative Committee. Thus, in substance, the concurrent resolution has accomplished all of the purposed envisioned by the Wilson-Sutton bills. That the resolution was not intended as a placating gesture is evidenced by the fact that the Joint Committee has been given an appropriation of \$50,000!

"Your Committee intends to work during the present summer [1965] in close co-operation with the Joint Legislative Committee in the hope that that Committee will recommend passage of a broad statute resolving some of the difficult problems in the field of matrimonial law, including the creation of a realistic divorce law."

Our Committee was honored by the appointment to the Legislative Advisory Council of two of our members, Vincent J. Malone, Esq., and me.

Discussing past frustrations and contrasting them with the present hopeful outlook, Honorable Samuel I. Rosenman, President of the Association of the Bar, in his most recent annual report said:

"For many years now Presidents of the Association have been compelled to report complete failure of the Association's efforts to ameliorate New York's medieval laws dealing with divorce. It is with gusto that I report this year significant progress towards this long desired reform; and that this progress can be attributed in part to the work of our Association . . . Thus, the people of the State of New York now have a means by which intelligent consideration and

impartial consideration can be given to the need not only for the modernization of the laws relating to divorce but many other statutes relating to matrimonial law."

Some cynics have been reported as saying that the creation of the Joint Legislative Committee was but another meaningless placating gesture and that the Committee would accomplish nothing. The diligence of your Committee has belied this direful prognostication. You have appointed an able and energetic chief counsel and staff. The individual members of your Committee have applied themselves with singular devotion to the task appointed you. Our Committee can state these facts from close, personal observation, since we have been privileged to work with your Committee staff and members. As your Committee knows, we have undertaken in-depth studies of the problems involved and have been aided by the generous help of Columbia University Law School and New York University Law School, which great institutions have assigned student researchers to assist our Committee members. The studies prepared by us will, of course, be made available to your Committee at any time you may desire.

A major function engaged in by your Committee during the past few months has been the holding of hearings throughout the State (in New York City, Buffalo and Albany). At these hearings, testimony has been presented by a vast number of citizens and organizations familiar with the field which you are investigating. Not only Justices and lawyers but also representatives of all religious faiths and of social work agencies have testified. The proof adduced at these hearings has established beyond peradventure of doubt that the problems created by New York's antiquated matrimonial statutes are statewide and are not peculiar to any single portion of the State. The hardships imposed by our present statutory straightjacket adversely affect citizens of cities, towns and villages, of all economic strata and of all religious faiths.

From the inception of the work of our Special Committee, we determined that it was our duty to approach the problems presented as *lawyers*. Thus, we have first considered the evidence, gleaned from the hearings held by your Committee and from our own knowledge in the courts of matrimonial practice, have then determined the ultimate facts which we deemed established by that evidence and, finally, upon consideration of these ultimate facts, have prepared our recommendations. It is our conclusion that, at the very least, the following facts have been established by the evidence:

A

New York is the only state in the Union which has a single ground (adultery) for divorce. This medieval approach is an absurd anachronism, since, in other respects, New York State is recognized as a leader in social legislation.

Historically, it is of importance to note that the divorce statute establishing adultery as a sole ground was not originally intended by the legislature to have that restrictive effect. Prior to the enactment of the statute, divorces were granted through application to the legislature, which issued a "bill of divorcement" in individual cases. When the number of applications for divorce on the ground of adultery became burdensome to the legislature, a committee headed by Alexander Hamilton, prepared a statute giving power to the courts to grant decrees in divorce cases where adultery was the ground of complaint. But this did not mean that a New York divorce could not be granted on other grounds; because the legislature continued to grant "bills of divorcement" for many and varied faults on the part of the defendant. Indeed, divorces through the legislative process persisted for a great many years after the enactment of the divorce statute, until New York State's constitutional inhibition prevented the continuance of this practice.

B

For one hundred fifty years the New York statute making adultery the sole ground for divorce has persisted. Beyond any question, this limitation has led to grave and

New York's restrictive legislation. It is significant that no representative of any religious group testifying in the courts of your hearings has asserted that the present single ground for divorce is sufficient to meet existing social needs.

C

unhappy social consequences. Marriages which, in fact, have long since ceased to exist are nevertheless binding legal relationships. The testimony of every social agency before your Committee has presented a veritable chamber of horrors of the consequences of

Almost two decades ago, a grand jury in New York County made a presentment, wherein it was asserted that, because of the narrow single ground for divorce in New York, perjury was rampant, particularly in undefended cases (which presently constitute in excess of 95% of all trials in matrimonial actions). During the course of your Committee's hearings Justices of the Supreme Court at the first New York hearing and lawyers experienced in the trial of matrimonial cases at the Albany hearing testified in no uncertain terms that it is obvious in most uncontested trials of matrimonial cases that perjury is being committed. Nevertheless, the Justices are compelled to grant divorces on uncontradicted testimony, even though they do not believe it, and the failure to grant a divorce in such circumstances will be reversed on appeal.

It has been estimated by Justices of the Supreme Court and by lawyers experienced in these matters that the trial of an undefended divorce case takes, on the average, between seven and seven and one-half minutes. These trials are a formal farce. A relationship, which has been recognized in the preamble of the resolution creating your Committee, as one of the most important human relationships, is legally dissolved in a rubber-stamp proceeding before an embarrassed judge, who is compelled by law to put his signature on a decree, which he and everyone else in the case knows is probably based upon an untruth.

In New York an additional tragi-comedy has been added to our undefended calendars. As statistics amply demonstrate New Yorkers use an action to annul a marriage as a substitute for a divorce action and the statistics further establish that New York has the highest rate of annulment actions of any state in the Union. Again, these actions to annul a marriage are often predicated upon an agreement between the husband and wife to end their marriage by a perjurious conspiracy. Precise testimony on this subject was adduced before your Committee through the testimony of one of the most experienced jurists in New York State. Another Justice of the Supreme Court testified that he and his fellow-judges were so embarrassed by what is going on in this field that they actually dreaded an assignment to sit in the parts of the court considering matrimonial actions. A thoughtful author has explored the absurdity of substituting actions for annulment for actions for divorce in an article entitled "New York, The Poor Man's Reno."

During the course of your hearings, Justices of the Supreme Court and lawyers testified that there is a virtual rebellion on the part of judges and reputable lawyers to end this orgy of perjury and disrespect for the law by the enactment of realistic divorce statutes.

D

A classical method of avoidance of New York's single ground statute (for those who can afford it) is to obtain a divorce in a state other than New York or in Mexico. In out-of-state divorces, where the parties actually reside in New York, perjury is completely demonstrable and no expert testimony is needed to establish its existence. The plaintiff "establishes a residence" for the period of time required by the state in which he or she seeks a divorce. In most jurisdictions, the plaintiff is required to testify that he or she not only lives in that state but intends permanently to reside there, thus establishing not only residence but domicile. The fact of the matter usually is that the person so testifying has no intention of remaining in the divorce-state, but actually has transportation arranged in advance for return to New York directly after the out-of-state trial is completed.

In Mexican divorces, there is not even a requirement that domicile be proved. In fact, the Mexican proceeding can hardly be regarded as a trial. Yet, by a strange

analogy, it would presently appear that a Mexican divorce is safer from attack in New York than an out-of-state divorce, because an out-of-state divorce can be attacked (by others than the parties who appeared by attorney) upon the ground that there was no domicile.

The tragedy of out-of-state and Mexican divorces arises from the fact that the trials of those cases *never* give attention to the protection of the children of the marriage. The customary practice (because all of these divorces are based upon an advance agreement of the parties) is that a separation agreement is entered into in New York. One of the parties then goes to the foreign jurisdiction and "establishes a residence." The other party authorizes an attorney of the foreign jurisdiction to appear for him. The separation agreement is offered in evidence in the foreign jurisdiction and is mechanically approved by the court. There is no inquiry as to whether provisions for the support of the children or for custody or visitation are in the best interest of the children. There is no inquiry as to the pressures applied by either party against the other in formulating the separation agreement. There is not even an inquiry as to whether the amount of support provided for a wife is sufficient or realistic. The foreign court acts as a rubber-stamp and there the nauseating process ends.

E

The cruel economic consequences of New York's single-ground statute have been the subject of extensive testimony before your Committee. It is perfectly obvious that the ability to escape to a foreign jurisdiction is non-existent in the case of that vast segment of our population that cannot afford the expense of such an escape. We are confronted by the fact that persons in the lower-income group who are unwilling to be parties to a perjurious New York State divorce or annulment action are completely unable legally to dissolve an insupportable marriage, no matter how great the hardship to both parties and to their children may be. Thus, we have, as several witnesses testified, "one law for the rich and no law for the poor."

Although there was no testimony at the hearings conducted by your Committee with respect to the economic impact of our one-ground statute upon people of means, our Special Committee is able to state of its own knowledge that this impact can be unjustifiably grotesque.

As I have heretofore stated, almost all out-of-state divorces are initiated by a separation agreement, which is obviously the result of bargaining between the parties. But an out-of-state divorce will not be granted unless both parties appear by attorney in the foreign jurisdiction. Thus, even though both parties may want a divorce, either one of them is in a position literally to blackmail the other by insistence on economic considerations out of all proportions to the realities of the case. Lawyers practising in the field of matrimonial law know that in many instances one of the parties will demand excessive economic compensation (whether in the form of high alimony, a substantial property settlement, or, conversely, low alimony and no division of property) as a price for agreeing to appear by attorney in a foreign jurisdiction. Even more terrible is the exaction as a price for such appearance of the custody of children and rights of visitation, without regard to the welfare of the children. The children are not represented by counsel either in the preparation of a separation agreement or in the trial in the foreign jurisdiction. Although they are euphemistically called "wards of the state" their protection is minimal or non-existent and it is no answer to this tragic proposition that a New York court may, acting as *parens patriae*, later change custodial and visitation determinations of a foreign court; because, when proceedings (usually by writ of habeas corpus or petition in equity) are initiated to attempt such change, the children are often more damaged by the trial of such proceedings than if they had not been started. We have all witnessed the pitiful situation where a child is called into court and questioned, either in or out of the judge's chambers, in a custody proceeding.

F

The representative of social work agencies testified before your Committee with ample supporting proof including the recitation of the facts in individual cases that,

because of New York's ground statute and the inability of the lower-income segment of our community to escape to another jurisdiction for the purpose of obtaining a divorce, there is a general and wide practice, which is characterized as "self-help." In simple language, this means that many people who cannot obtain a divorce are virtually compelled, by reason of their natural instincts and sometimes through economic necessity, to set up irregular relationships and create "new families" without benefit of clergy.

The consequences of such "self-help" result in many human tragedies. Children born of this "irregular family" are illegitimate. Upon the death of one of the mates, serious estate questions arise. Blackmail is rampant, being freely indulged in, for example, by a man who has deserted his wife and who then, upon discovering that she is living "in sin" with another man, threatens exposure unless he is paid off. "Self-help" often arises where a deserting spouse vindictively keeps his or her mate in a "marital limbo."

In the process of breaking up and re-forming families in the illegal fashion known as "self-help," many deserted wives and children are added to the relief rolls.

Although I have heretofore referred to the "self-help" situation in connection with the lower-income segment of our community, it should be borne in mind that "self-help" is often present in the economically well-fixed group. This subject was covered in-depth in your Committee's Albany hearing. The reports of decisions in the various Surrogate's Courts amply demonstrate this point.

G

Almost every witness who testified at your hearings emphasized the necessity for the State to adopt a realistic attitude toward preserving marriages. It seemed to be the consensus that some marriages can be preserved if the court is empowered to take steps toward that end. All the witnesses recognized that if a marriage has completely ended and the judgment merely memorializes that fact, no proceeding will be able to rescue such a non-marriage. On the other hand, it was urged that the bringing of a divorce action does not, *ipso facto*, mean that the marriage is truly at an end. Although it is stated in many decisions that the state is a party to every marriage, the power of the courts to attempt amelioration of the social situation leading to a divorce action is severely limited. The witnesses were unanimous that such power should be created.

* * *

Based upon the foregoing factual considerations and numerous others within the knowledge of the members of our Special Committee, we make the following recommendations for modernization of New York's matrimonial laws:

I

No divorce shall be granted unless the court makes a specific finding based upon all of the evidence that the disruption of the marriage is irreparable, that there is no reasonable expectation of reconciliation and that there is no reasonable probability that the marriage can be preserved.

The concept underly this recommendation is that the State, through its courts, can realistically assume its technical role as a party to every marriage. The statute may be implemented by granting to the court the power to bring in witnesses of its own accord.

It is our submission that the requirement for such a finding, as a prerequisite to the granting of a divorce, is far superior to a mere reconciliation proceeding. A "compulsory" reconciliation proceeding is a contradiction in terms. It is clearly meaningless if the defendant in a matrimonial case refuses to participate realistically in the same or if either party refuses to be reconciled.

On the other hand, the mandatory requirement for a finding as a matter of jurisdiction will enable (and indeed require) the court to make every effort to reconcile the parties, utilizing not only the process of the court to bring in as witnesses all

persons who may be helpful in reaching a solution of the marital problem, but also employing, if deemed by the court to be desirable, the help of social service agencies, probation officers and the facilities existing in the Family Court of the State of New York.

We do not recommend repeal of the present statute which grants power to the Appellate Divisions to set up reconciliation proceedings; but we urge that these should be an adjunct to the finding to be made or refused by the court.

The real question is whether a marriage can be saved. If a reconciliation or conciliation proceeding is deemed necessary for a resolution of that question, the court should be empowered to initiate such a proceeding.

A jurisdictional finding, such as we are here recommending, should be required in all divorce cases, including those brought upon the present permissible ground of adultery and those brought upon any of the additional grounds which I shall presently suggest.

II

It is recommended by our Special Committee that, in addition to the present ground of adultery, the following grounds for divorce be added to the New York statute:

1. Abandonment for one year.
2. Cruel and inhuman treatment of the plaintiff by the defendant.
3. Habitual drunkenness substantially affecting the welfare of the other spouse or the children of the marriage.
4. Chronic drug addiction substantially affecting the welfare of the other spouse or the children of the marriage.
5. Conviction of a felony in a state or federal court pursuant to which conviction the defendant has been actually incarcerated for a period of at least two years.
6. Living apart voluntarily for two years without cohabitation. However, this action or special proceeding shall be entitled without a denomination of either party as the plaintiff or defendant. Furthermore, this action or proceeding shall be termed "an action [or proceeding] for dissolution of marriage" and relief shall be granted to both parties, as justice requires.

The grounds suggested by us are those which, in the experience of lawyers and social workers and in the testimony adduced before your Committee appear to be the most disruptive of the marriage relationship. Each of these grounds is now operative in many states, some of them for a long period of time.

The text embodying each of the grounds recommended by us is, we believe, sufficiently clear to require no explanation. However, a few comments may be helpful:

Grounds No. 1 and No. 2 (abandonment and cruel and inhuman treatment). We suggest that the words indicated in our recommendation be used. These words already exist in the New York separation statute. They have been construed by the courts time and time again. By using these words we would avoid unnecessary future litigation as to the meaning of substitute phrases.

Grounds No. 3 and No. 4 (habitual drunkenness and chronic drug addiction). We have emphasized that the improper conduct must substantially affect the welfare of the complaining spouse or the children of the marriage. We do not consider habitual drunkenness or chronic drug addiction, standing alone, as sufficient ground for legal termination of the marriage; but where such conduct actually substantially affects the welfare of the family, the marriage should be ended.

Ground No. 5 (conviction of a felony) has been limited to those cases where there is actual incarceration for a period of at least two years. We believe that conviction,

alone, should not be a ground, because the shock attendant upon the conviction of a spouse may lead to a hasty and ill-advised commencement of an action for a divorce.

Ground No. 6 (living apart voluntarily) creates a new type of proceeding. Where the spouses have separated and have actually lived apart for two years or more, there would seem to be no reason why the legal bond of matrimony should be continued, *provided the court makes the finding required in our first recommendation*. There are some marriages which simply do not work out, despite every effort on the part of both spouses. There is no need to continue such a marriage *as a matter of law* when, as a matter of *fact*, such a continuance would only lead to misery on the part of husband, wife and children.

The proceeding here envisaged eliminates the question of guilt and removes the necessity for the parties, who have parted in a civilized manner, to become bitter protagonists in an adversary proceeding.

As the testimony before your Committee has shown and as the practice of the members of our Special Committee has amply demonstrated, many very young people marry hastily and learn, almost immediately after their marriage, that their union was a mistake and should never have taken place. Such young people, under the present law of New York, are confronted with the fact that, unless adultery is committed (or unless they are willing to enter into a conspiracy falsely to establish the existence of adultery or some legal ground to obtain an annulment, or are enabled to escape to another jurisdiction for the purpose of obtaining a divorce) they are legally bound to a status which has no relationship to the actual facts of their lives. It is not uncommon for such young people to separate and to continue living apart. In these situations, the establishment, as a ground for divorce, of voluntarily living apart for a period of two years or more, would seem to be the *only* reasonable solution. The two-year requirement should give ample time for the young couple to ascertain that their separation was not due to pique or to some hasty decision based upon a transient anger. In a somewhat different context, the same reasoning applies to couples who have separated for two years or more after a longer marriage.

Under present conditions in New York (and, indeed, in almost every other state), there is no statutory provision for screening prospective brides and grooms so as to evaluate, in advance, the probabilities of a marriage being successful. It is easier and cheaper to get married than to get a license to drive an automobile. Although ministers of the various faiths individually insist upon some sort of counselling before they consent to perform a marriage, this is certainly not the general rule. Nor are parents an effective brake on sudden and ill-advised prospective marriages. It has often been remarked that the surest way to get young couples quickly married is for the parents to object to the marriage.

Our Special Committee suggests that there be evolved some type of community action to establish advance counselling prior to marriage. We are not sure that any statute directed toward this end would be acceptable to the community; but we respectfully suggest that this matter should be covered in your Committee's report to the legislature.

III

In the case of *Viles v. Viles*, 14 N.Y. 2D 365, the New York Court of Appeals, by a divided Court, decided, as a matter of statutory construction, that a separation agreement between a husband and wife was subject to attack and vitiation if made in contemplation of a divorce or in furtherance of obtaining a divorce. The Court was construing Section 5-311 of the General Obligations Law, which, in substance, provides that the parties to a marriage may not contract to alter or dissolve the marriage.

As was pointed out in the dissenting opinion in the Court of Appeals, this determination might make it virtually impossible for parties who are contemplating a divorce to settle, as a result of bargaining and without rancor, such questions as support and the division of property. Thus, bitterness might well be evolved in a situation where such an attitude could have been avoided by agreement.

From the earliest days in New York, separation agreements have been a standard practice. Even before the "female emancipation statutes," giving women the right to enter into contracts, it was quite usual for a husband and wife to contract as to support and division of property, the wife acting through a trustee, who signed the contract in her behalf. In our modern era, separation agreements in situations where a marriage no longer exists in fact, are encouraged by all reputable lawyers in order to avoid painful and unnecessary litigation, harmful both to the spouses and their children.

As I have stated, the decision of the Court of Appeals in the *Viles* case was based upon the majority of the Court's construction of a statute. It was not and has not been suggested that a separation agreement is immoral if it does not *require* the parties to obtain a divorce. Indeed, the law is well settled that an agreement making a divorce mandatory is void both upon legal and moral grounds. The question presented is whether a separation agreement, made in contemplation of a divorce or without any such contemplation, but containing no provision requiring either party to obtain a divorce, must, as a matter of statutory construction, be denied enforcement.

Our Special Committee strongly recommends that the doubt which has arisen by reason of the *Viles* decision be removed, in order that the parties to an unfortunate marriage, who have in fact separated, may not be required to go into court and litigate questions which could easily be settled by reasonable negotiation. Accordingly, we recommend that Section 5-311 of the General Obligation Law be amended by adding thereto a sentence, reading as follows:

"An agreement, heretofore or hereafter made between a husband and wife, shall not be considered a contract to alter or dissolve the marriage unless it contains an express provision requiring the dissolution of the marriage."

IV

Section 235 of the Domestic Relations Law provides, in effect, that the contents of the files in matrimonial actions shall not be publicly disclosed and that, if the evidence on such trials be such that public interest requires that the examination of the witnesses should not be public, the court may exclude all persons from the room except the parties to the action, their counsel and the witnesses, and in such case may order the evidence, when filed with the clerk, sealed up, to be exhibited only to the parties to the action or someone interested, on order of the court.

This statute is a salutary one, aimed at granting protection against that type of publicity, which could make even more unfortunate and distressing the fact that a divorce, annulment of separation is being sought.

Although it is obvious that some type of protection ought to be afforded in cases involving the custody of children, there is no statutory provision to that effect. Accordingly, our Special Committee recommends that Section 235 of the Domestic Relations Law be amended, to include within its protection, cases involving the custody of or right to visitation with any child of a marriage.

* * *

On behalf of the Special Committee on Matrimonial Law of the Association of the Bar of the City of New York, I thank you for your having so attentively listened to our recommendations. We believe that they are practical and are legally, socially and morally sound. They are based on careful studies. If your Committee so desires, we are prepared to present to you the actual texts of proposed statutes embodying our recommendations. We are also available to work with you on the drafting of such statutes as you may determine should be introduced in the legislature by your Committee.

After over a century of frustration, we are at the point where, through your Committee, substantial legislation can be introduced to ameliorate the disastrous effects of New York's medieval matrimonial statutes. The minute of truth is here. There is no justification for, nor can there be any excuse for, procrastination. We pray that the citizenry of New York may soon receive the benefit of the painstaking work to which your Committee has so devotedly addressed itself.

November 29, 1965

APPENDIX "66"

Legend: Deletions are indicated by square brackets. Changes or additions in text are indicated by italics.

1966 REGULAR SESSION

Domestic Relations—Matrimonial Actions

CHAPTER 254

An Act to amend the domestic relations law and the general obligations law, in relation to certain matrimonial actions, establishing a conciliation bureau in each judicial district, prescribing its functions, powers and duties, and repealing section one hundred fifty-four-a of the judiciary law and sections one hundred seventy, one hundred seventy-one, one hundred seventy-four and two hundred one of the domestic relations law, relating thereto.

Approved April 27, 1966, effective as provided in section 15.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section eight of the domestic relations law, as last amended by chapter two hundred sixty-five of the laws of nineteen hundred nineteen, is hereby amended to read as follows:

§ 8. Marriage after divorce [for adultery]

Whenever a marriage has been [or shall be dissolved, the complainant may marry again during the lifetime of the defendant. But a defendant for whose adultery the judgment of divorce has been granted in this state may not marry again during the lifetime of the complainant, unless the court in which the judgment of divorce was rendered shall in that respect modify such judgment, which modification shall be made only upon satisfactory proof that three years have elapsed since the decree of divorce was rendered, and that the conduct of the defendant since the dissolution of said marriage has been uniformly good; and a defendant for whose adultery the judgment of divorce has been rendered in another state or country may not marry again in this state during the lifetime of the complainant unless three years have elapsed since the rendition of such judgment and there is no legal impediment, by reason of such judgment, to such marriage in the state or country where the judgment was rendered. But this section shall not prevent the remarriage of the parties to an action for divorce] *dissolved by divorce, either party may marry again.*

§ 2. Section one hundred seventy of such law is hereby repealed and a new section one hundred seventy is hereby inserted therein, in lieu thereof, to read as follows:

§ 170. *Action for divorce*

An action for divorce may be maintained by a husband or wife to procure a judgment divorcing the parties and dissolving the marriage on any of the following grounds:

(1) *The cruel and inhuman treatment of the plaintiff by the defendant such that the conduct of the defendant so endangers the physical or mental well being of the plaintiff as renders it unsafe or improper for the plaintiff to cohabit with the defendant.*

(2) *The abandonment of the plaintiff by the defendant for a period of two or more years.*

(3) *The confinement of the defendant to prison for a period of three or more consecutive years after the marriage of plaintiff and defendant.*

(4) *The commission of an act of adultery, provided that adultery for the purposes of articles ten, eleven, and eleven-A of this chapter, is hereby defined as the commission of an act of sexual or deviate sexual intercourse, voluntarily performed by the defendant, with a person other than the plaintiff after the marriage of plaintiff and defendant.*

(5) *The husband and wife have lived apart pursuant to a decree of separation for a period of two years after the granting of such decree, and satisfactory proof has been submitted by the plaintiff that he or she has duly performed all the terms and conditions of such decree.*

(6) *The husband and wife have lived separate and apart pursuant to a written agreement of separation, subscribed and acknowledged by the parties thereto in the form required to entitle a deed to be recorded, for a period of two years after the execution of such agreement and satisfactory proof has been submitted by the plaintiff that he or she has duly performed all the terms and conditions of such agreement. Such agreement shall be filed in the office of the clerk of the county wherein either party resides within thirty days after the execution thereof.*

§ 3. Section one hundred seventy-three of such law, as added by chapter three hundred thirteen of the laws of nineteen hundred sixty-two, is hereby amended to read as follows:

§ 173. Jury trial

In an action for divorce there is a right to trial by jury of the [issue of adultery] *issues of the grounds for granting the divorce.*

§ 4. Section one hundred seventy-four of such law is hereby repealed.

§ 5. Section two hundred of such law, as added by chapter three hundred thirteen of the laws of nineteen hundred sixty-two, is hereby amended to read as follows:

§ 200. Action for separation

An action may be maintained by a husband or wife against the other party to the marriage to procure a judgment separating the parties from bed and board, forever, or for a limited time, for any of the following causes:

1. *The cruel and inhuman treatment of the plaintiff by the defendant such that the conduct of the defendant so endangers the physical or mental well being of the plaintiff as renders it unsafe or improper for the plaintiff to cohabit with the defendant.*

2. [Such conduct on the part of the defendant towards the plaintiff as may render it unsafe and improper for the latter to cohabit with the former.]

[3.] The abandonment of the plaintiff by the defendant.

[4.] 3. Where the wife is plaintiff, the neglect or refusal of the defendant to provide for her.

[5.] 4. The commission of an act of adultery by the defendant; except where such offense is committed by the procurement or with the connivance of the plaintiff or where there is voluntary cohabitation of the parties with the knowledge of the offense or where action was not commenced within five years after the discovery by the plaintiff of the offense charged or where the plaintiff has also been guilty of adultery under such circumstances that the defendant would have been entitled, if innocent, to a divorce, *provided that adultery for the purposes of this subdivision is hereby defined as the commission of an act of sexual or deviate sexual intercourse, voluntarily performed by the defendant, with a person other than the plaintiff after the marriage of plaintiff and defendant.*

5. *The confinement of the defendant to prison for a period of three or more consecutive years after the marriage of plaintiff and defendant.*

§ 6. Section two hundred one of such law is hereby repealed.

§ 7. Such law is hereby amended by inserting therein a new article, to be article eleven-A, to read as follows:

ARTICLE 11-A. SPECIAL PROVISIONS RELATING TO DIVORCE AND SEPARATION

Section

210. *Limitations on actions for divorce and separation.*

211. *Pleadings and proof.*

§ 210. *Limitations on actions for divorce and separation.*

No action for divorce or separation may be maintained on a ground which arose more than five years before the date of the commencement of that action for divorce or separation except where:

(a) The defendant has abandoned the plaintiff and defendant has not resumed living with plaintiff.

(b) The husband and wife have lived apart pursuant to a decree of separation for a period of two years after the granting of such decree and satisfactory proof has been submitted by the plaintiff that he or she has duly performed all of the terms and conditions of the decree.

(c) The husband and wife have lived separate and apart pursuant to a written agreement of separation, subscribed and acknowledged by the parties thereto in the form required to entitle a deed to be recorded, for a period of two years after the execution of such agreement and satisfactory proof has been submitted by the plaintiff that he or she has duly performed all of the terms and conditions of such agreement and such agreement has been duly filed in the office of the clerk of the county wherein either party resided within thirty days after the execution thereof.

§ 211. *Pleadings and proof*

An action for divorce or separation shall be commenced by the service of a summons. A verified complaint in such action may not be served until the expiration of one hundred twenty days from the date of service of the summons or the expiration of conciliation proceedings under article eleven-B of this chapter, whichever period is less. In an action for divorce or separation, a final judgment shall not be entered by default for want of appearance or pleading, or by consent, or upon trial of an issue, without satisfactory proof of the grounds for divorce or separation. Where a complaint or counterclaim in an action for divorce or separation charges adultery, the answer or reply thereto may be made without verifying it, except that an answer containing a counterclaim must be verified as to that counterclaim. All other pleadings in an action for divorce or separation shall be verified.

§ 8. Such law is hereby amended by inserting therein a new article, to be article eleven-B, to read as follows:

ARTICLE 11-B. CONCILIATION BUREAU

Section

215. *Conciliation bureau.*

215-a. *General powers and duties of the conciliation bureau.*

215-b. *Commissioners; counselors; special guardians; other personnel.*

215-c. *Conciliation conference after commencement of an action for divorce.*

215-d. *Conciliation hearings.*

215-e. *Temporary alimony, child support and counsel fees.*

215-f. *Records to be confidential.*

215-g. *Stay of action for divorce.*

§ 215. Conciliation bureau

There is hereby created and established a conciliation bureau of the state of New York in each judicial district of the supreme court. The head of such bureau in each judicial district shall be a supreme court justice designated by a majority of the justices of the appellate division of the judicial department in which the judicial district is located. Such justice shall be the chief administrative officer of the bureau and shall have the responsibility for administering and supervising the affairs of the bureau in accordance with rules and regulations promulgated by the appellate division of the appropriate judicial department. Upon the request of the supervising justice, one or more additional justices may be assigned to assist the supervising justice in the performance of his duties.

§ 215-a. General powers and duties of the conciliation bureau

The conciliation bureau shall have the power to conduct all conciliation proceedings after the commencement of an action for divorce, in the manner provided by this article.

§ 215-b. Commissioners; counselors; special guardians; other personnel

a. The supervising justice of each judicial district shall appoint as many persons as may be necessary to be conciliation commissioners, special guardians and counselors to perform the duties prescribed by this article. Commissioners, special guardians and counselors shall receive a fee to be fixed by a majority of the justices of the appropriate appellate division in each judicial department within the amounts made available by appropriation therefor by the state and no part of the cost herein shall be a charge against any party or political subdivision of the state.

b. No person shall be appointed as a conciliation commissioner unless he is an attorney admitted to practice in this state for at least five years.

c. The appropriate appellate division shall fix rules for the appointment of counselors and may provide for the use of public, religious and social agencies established in the various judicial districts.

d. No person shall be appointed a special guardian unless he is an attorney admitted to practice in this state for at least five years.

e. In addition to conciliation commissioners, special guardians and counselors, the Bureau may employ such other officers, employees and clerical assistants as it may deem necessary and shall fix their compensation within the amounts made available by appropriation therefor by the state and no part of the cost herein shall be a charge upon any party or political subdivision of the state.

§ 215-c. Conciliation conference after commencement of an action for divorce.

a. Within ten days after the commencement of an action for divorce, the party plaintiff in such action shall file with the conciliation bureau in the judicial district where the plaintiff resides, a notice of commencement of such action. Failure to file the notice as required herein shall be deemed a discontinuance of the cause of action. Such notice shall state:

(1) the names, age and address of the parties to the marriage;

(2) the names, age and address of minor, handicapped or incompetent children, if any, of the parties;

(3) the type of divorce action brought and the date on which commenced.

b. Upon the filing of such notice, the appropriate supervising justice shall assign the matter to a conciliation commissioner.

(1) If there are minor, handicapped or incompetent children of the marriage, the commissioner may request the supervising justice to appoint a special guardian for the minor, handicapped or incompetent children. Upon such appointment, the special guardian shall be deemed to be a party to the proceedings.

(2) The commissioner shall give notice of the filing under subdivision a of section

two hundred fifteen-c of this article to all parties within five days after the matter is assigned to him and shall fix a date for a conciliation conference. All parties shall be required to attend at least one conciliation conference, or may, upon good cause shown and in the discretion of the commissioner, secure a certificate of no necessity for a conference and conciliation procedures shall be at an end.

(3) If one of the parties to the proceedings fails to appear at a conciliation conference, the conciliation commissioner or counselor who scheduled the same may request the conciliation commissioner, if a counselor scheduled the conference, or the conciliation commissioner may apply to the supervising justice for an order directing such party to appear. Any party who fails to appear as ordered shall be guilty of contempt and proceedings thereon shall follow supreme court practice.

(4) If the conciliation commissioner shall determine

(a) that further conferences will be beneficial and may result in a continuation of the marriage, he may refer the parties to the proceedings to a counselor.

(b) that no further purpose will be served by a continuation of conciliation conferences, he shall issue a certificate of no further necessity for conferences and report same to the supervising justice and conciliation procedures shall be at an end.

c. Special guardians shall have the following duties:

(1) to protect the interests of minor, handicapped or incompetent children of the marriage.

(2) to consult with the parties, conciliation commissioners and/or counselors and recommend concerning the well being of the children.

(3) to consult with the parties, supervising justice, conciliation commissioner and/or counselors and recommend concerning temporary custody, support, medical care and any other problem concerning the overall well being of the children.

(4) to file a report with the conciliation commission and the supervising justice setting forth his recommendations and his reasons therefor.

d. Conciliation conferences with counselors shall be held within ten days after the reference of the proceedings to a counselor and shall be conducted informally. The statutory provisions or rules of practice, procedure, pleading or evidence shall not be applicable to the conduct thereof.

e. In conducting a conciliation conference, a counselor shall do such acts as he feels necessary to effect a reconciliation of the spouses or an adjustment or settlement of the issues of the matrimonial action. To facilitate and promote the reconciliation the counselor may, with the consent of the parties, recommend or make use of the assistance of physicians, psychiatrists or clergymen of the religious denomination to which the parties belong.

f. In the event the conciliation conferences do not effect a reconciliation of the spouses, the counselor shall file a report with a conciliation commissioner and request that such commissioner hold a conciliation hearing on the issues of the controversy. The final report of a conciliation counselor must be filed within thirty days after the matter is assigned to him.

§ 215-d. Conciliation hearings

a. Within twenty days after receipt of a counselor's report, the conciliation commissioner may fix a date for a conciliation hearing and shall give written notice to all parties of such date. Attendance at a conciliation hearing shall be mandatory for all parties to the proceedings. Conciliation procedures shall be at an end if the conciliation commissioner, in his discretion, shall not hold a hearing.

b. Each party shall be entitled to be heard, to present evidence and to cross examine witnesses and shall have the right to be represented by an attorney.

c. A conciliation commissioner shall have the power to compel the attendance of all parties at a conciliation hearing. If one of the parties fails to appear at a conciliation hearing, the commissioner may apply to the supervising justice for an order directing such party to appear. Any party who fails to appear as ordered shall be guilty of contempt and proceedings thereon shall follow supreme court practice. In addition, any party and the conciliation commissioner shall have the power to compel the attendance of witnesses, the production of books, records, documents and other evidence by the issuance of a subpoena signed by him.

d. In each case a conciliation hearing shall be held within thirty days after the submission of a final report by a conciliation counselor.

e. If, upon all the evidence at the hearing, the commissioner shall find that reconciliation is possible and would best serve the interest of both parties to the marriage, and any children thereof, the commissioner shall submit his findings to the supervising justice and shall apply for an order from such justice requiring the parties, for a period not to exceed sixty days, to attempt to effect a reconciliation. If, upon all the evidence, the commissioner shall find that reconciliation is not possible, or would not serve the interest of the parties or their children, he shall submit a report to such effect with the supervising justice of the bureau and conciliation procedures shall be at an end.

§ 215-e. Temporary alimony, child support and counsel fees

Any party involved in a conciliation proceeding may, at any stage thereof, apply for an order directing the payment of temporary alimony, child support and counsel fees. Such application shall be made to the conciliation commissioner assigned to the parties hereunder who shall hold a hearing and take testimony as to the financial ability and needs of the parties and recommend and report his findings to a justice of the supreme court of the appropriate judicial district. Such justice shall review, determine and in his discretion shall issue an appropriate order based on said recommendation and report. The relief sought shall be based on an affidavit of the party seeking the relief which shall relate only to the financial ability and needs of the parties.

§ 215-f. Records to be confidential

The records of the conciliation bureau shall be confidential and shall be available only to employees of the bureau, the parties to the proceedings and their attorneys.

§ 215-g. Stay of action for divorce

No action for divorce shall be brought to trial until:

(1) a final report has been filed by a conciliation commissioner with the supervising justice of the conciliation bureau in the judicial district in which the action is to be tried; or

(2) one hundred twenty days have elapsed since the filing of a notice of commencement of an action for divorce as herein provided.

§ 9. Section two hundred thirty of such law, as last amended by chapter six hundred eight-five of the laws of nineteen hundred sixty-three, is hereby amended to read as follows:

§ 230. Required residence of parties [to marriage in action for annulment or separation]

An action to annul a marriage or to declare the nullity of a void marriage, or for divorce or separation may be maintained [in either of the following cases] only when:

[1. Where both parties are residents of the state when the action is commenced.]

[2. Where the parties were married within the state and either the plaintiff or the defendant is a resident thereof when the action is commenced.]

[3. Where the parties were married without the state, and either the plaintiff or the defendant is a resident of the state when the action is commenced and has been a

resident thereof for at least one year continuously at any time prior to the commencement of the action.]

1. *The parties were married in the state and either party is a resident thereof when the action is commenced and has been a resident for a continuous period of one year immediately preceding, or*

2. *The parties have resided in this state as husband and wife and either party is a resident thereof when the action is commenced and has been a resident for a continuous period of one year immediately preceding, or*

3. *The cause occurred in the state and either party has been a resident thereof for a continuous period of at least one year immediately preceding the commencement of the action, or*

4. *The cause occurred in the state and both parties are residents thereof at the time of the commencement of the action, or*

5. *Either party has been a resident of the state for a continuous period of at least two years immediately preceding the commencement of the action.*

§ 10. Section two hundred thirty-five of such law, as added by chapter three hundred thirteen of the laws of nineteen hundred sixty-two, is hereby amended to read as follows:

§ 235. Information as to details of matrimonial actions *or proceedings*

An officer of the court with whom the proceedings in an action to annul a marriage or *to declare the nullity of a void marriage* or for divorce or separation or *a written agreement of separation or an action or proceeding for custody, visitation or maintenance of a child* are filed, or before whom the testimony is taken, or his clerk, either before or after the termination of the suit, shall not permit a copy of any of the pleadings or testimony, or any examination or perusal thereof, to be taken by any other person than a party, or the attorney or counsel of a party who had appeared in the cause, except by order of the court.

If the evidence on the trial of such an action *or proceeding* be such that public interest requires that the examination of the witnesses should not be public, the court or referee may exclude all persons from the room except the parties to the action and their counsel and the witnesses, and in such case may order the evidence, when filed with the clerk, sealed up, to be exhibited only to the parties to the action *or proceeding* or some one interested, on order of the court.

§ 11. Such law is hereby amended by inserting therein a new section, to be section two hundred fifty, to read as follows:

§ 250. *Divorces obtained outside of the State of New York*

Proof that a person obtaining a divorce in another jurisdiction was (a) domiciled in this state within twelve months prior to the commencement of the proceeding therefor, and resumed residence in this state within eighteen months after the date of his departure therefrom, or (b) at all times after his departure from this state and until his return maintained a place of residence within this state, shall be prima facie evidence that the person was domiciled in this state when the divorce proceeding was commenced.

"The provisions of this section shall not apply to a divorce obtained in another jurisdiction prior to September first, nineteen hundred sixty-seven."

§ 12. Section 5-311 of the general obligations law is hereby amended to read as follows:

§ 5-311. Certain agreements between husband and wife void.

A husband and wife cannot contract to alter or dissolve the marriage or to relieve the husband from his liability to support his wife or to relieve the wife of liability to

support her husband provided that she is possessed of sufficient means and he is incapable of supporting himself and is or is likely to become a public charge.

An agreement, heretofore or hereafter made between a husband and wife, shall not be considered a contract to alter or dissolve the marriage unless it contains an express provision requiring the dissolution of the marriage or provides for the procurement of grounds for divorce.

§ 13. Section one hundred fifty-four-a of the judiciary law is hereby repealed.

§ 14. If any clause, sentence, paragraph, section or part of this act shall be adjudged by any court of competent jurisdiction to be invalid such judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, section or part thereof directly involved in the controversy in which such judgment shall have been rendered.

§ 15. This act shall take effect September first, nineteen hundred sixty-seven provided that the two year period specified in subdivisions five and six of section one hundred seventy of the domestic relations law as added by this act shall not be computed to include any period prior to September first, nineteen hundred sixty-six and provided further that sections ten and twelve hereof shall take effect immediately.

NOTE.—Sections one hundred seventy and one hundred seventy-four of the domestic relations law, proposed to be repealed by this act, relate to actions for divorce upon grounds of adultery. Proposed new section one hundred seventy set forth new and additional grounds for granting divorce. Section two hundred one of the domestic relations law, proposed to be repealed by this act, prohibits the granting of a final judgment of separation without proof of the grounds for separation. Section one hundred fifty-four-a of the judiciary law, proposed to be repealed by this act, provides for rules relating to voluntary marital conciliation proceedings. Article eleven-B of the domestic relations law, proposed in this act, establishes a new conciliation procedure.

APPENDIX "67"

THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK

42 West 44th Street

SPECIAL COMMITTEE ON MATRIMONIAL LAW

Report on Recommended Amendments
to the Divorce Reform Law of 1966*(Chapter 254 of the Laws of 1966)*

Our Committee played a significant role in the events which led to the enactment of the Divorce Reform Law of 1966 (Chapter 254). Since its enactment that law has been subjected to a substantial volume of criticism, much of which, in the view of our Committee, has been hastily considered and intemperate. Recognizing that the statute, as enacted, is defective in a number of respects, our Committee nevertheless feels that the remedy does not lie in a hysterical condemnation of the law as a whole or in generalized critical characterizations of various of its provision. We believe that the necessary changes in the law can be achieved only through a careful study of its provisions and the submission of specific proposals for necessary changes.

With this purpose in mind, the following report is respectfully submitted.

I

THE CONCILIATION PROCEDURES

A. *The Basic Procedural Scheme*

Much of the criticism of the law has been directed to the provisions of Article 11-B which establishes a conciliation bureau in each judicial district of the supreme court and provides for conciliation procedures in divorce cases. It has been urged that although one of the purposes of divorce reform in this state was to make the remedy of divorce available to the poor as well as to the rich, the proposed conciliation procedures may prove to be so time-consuming and burdensome as to inordinately increase the cost of a divorce proceeding to the litigant and to discourage resort to the courts of this state for matrimonial relief, particularly among the lower economic groups.

The following analysis of the conciliation procedure contemplated by Article 11-B would seem to confirm the validity of these fears:

Sections 215 and 215-a of the Act establish a conciliation bureau in each judicial district of the supreme court under the administrative supervision of a designated supervising justice, and vest that bureau with power to conduct all the conciliation proceedings provided for in the Article after the commencement of an action for divorce. Section 215-b authorizes the appointment of conciliation commissioners, special guardians and counselors to perform the duties prescribed by the Article.

The party plaintiff in a divorce action, within ten days after the commencement of the action, is required to file notice of such commencement with the collection bureau (§215-c(a)). Upon the filing of such notice the appropriate supervisory justice is required to assign the matter to a conciliation commissioner (§215-c(b)). No time limit for the making of such assignment is prescribed.

Within five days after assignment of the matter the conciliation commissioner is required to give notice to all parties and to fix a date for a conciliation conference (§215-c(b)(2)). No specific period of notice prior to the date fixed for such conciliation

conference is prescribed nor is a time limit prescribed within which such conciliation conference must be held. All parties are required to attend at least one conciliation conference unless a certificate of no necessity for conference is issued by the conciliation commissioner (§215-c(b)(2)). If one of the parties fails to appear at a scheduled conciliation conference, an order may be obtained from the supervising justice directing such appearance (§215-c(b)(3)).

If the conciliation commissioner determines that no further purpose will be served by a continuation of conciliation conferences he must issue a certificate of no further necessity for conferences and report the same to the supervisory justice, in which case conciliation procedures are terminated. However, if the conciliation commissioner determines that further conferences will be beneficial and may result in a continuation of the marriage, he may refer the parties to a counselor (§215-c(b)(4)).

Conciliation conferences with a counselor must be held within ten days after the reference of the proceeding to such counselor (§215-c(d)). The counselor is authorized to make such efforts as he feels necessary to effect a reconciliation or to adjust or settle the issues of the matrimonial action and may, with the consent of the parties, make use of the assistance of physicians, psychiatrists or clergymen (§215-c(e)).

If the conciliation conferences with a counselor do not effect a reconciliation, the counselor is required to file a report with the conciliation commissioner and request the commissioner to hold a conciliation hearing on the issues of the controversy. The final report of the conciliation counselor must be filed within 30 days after the matter is assigned to him (§215-c(f)).

Within 20 days after receipt of a counselor's report the conciliation commissioner may fix a date for a conciliation hearing and give written notice thereof to all parties. Attendance by all parties is required and may be compelled by court order, if necessary (§215-d(a), (c)). Each party has the right to be heard, to present evidence, to cross examine witnesses and to be represented by an attorney (§215-d(b)). Such conciliation hearing must be held within 30 days after submission of the conciliation counselor's final report (§215-d(d)).

If the commissioner finds that reconciliation is possible and would best serve the interest of the spouses and any children thereof he must submit his findings to the supervising justice and apply for an order requiring the parties, for a period not to exceed 60 days, to attempt to effect a reconciliation. If the commissioner finds that reconciliation is not possible or would not serve the interest of the parties or their children he must so report to the supervising justice and the conciliation proceedings thereupon terminate (§215-d(e)).

In cases where there are minor, handicapped or incompetent children of the marriage the conciliation commissioner may request the supervising justice to appoint a special guardian who is deemed a party to the proceeding (§215-c(b)(1)). Where a special guardian has been appointed his duties include consultation with the parties, conciliation commissioners, counselors and the supervising justice with respect to the well being of the children, and any issues concerning temporary custody, support and medical care. He is required to file a report with the conciliation commissioners and the supervising justice setting forth his recommendations and the reasons therefor (§ 215-c(c)).

In a Report of this Committee submitted while the "Leader's Bill" was pending before the legislature, we characterized the foregoing conciliation proceedings as "unworkable and impractical" and expressed the fear that they "create an unwarranted bureaucracy leading to the substantial possibility that they may be used as a means of expensive and unjustified political patronage." We still adhere to these views.

Participation in all the steps of conciliation procedures as now constituted may require a party to be in attendance before the conciliation commissioner and counselors on at least three different occasions. If one of the parties does not appear at a scheduled conciliation conference or hearing or if multiple conferences or extended hearings are

held, this figure may well be doubled to tripled. On a substantial number, if not all, of these occasions the appearance of the parties' counsel may also be required, thus substantially adding to the litigants' legal costs. Moreover, there may well be a duplication of the testimony and evidence submitted at the conciliation hearing and that ultimately produced at the divorce trial. We are accordingly seriously concerned that the inconvenience and additional legal costs imposed by the conciliation procedures on the litigants may well serve, as a practical matter, to prevent lower economic groups from resort to the courts and, as to members of more affluent economic groups, may perpetuate the scandal of "escape" to other jurisdictions.

We are also concerned that, by reason of the cumbersome complexity of the procedure there is the danger, on the one hand, that certificates of "no necessity" will be issued perfunctorily and without adequate conciliation efforts in appropriate cases, and, on the other, that if full scale efforts at conciliation are made in every case the staffs of the conciliation bureaus, at least in some areas, will be so overburdened as to be unable to function effectively.

We also question the efficacy of the power granted to the supervising justice to issue an order "requiring the parties, for a period not to exceed sixty days, to attempt to effect a reconciliation." This coercive power cannot be found in any of the conciliation or counseling provisions of other states. Apart from the fact that it may raise constitutional questions, conciliation experience adequately demonstrates that marital harmony cannot be mandated by judicial fiat. In testimony offered by our Committee before the New York State Joint Legislative Committee on Matrimonial Laws on November 29, 1965, we pointed out that a "compulsory" reconciliation proceeding is a "contradiction in terms."

Our Committee has heretofore suggested that the procedure could be simplified by the elimination of the conciliation commissioners. In lieu therefore, we recommended that the determination as to whether conciliation efforts should be undertaken in a given case be left to the appropriate justice of the Supreme Court who could make direct referrals to court-appointed conciliation counselors in cases deemed practically worthy of such reference. We reaffirm this recommendation; but suggest that if the legislature determines that our suggestion would place too great a burden on justices at Special Term, it reconsider the conciliation procedures which were embodied in the Wilson-Sutton Bill.

B. Administration of the Conciliation Bureaus

We recognize that the legislature may be disposed to provide a trial period for the existing conciliation procedures before considering revisions thereof. If this view be adopted we nevertheless strongly urge that the administrative provisions of Article 11-B are unsound and require immediate amendment.

(1) Establishment of Conciliation Bureaus on Departmental Basis

Under Section 215 of the Divorce Reform Law a separate conciliation bureau is to be established in each of the eleven judicial districts of the supreme court. The appointment of a supreme court justice in each such district as supervising justice of such bureau is required. The supervising justice is designated as the chief administrative officer of the bureau and is vested with responsibility for administering and supervising its affairs in accordance with rules and regulations promulgated by the Appellate Division of the appropriate judicial department.

In our view this administrative scheme is impractical and wasteful for the following reasons, among others.

(a) The administration of conciliation bureaus on a judicial district basis conflicts with the general intent of the present Judiciary article of the State Constitution to vest routine supervision of the administration of courts in the Appellate Divisions of the four judicial departments.

(b) In some judicial districts the volume of divorce cases may be so great as to impose an unnecessary burden on available judicial manpower by requiring the supervising justice to perform tasks which are largely administrative in character and which might be more economically handled by a salaried non-judicial administrative official of the court. In other districts the divorce caseload is so minimal as to make the designation of a supervising justice a meaningless gesture.

(c) Fragmentation of administrative control over conciliation proceedings among eleven separate judicial districts will make it almost impossible to establish meaningful uniform standards and procedures for the operation of such bureaus even within a single judicial department. By centralizing administrative control over these bureaus in the Appellate Division of each judicial department uniform standards could be established and enforced in each department and, through the vehicle of the Administrative Board of the Judicial Conference on which the presiding justices of each Appellate Division sit, statewide uniformity in policy and procedures could be achieved if deemed desirable.

We accordingly specifically urge that Section 215 be amended so as to provide for the establishment of a conciliation bureau in each judicial department of the supreme court rather than for each judicial district. It is further recommended that the provisions of Section 215 requiring the designation of a supreme court justice in each judicial district as supervising justice of the conciliation bureau be eliminated and that there be added to that section authorization for the appointment by the respective Appellate Divisions of one or more non-judicial officials in each judicial department who, subject to the supervision of the Appellate Division, shall be responsible for the administration and supervision of the affairs of the bureau in that department. Conforming amendments to other sections of Article 11-B in which reference is made to "the supervising justice" would also be required.

(2) Appointment and Compensation of Conciliation Commissioners and Counselors

Section 215(b) of the Act authorizes the supervising justice of each judicial district to appoint as many persons as may be necessary to be conciliation counselors, special guardians and counselors to perform the duties prescribed by Article 11-B. The fees of such personnel are to be fixed by a majority of the justices of each Appellate Division within amounts made available by appropriation therefor by the state. For reasons heretofore stated, we are of the view that the power to appoint conciliation commissioners and counselors should be vested in the Appellate Division of each judicial department.

We are also of the view that conciliation commissioners and counselors should be employed on a salaried basis, either full time or part time as the needs of each separate judicial department may dictate. In making this recommendation we are motivated by the following considerations:

(a) The only statutory qualification for a conciliation commissioner is that he be an attorney admitted to practice in his state for at least five years (Sec. 215-b(b)). No qualifications are imposed for conciliation counselors. It should be apparent that the conciliation procedures will be an exercise in futility unless the persons holding these positions are either possessed of special background or training in the work which they are to perform or, at the least, are enabled, by the accumulation of experience, to develop such expertise. Persons possessing such special qualifications are in short supply and assignment of conciliation commissioners or counselors on a case-by-case basis will not permit the necessary acquisition of experience and expertise.

(b) The development and application of uniform standards in the handling of conciliation matters will be rendered difficult, if not impossible, if the functions of conciliation commissioner and counselor are performed by a large number of persons assigned on a case-by-case basis.

(c) If compensation is awarded on a case-by-case basis there may be at least temptation for conciliation commissioners and counselors to protract their efforts

beyond those really necessary in order to buttress their individual applications for compensation. Even if there is no real danger of this, we are convinced that the use of salaried conciliation commissioners and counselors will prove much less expensive to the state than a system under which compensation is fixed on a per case basis.

(d) Employment of conciliation commissioners and counselors on a salaried basis will avoid the danger of the use of the appointive power as a means for expensive and unjustified political patronage.

(e) Employment of conciliation commissioners and counselors on a departmental and salaried basis will provide greater administrative flexibility in that the same personnel may be used in a number of judicial districts, the caseload of each of which may not warrant the employment of full time or even part time personnel.

(3) Designation of Public and Private Agencies as Counselors

Under Section 215-b(c) of the Act the Appellate Divisions may provide for the use of public, religious and social agencies for counseling purposes. In some areas of the state the functions of conciliation counselors might best be performed by existing community agencies. We accordingly suggest that existing provisions of this section be broadened so as to expressly authorize the Appellate Divisions to contract with appropriate public, religious and social agencies to perform the services of counselor contemplated by Article 11-B.

(4) Appointment of Special Guardians

Under the provisions of Section 215-b(a) special guardians are to be appointed by the supervising justice of each judicial district. No qualifications for a special guardian are prescribed other than that he be an attorney admitted to practice in this state for at least five years.

As in the case of conciliation commissioners and counselors it is important that special guardians possess or be enabled to acquire the special experience necessary for the proper performance of their duties. We are accordingly concerned that the indiscriminate appointment of special guardians on a case-by-case basis will not provide such expertise. In some areas of the state the services of special guardian could be most effectively and economically performed by a staff of one or more attorneys attached to the court on a full time or part time basis. In other areas, where this is impractical, assignments should be made from a list of appointees approved by the appropriate Appellate Division. This is the procedure prescribed by Section 243 of the Family Court Act for the appointment of law guardians who represent minors in that Court.*

Accordingly, we recommend that Section 215-b be amended so as to authorize the Appellate Division to enter into agreements with legal aid societies or with any qualified attorney or attorneys to serve as special guardians under Article 11-B. We also recommend that, as an alternate procedure, the Appellate Divisions be authorized to designate a panel from which special guardians are to be appointed by the supreme court justices and, in this connection, to invite any bar association in the community to recommend qualified persons for consideration.

* Family Court Act, Section 243:

"*Designation by appellate division.* (a) The appellate division of the supreme court for the judicial department in which a county is located may enter into an agreement with a legal aid society for the society to provide law guardians for the family court in that county or may enter into an agreement with any qualified attorney or attorneys to serve as a law guardian or as law guardians for the family court in that county.

(b) The appellate division of the supreme court for the judicial department in which a county is located may designate a panel of law guardians for the family court in that county. For this purpose, it may invite any bar association in the county to recommend qualified persons for consideration by the appellate division in making its designation."

Statistics compiled by the Judicial Conference indicate that where law guardian services have been provided under contracts with legal aid societies the cost per case has been less than \$20, while the per case cost of such services performed by counsel on an assigned basis averages almost \$50.

(5) Pre-Litigation Conciliation

It has been suggested that the conciliation procedures provided for by Article 11-B should be made available to spouses even prior to the commencement of a matrimonial action. Such a conciliation proceeding is already available under Article 9 of the Family Court Act and effectuation of this suggestion would create an unnecessary duplication of facilities and services. It may well be, however, that the conciliation facilities and services of the Family Court will have to be greatly strengthened if the purposes of Article 9 of the Family Court Act are to be successfully pursued.

II

SEPARATION ACTIONS

A. Service of Pleading in Separation Actions

Section 211 of the Divorce Reform Law requires that an action for divorce or separation be commenced by the service of a summons and prohibits the service of a verified complaint in said action "until the expiration of one hundred twenty days from the date of service of the summons or the expiration of conciliation proceedings under article eleven-B of this chapter, whichever period is less." Since the conciliation procedures provided for in Article 11-B pertain solely to actions for divorce and to not apply to separation actions, the foregoing provision (as to a separation action) is patently a typographical error which should be eliminated. A compulsory delay of 120 days between the service of a summons in a separation action and the filing of a complaint has never been suggested by anybody.

In the absence of mandatory conciliation procedures during this interval we are of the view that no real purpose is served by the mandated delay.

It is accordingly recommended that Section 211 be amended by eliminating the reference to separation actions from the first sentence thereof and that Section 215-e be amended as hereinafter set forth.

B. Temporary Alimony, Child Support and Counsel Fees

Section 215-e provides that any party "involved in a conciliation proceeding may, at any stage thereof, apply for an order directing the payment of temporary alimony, child support and counsel fees." Such application must be made to the conciliation commissioner, who is directed to hold a hearing and take testimony as to the financial ability and needs of the parties and to recommend and report his findings to a justice of the supreme court of the appropriate judicial district. Such justice is authorized to review, determine and in his discretion to issue an appropriate order based on such recommendation and report. Section 215-e further provides that "The relief sought should be based upon the affidavit of the party seeking the relief but shall relate only to the financial ability and means of the parties."

We approve the provision which permits the granting of temporary alimony, child support and counsel fees on the basis of affidavits relating only to the financial ability, means and needs of the parties. In our view, the elimination of the requirement of showing reasonable probability of success in the action is desirable since it avoids the necessity for recriminatory cross-allegations of fault, which presently strongly militate against any possibility of reconciliation during the pendency of the action.

We recommend that the provision concerning temporary awards on the basis of affidavits relating only to financial ability, means and needs of the parties be incorporated in the Domestic Relations Law by appropriate amendments to Sections 236, 237 and (to the extent applicable) 240 thereof.

We disapprove the provisions of Section 215-e of the Act which provide that applications for orders directing the payment of temporary alimony, child support and counsel fees should, in the first instance, be made to a conciliation commissioner. As we have noted above, this portion of Section 215-e could have no application to separation

actions, because separation actions are not within the compass of conciliation proceedings. However, our objection goes much deeper than this.

In the last analysis, the responsibility for fixing temporary alimony and counsel fees rests with a justice of the supreme court. This is recognized in the present text of Section 215-e, which requires a justice at special term to pass on the recommendation of the conciliation commissioner. What the present statute provides is that, in every case where there is a conciliation proceeding, the parties be subjected to a preliminary hearing on the question of temporary alimony, child support and counsel fees before a conciliation commissioner. Then, the matter goes back to a justice at special term. We thus have two steps in situations where a single application to the court usually prevails. It is true that the courts sometimes refer the matter to a referee and hold in abeyance the decision of the motion until the report of the referee comes in. However, although such a procedure may be justified in a given situation, it is absurd to make it mandatory and uniform.

It should be noted that there is no provision in the Act for a justice at special term to grant an interim order for temporary alimony and child support while the matter is pending before the conciliation commissioner. Since there is also no time requirement for the referral of the entire matter to the conciliation commissioner, a woman and her children might well starve before the matter of temporary financial adjustment would have been passed upon.

It should also be noted that Section 215-e makes no provision for the determination of temporary custody and visitation. If there is an issue in this respect (and there very often is) we might have the ridiculous situation where a justice of the supreme court determines questions of temporary custody and visitation but is powerless to decide questions of support while such temporary custody and visitation are in effect.

III

INHERITANCE RIGHTS OF DIVORCED INNOCENT SPOUSE

Under the provisions of Section 170(5) of the Act an action for divorce may be maintained by a husband or wife where they have lived apart pursuant to a decree of separation for a period of two years after the granting of such decree and satisfactory proof has been submitted by the plaintiff that he or she has duly performed all the terms of conditions of such decree. The operation of this provision may produce an inequitable result in certain cases by depriving a faultless spouse who has procured a judgment of separation without any desire of divorcing his or her spouse of the right to share in the other spouse's estate.

Under Sections 18 and 18-b of the Decedent Estate Law a "surviving spouse" has, subject to certain exceptions, the right to share in the estate of the other spouse who dies intestate. Under Section 83 of the Decedent Estate Law a "surviving spouse" has the right, subject to certain exceptions, to elect against the Will of the other spouse. Under Section 50 of the Decedent Estate Law the term "surviving spouse" as used in the foregoing sections is so defined as to exclude a divorced spouse regardless of whether he or she was plaintiff or defendant in the divorce action and regardless of whether or not the divorce was procured by reason of his or her fault. Situations may well be envisaged in which one spouse successfully maintains a separation action but, for religious or other reasons, does not desire a divorce. If the parties live separate and apart for two years after the granting of the separation decree the defendant in the separation action who has duly performed all the terms and conditions of such decree may procure a decree of divorce against the innocent spouse. In at least certain of these cases the loss by the innocent spouse of all inheritance rights may be grossly unfair.

It is accordingly recommended that a new section be added to Article 13 of the Domestic Relations Law so as to vest discretion in the court in divorce actions to include in any judgment of divorce based upon a separation decree obtained by the

defendant in the divorce action an express reservation to such defendant of the rights of a "surviving spouse" provided for in Sections 18, 18-b and 83 of the Domestic Relations Law. It is contemplated that such power would be solely discretionary in character and would be exercised only where the particular circumstances so dictated. Amendment of Section 50 of the Decedent Estate Law would also be required so as to expressly include within the definition of a "surviving spouse" a spouse whose inheritance rights had been expressly preserved by the terms of a divorce entered in this state as above suggested.*

IV

VALIDITY OF DIVORCES OBTAINED IN OTHER JURISDICTIONS

Much criticism has been directed against Section 250 of the Divorce Reform Law which provides, in substance, that proof that a person obtaining a divorce in another jurisdiction was either (a) domiciled in this state within 12 months prior to the commencement of the proceeding for said divorce, and resumed residence in this state within 18 months after the date of his departure therefrom or (b) at all times after his departure from the state and until his return, maintained a place of residence within this state, constitutes *prima facie* evidence that such person was domiciled in this state when the foreign divorce proceeding was commenced.

In our view this section, if properly construed, is applicable solely to *ex parte* divorces procured in sister states or in foreign jurisdictions in which domicile is the basis of divorce jurisdiction. We are strongly of the view that the application of these provisions to bilateral divorce decrees made in sister states would constitute an unconstitutional denial of full faith and credit. We are also of the view that Section 250 will have no application to divorce decrees issued in those areas of Mexico in which jurisdiction is based upon express or implied submission rather than domicile. If this section were otherwise construed we would favor its repeal.

V

FILING AND CONFIDENTIALITY OF SEPARATION AGREEMENTS

A. Filing of Separation Agreements

Section 170(6) of the Law provides, in substance, that an action for divorce may be maintained if a husband and wife have lived separate and apart pursuant to a written agreement of separation, subscribed and acknowledged by the parties thereto in the form required to entitle a deed to be recorded, for a period of two years after the execution of such agreement and satisfactory proof has been submitted by the plaintiff that he or she has fully performed all the terms and conditions of such agreement. That section further requires that the agreement be filed in the office of the clerk of the county wherein either party resides within 30 days after the execution thereof.

Despite the provisions of Section 235 regarding confidentiality, many attorneys are worried about the necessity for the public filing of a document which may contain detailed information about the financial means of the parties, alimony, child support, custody, etc. Since the requirement of filing is designed to provide reliable proof as to the facts of the execution of a separation agreement and the date of such execution, there would appear to be no real purpose served in requiring the filing of the entire agreement. We suggest that the objectives of the filing requirement could be satisfied by a provision authorizing the filing of a memorandum of such agreement subscribed and

* Consideration should be given to a solution of this problem in the event divorces and remarriages result in multiple proliferation of "surviving spouses."

acknowledged by the parties in the form required to entitle a deed to be recorded, which merely sets forth the fact of the making of the agreement and the date on which it was executed. We accordingly recommend that Section 170 (6) be amended accordingly. Conforming amendments to Section 211 (c) will also be required.

The requirement that the agreement, itself, be signed and acknowledged should be preserved to avoid any question as to its contents when a divorce premised upon observance of its conditions is sought.

**B. Confidentiality of Filed Separation Agreement
or Memorandum of Separation Agreement**

Although Section 235 of the Divorce Reform Law is obviously designed to protect the confidentiality of separation agreements filed with the county clerk, the language is somewhat ambiguous and may be construed to extend the protection of confidentiality to such agreements only where a matrimonial or custody action or proceeding is before the court. If so construed, the protection of confidentiality which the section is designed to afford will not extend to the many separation agreements which will normally be filed in advance of any action or proceeding. We accordingly propose that Section 235 be so amended as to make clear that the written separation agreement (or a memorandum of separation agreement, if such is authorized) shall be held confidential whenever filed.

CONCLUSION

The passage of Chapter 254 of the Laws of 1966 (most of which will become effective on September 1, 1967) represented a fine legislative response to the clear and unmistakable will of the people of New York that New York State's medieval matrimonial statutes be modernized.

Unfortunately, some of the provisions of that statute may result in a situation where its beneficent aims cannot be accomplished because the mechanics for carrying out those aims are impractical and unworkable. It is the opinion of our Committee that the legislature will again be responsive to the need for amendment. For this reason, we have submitted the foregoing recommendations.

Since this report is issued before Election Day, we cannot assume, with any degree of certainty, who will be the legislative leaders in the forthcoming session of the legislature. However, it is believed wise to circulate this report as soon as possible so that, after the election, a bill may be pre-filed to carry out these recommendations or such portions thereof as the legislative leaders or individual legislators may desire to have enacted. Accordingly, copies of this report will not only be printed in THE RECORD of the Association, but will be widely circulated. Needless to say, any legislator (present or future) will be furnished a copy thereof upon more request addressed to the Secretary of the Association.

The drawing of bills (or an omnibus bill) to put into effect some or all of our recommendations may present some problems of draftsmanship. As in the past, our Committee happily holds itself open for consultation with and assistance to members of the legislature.

Respectfully submitted,

**SPECIAL COMMITTEE ON MATRIMONIAL LAW
OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK**

Howard Hilton Spellman, *Chairman*
Jacob L. Isaacs, *Vice-Chairman*
Samuel G. Fredman, *Secretary*

Leroy D. Clark
Bernard F. Curry
Doris J. Freed
Martin Kleinbard

Harold L. Lipton
Vincent J. Malone
Edmund P. Rogers, Jr.
Paul W. Williams

APPENDIX "68"

Legend: Deletions are indicated by square brackets. Changes or additions in text are indicated by italics.

An act to amend the domestic relations law and the estates, powers and trusts law, in relation to procedures governing matrimonial actions and repealing sections two hundred fifteen, two hundred fifteen-a, two hundred fifteen-b, two hundred fifteen-c, two hundred fifteen-d and two hundred fifteen-e of the domestic relations law relating thereto.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivisions three, four, five and six of section one hundred seventy of the domestic relations law, as added by chapter two hundred fifty-four of the laws of nineteen hundred sixty-six, are hereby amended to read, respectively, as follows:

(3) The confinement of the defendant [to] *in* prison for a period of [three] *two* or more consecutive years after the marriage of plaintiff and defendant.

(4) The commission of an act of adultery, provided that adultery for the purposes of articles ten, eleven, and eleven-A of this chapter, is hereby defined as the commission of an act of sexual or deviate sexual intercourse, voluntarily performed by the defendant, with a person other than the plaintiff after the marriage of plaintiff and defendant. *The term deviate sexual intercourse shall include an act of sodomy, bestiality or homosexuality.*

(5) The husband and wife have lived apart pursuant to a decree *or judgment* of separation *granted on or after September one, nineteen hundred sixty-six*, for a period of two years after the granting of such decree *or judgment*, and satisfactory proof has been submitted by the plaintiff that he or she has [duly] *substantially* performed all the terms and conditions of such decree.

(6) The husband and wife have lived separate and apart pursuant to a written agreement of separation, subscribed and acknowledged *on or after August one, nineteen hundred sixty-six* by the parties thereto in the form required to entitle a deed to be recorded, for a period of [two years] *eighteen months* after the execution of such agreement and satisfactory proof has been submitted by the plaintiff that he or she has [duly] *substantially* performed all the terms and conditions of such agreement. Such agreement *or a memorandum thereof entitled "memorandum of separation agreement," subscribed and acknowledged by the parties thereto in the form required to entitle a deed to be recorded, and setting forth the names and addresses of the parties, the fact that a written separation agreement has been entered into by them in conformance with this section and the date of execution and acknowledgement thereof by each party,* shall be filed in the office of the clerk of the county wherein either party resides within thirty days after the execution thereof. *The eighteen month period specified herein shall not be computed to include any period prior to September one, nineteen hundred and sixty-six.*

§ 2. Section one hundred seventy-one of the domestic relations law as added by chapter three hundred thirteen of the laws of nineteen hundred sixty-two is hereby **REPEALED**.

§ 3. Subdivision five of section two hundred of such law, as added by chapter two hundred fifty-four of the laws of nineteen hundred sixty-six, is hereby amended to read as follows:

5. The confinement of the defendant [to] *in* prison for a period of [three] *two* or more consecutive years after the marriage of plaintiff and defendant.

§ 4. Section two hundred eleven of such law, as added by chapter two hundred fifty-four of the laws of nineteen hundred sixty-six, is hereby amended to read as follows:

§ 211. Pleadings and proof. [An action for divorce or separation] *A matrimonial action* shall be commenced by the service of a summons [.], *only and* [A] a verified complaint in such action may not be served until the expiration of [one hundred twenty] *sixty* days from the date of service of the summons or the [expiration] *termination* of conciliation proceedings under article eleven-B of this chapter, whichever period is less. In *a matrimonial action*, [an action for divorce or separation.] a final judgment shall not be entered by default for want of appearance or pleading, or by consent, or upon trial of an issue, without satisfactory proof of the grounds *therefor* [for divorce or separation.] Where a complaint or counterclaim in an action for divorce or separation charges adultery, the answer or reply thereto may be made without verifying it, except that an answer containing a counterclaim must be verified as to that counterclaim. All other pleadings in *a matrimonial action* [an action for divorce or separation] shall be verified.

§ 5. Section two hundred fifteen of such law is hereby REPEALED and a new section two hundred fifteen is added thereto to read as follows:

§ 215. *Conciliation Bureau. It is the policy of the State of New York to preserve the marriage state wherever possible. To that end there is hereby created and established a conciliation bureau of the State of New York in each of the four Judicial Departments. The commissioner or head of such bureau in each Judicial Department and such assistants and staff as may be necessary and conciliation counselors shall be appointed and be removable by the presiding Justice of the Appellate Division of such Judicial Department. Appointments and transfers to such bureau shall be consistent with the Civil Service Law. The Appellate Division may enter into agreements with public, religious and social agencies to provide conciliation counsellors, and may by rule in addition to or in place thereof provide for the utilization of the appropriate facilities of the Family Court.*

Standards and qualifications of the personnel in such bureau shall be established by the Administrative Board.

The appropriate Appellate Division shall establish rules and regulations for the method of conciliation.

6. Sections two hundred fifteen-a, two hundred fifteen-b, two hundred fifteen-c, two hundred fifteen-d and two hundred fifteen-e of such law are hereby REPEALED and a new section two hundred fifteen-a is hereby added thereto to read as follows:

§ 215-a. *Conciliation proceedings after commencement of an action.*

a. Within ten days after the commencement of a matrimonial action the party-plaintiff in such action shall file with the clerk of the conciliation bureau in the Department where the action was started a notice of the commencement of such action. Failure to file such notice shall be deemed a discontinuance of the cause of action.

Such notice shall contain:

- 1. the names, ages and addresses of the parties to the marriage;*
- 2. the names, ages and addresses of all children of the parties and those who are minor, handicapped or incompetent;*
- 3. the nature of the action and the date on which it was commenced;*
- 4. the duration of the marriage;*
- 5. whether the husband is supporting the wife and children and who has custody of the children;*
- 6. any attempts made at reconciliation.*

After the filing of such notice and upon any information available to the court the court wherein the action is pending upon motion of either party or upon its own motion shall determine whether it shall issue a certificate of no necessity or call for a conciliation conference.

The court shall then either enter an order that conciliation proceedings are not necessary and that plaintiff is entitled to proceed immediately with the further prosecution of the action or refer the action to the commissioner of the bureau for conciliation proceedings.

Upon the filing of such an order, the commissioner of the bureau shall forthwith assign the matter to a conciliation counsellor.

The counsellor shall then hold at least one conciliation conference at which both parties may be compelled to attend and such other conferences as may be provided by the rules of the Appellate Division.

The final report of the conciliation counsellor must be filed with the commissioner within thirty days after the matter has been assigned to him unless the time is extended by the court.

If the counsellor has effected a reconciliation of the spouses, the action shall be dismissed. If he has been unable to effect a reconciliation, the commissioner shall thereupon issue a certificate of termination of conciliation proceedings and the action shall proceed accordingly.

7. Section two hundred fifteen-f of such law as added by chapter two hundred fifty-four of the laws of nineteen hundred sixty-six is hereby amended to read as follows and renumbered two hundred fifteen-b:

§ 215-[f] b. Records to be confidential. [The records of the conciliation bureau] *All conciliation records shall be confidential and shall be available only to employees of the bureau or such agency to which the matter has been referred. [the parties to the proceeding and their attorneys.] and such records and any statements made by the parties during a conciliation conference shall not be admissible in evidence for any purpose in any proceeding.*

8. Section two hundred fifteen-g of such law, as added by chapter two hundred fifty-four of the laws of nineteen hundred sixty-six, is hereby amended to read as follows and renumbered two hundred fifteen-c:

§ 215-[g] c. Stay of [action for divorce] *matrimonial actions.*

No action for divorce *annulment or separation* shall be brought to trial until:

[*(1) a final report has been filed by a conciliation commissioner with the supervising justice of the conciliation bureau in the judicial district in which the action is to be tried; or* (1) *a conciliation proceeding has been concluded as provided in section two hundred fifteen and section two hundred fifteen-a hereof; or*

(2) [one hundred twenty] *sixty* days have elapsed since the filing of a notice of commencement of [an] *the* action [for divorce] as herein provided.

§ 9. Section two hundred thirty-five of such law, as last amended by chapter two hundred fifty-four of the laws of nineteen hundred sixty-six, is hereby amended to read as follows:

§ 235. Information as to details of matrimonial actions or proceedings. An officer of the court with whom the proceedings in an action to annul a marriage or to declare the nullity of a void marriage or for divorce or separation or a written agreement of separation or an action or proceeding for custody, visitation or maintenance of a child are filed, or before whom the testimony is taken, or his clerk, either before or after the termination of the suit, shall not permit a copy of any of the pleadings, *written agreement of separation or memorandum thereof* or testimony, or any examination or perusal thereof, to be taken by any other person than a party, or the attorney or counsel of a party who had appeared in the cause, except by order of the court.

If the evidence on the trial of such an action or proceeding be such that public interest requires that the examination of the witnesses should not be public, the court or referee may exclude all persons from the room except the parties to the action and their counsel [and the witnesses], and in such case may order the evidence, when filed with the clerk, sealed up, to be exhibited only to the parties to the action or proceeding or some one interested, on the order of the court.

§ 10. Section two hundred forty-one of such law, as added by chapter three hundred thirteen of the laws of nineteen hundred sixty-two, is hereby amended to read as follows:

§ 241. Interlocutory judgment in action to annul a marriage or for divorce. In an action brought for judgment annulling a marriage, or divorcing the parties and dissolving a marriage, the decision of the court or report of the referee must be filed and interlocutory judgment thereon must be entered within fifteen days after the party becomes entitled to file or enter the same, and cannot be filed or entered after the expiration of said period of fifteen days unless by order of the court upon application and sufficient cause being shown for the delay. The interlocutory judgment, in the discretion of the court, may provide for the payment of alimony or for the support and maintenance of the children of the marriage until the interlocutory judgment becomes final or until the entry of final judgment; *may provide, in the case of a divorce granted under subdivision five of section one hundred seventy in favor of a party against whom a decree of separation was entered, that the party against whom the interlocutory judgment is entered in an action for divorce shall qualify under the estates, powers and trusts law as a surviving spouse*; it may include a judgment for costs, when costs are awarded, in which case said judgment for costs shall be docketed by the clerk, and thereupon shall have the same force and effect as if docketed upon the entry of final judgment therein, except that it shall not be enforceable by execution or punishment until the interlocutory judgment becomes the final judgment or until the entry of final judgment in said action.

§ 11. Section two hundred fifty of such law, as added by chapter two hundred fifty-four of the laws of nineteen hundred sixty-six, is hereby amended to read as follows:

§ 250. Divorces obtained outside the state of New York, Proof that a person obtaining a divorce in another jurisdiction, *other than one obtained in an action in which both parties appeared*, was (a) domiciled in this state within twelve months prior to the commencement of the proceeding therefor, and resumed residence in this state within eighteen months after the date of his departure therefrom, or (b) at all times after his departure from this state and until his return maintained a place of residence within this state, shall be prima facie evidence that the person was domiciled in this state when the divorce proceeding was commenced.

The provisions of this section shall not apply to a divorce obtained in another jurisdiction prior to September first, nineteen hundred sixty-seven.

§ 12. Paragraph a and subdivision 1 of section five-one, two of the estates, powers and trusts law, as added by chapter nine hundred fifty-two of the laws of nineteen hundred sixty-six, is hereby amended to read as follows:

§ 5-1.2. Disqualification as surviving spouse. (a) A husband, [or] wife *or the former husband or wife of a marriage terminated by divorce* is a surviving spouse within the meaning, and for the purposes of 4-1.1, 5-1.1, 5-1.3, 5-3.1 and 5-4.4, unless it is established satisfactorily to the court having jurisdiction of the action or proceeding that:

(1) A final decree or judgment of divorce, *other than a decree or judgment of divorce in which the court preserved the right of a spouse to qualify as a surviving spouse*, of annulment or declaring the nullity of a marriage or dissolving such marriage

on the ground of absence, recognized as valid under the law of this state, was in effect when the deceased spouse died.

§ 12. Subdivisions 5 and 6 of section one hundred seventy of the domestic relations law as amended by this act and section ten of this act shall take effect immediately and sections two, three, four, five, six, seven, eight, nine, eleven and twelve of this act shall take effect September first, nineteen hundred sixty-seven.

NOTES: Section 171, herein repealed, establishes procurement, connivance, forgiveness, laches, and plaintiff's adultery as a defense to an action for divorce.

Section 215 creates a conciliation bureau. Section 215-a defines general powers and duty of such bureau. Section 215-b provides for Commissioners, Counselors, special guardians and other personnel in conciliation proceedings. Section 215-c provides for conciliation conferences. Section 215-d provides for conciliation hearings, including compulsory conciliation proceedings in the discretion of the Commissioner. These sections are repealed and conciliation proceedings are now provided for in new Sections 215 and 215-a in a more flexible and less complex manner.

Section 215-e herein repealed provides for temporary alimony, child support and counsel fees based solely on financial ability and need.



First Session—Twenty-seventh Parliament

1966-67

PROCEEDINGS OF
THE SPECIAL JOINT COMMITTEE OF THE SENATE
AND HOUSE OF COMMONS ON
DIVORCE

No. 20

THURSDAY, MARCH 2, 1967

Joint Chairmen

The Honourable A. W. Roebuck, Q.C.

and

A. J. P. Cameron, Q.C., M.P.

WITNESSES:

Robert McCleave, M.P.

Ian Wahn, M.P., Sponsor of Bill C-58.

APPENDIX:

69.—Bill C-58, An Act respecting Marriage and Divorce.

ROGER DUHAMEL, F.R.S.C.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1967

MEMBERS OF THE
SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS
ON DIVORCE
FOR THE SENATE

Hon. A. W. Roebuck, Q.C., Joint Chairman

The Honourable Senators

Aseltine	Connolly (<i>Halifax North</i>)	Flynn
Baird	Croll	Gershaw
Belisle	Denis	Haig
Burchill	Fergusson	Roebuck—(12).

FOR THE HOUSE OF COMMONS

A. J. P. Cameron, Q.C. (*High Park*), Joint Chairman

Members of the House of Commons

Aiken	Forest	McQuaid
Baldwin	Goyer	Otto
Brewin	Honey	Peters
Cameron (<i>High Park</i>)	Laflamme	Ryan
Cantin	Langlois (<i>Mégantic</i>)	Stanbury
Choquette	MacEwan	Trudeau
Chrétien	Mandziuk	Wahn
Fairweather	McCleave	Woolliams—(24).

(Quorum 7)

ORDERS OF REFERENCE

Extracts from the Votes and Proceedings of the House of Commons:

March 15, 1966:

"On motion of Mr. McIlraith, seconded by Mr. Hellyer, it was resolved—that a Special Joint Committee of the Senate and the House of Commons be appointed to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either House;

That 24 Members of the House of Commons, to be designated by the House at a later date, be members of the Special Joint Committee, and that Standing Order 67(1) of the House of Commons be suspended in relation thereto;

That the Committee have power to engage the services of such technical, clerical and other personnel as may be necessary for the purpose of the inquiry;

That the Committee have the power to send for persons, papers and records, to examine witnesses, to report from time to time, and to print such papers and evidence from day to day as may be ordered by the Committee, and that Standing Order 66 be suspended in relation thereto; and

That a Message be sent to the Senate requesting Their Honours to unite with this House for the above purpose, and to select, if the Senate deems it so advisable, some of its Members to act on the proposed Special Joint Committee."

"By unanimous consent, on motion of Mr. McIlraith, seconded by Mr. Hellyer, it was ordered—That the order of the House of Monday, February 21, 1966 referring the subject-matter of the following bills to the Standing Committee on Justice and Legal Affairs, namely:—

Bill C-16, An Act to provide in Canada for the Dissolution of Marriage (Additional Grounds for Divorce).

Bill C-19, an Act to provide in Canada for the Dissolution and the Annulment of Marriage.

Bill C-41, An Act to amend the British North America Acts, 1867 to 1965, (Provincial Marriage and Divorce Laws).

Bill C-44, An Act to provide in Canada for the Dissolution of Marriage.

Bill C-55, An Act to provide in Canada for the Dissolution of Marriage.

Bill C-58, An Act respecting Marriage and Divorce.

Bill C-79, An Act to amend the Dissolution and Annulment of Marriages Act (Additional Grounds for Divorce).

be discharged, and that the subject-matter of the same bills be referred to the Joint Committee of the Senate and House of Commons on Divorce".

March 16, 1966:

"By unanimous consent, on motion of Mr. Stewart, seconded by Mr. Byrne, it was ordered—That the subject-matter of Bill C-133, An Act to extend the grounds upon which courts now have jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief, be referred to the Special Joint Committee on Divorce".

"By unanimous consent, on motion of Mr. Stewart, seconded by Mr. Byrne, it was ordered—That the subject-matter of Notice of Motion No. 11 be referred to the Special Joint Committee on Divorce."

March 22, 1966:

"On motion of Mr. Pilon, seconded by Mr. McNulty, it was ordered—That a Message be sent to the Senate to acquaint Their Honours that this House will unite with them in the formation of a Joint Committee of both Houses to inquire into and report upon divorce in Canada, and that the Members to serve on the said Committee, on the part of this House, will be as follows: Messrs. Aiken, Baldwin, Brewin, Cameron (*High Park*), Cantin, Choquette, Chrétien, Fairweather, Forest, Gower, Honey, Laflamme, Langlois (*Mégantic*), MacEwan, Mandziuk, McCleave, McQuaid, Otto, Peters, Ryan, Stanbury, Trudeau, Wahn and Woolliams."

LÉON-J. RAYMOND,

Clerk of the House of Commons.

Extracts from the Minutes of the Proceedings of the Senate:

March 23, 1966:

"Pursuant to the Order of the Day, the Senate proceeded to the consideration of the Message from the House of Commons requesting the appointment of a Special Joint Committee of the Senate and House of Commons on Divorce.

The Honourable Senator Connolly, P.C., moved, seconded by the Honourable Senator Roebuck:

That the Senate do unite with the House of Commons in the appointment of a Special Joint Committee of both Houses of Parliament to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either House;

That twelve Members of the Senate, to be designated at a later date, act on behalf of the Senate as members of the said Special Joint Committee;

That the Committee have power to engage the services of such technical, clerical and other personnel as may be necessary for the purpose of the inquiry;

That the Committee have the power to send for persons, papers and records, to examine witnesses, to report from time to time, and to print such papers and evidence from day to day as may be ordered by the Committee, and to sit during sittings and adjournments of the Senate; and

That a Message be sent to the House of Commons to inform that House accordingly.

After debate, and—

The question being put on the motion, it was—

Resolved in the affirmative."

March 29, 1966:

"With leave of the Senate,

The Honourable Senator Beaubien (*Provencher*) moved, seconded by the Honourable Senator Inman:

That the following Senators be appointed to act on behalf of the Senate on the Special Joint Committee of the Senate and House of Commons to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, namely, the Honourable Senators Aseltine, Baird, Belisle, Bourget, Burchill, Connolly (*Halifax North*), Croll, Fergusson, Flynn, Gershaw, Haig, and Roebuck; and

That a Message be sent to the House of Commons to inform that House accordingly.

The question being put on the motion, it was—

Resolved in the affirmative."

May 10, 1966:

“Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Roebuck, seconded by the Honourable Senator Croll, for the second reading of the Bill S-19 intituled: “An Act to extend the grounds upon which courts now having jurisdiction to grant divorces a *vinculo matrimonii* may grant such relief”.

The question being put on the motion—

In amendment, the Honourable Senator Connolly, P.C., moved, seconded by the Honourable Senator Hugessen, that the Bill be not now read the second time, but that the subject-matter be referred to the Special Joint Committee on Divorce.

After debate, and—

The question being put on the motion, it was—

Resolved in the affirmative.”

J. F. MACNEILL,
Clerk of the Senate.

MINUTES OF PROCEEDINGS

THURSDAY, March 2, 1967.

Pursuant to adjournment and notice, the Special Joint Committee of the Senate and House of Commons on Divorce met this day at 3:30 p.m.

Present: For the Senate: The Honourable Senators Roebuck (*Joint Chairman*), Belisle, Denis, Fergusson and Gershaw—5.

For the House of Commons: Messrs: Cameron (*High Park*) (*Joint Chairman*), McCleave, Peters and Wahn—4.

In attendance: Peter J. King, Ph.D., Special assistant.

The following witnesses were heard:

Robert McCleave, M.P.

Ian Wahn, M.P., Sponsor of Bill C-58.

The following is printed as an Appendix:

69. Bill C-58, An Act respecting Marriage and Divorce.

At 4:45 p.m. the Committee adjourned until Tuesday next, March 7, 1967 at 3:30 p.m.

Attest.

Patrick J. Savoie,
Clerk of the Committee.

THE SENATE

SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS ON DIVORCE

EVIDENCE

OTTAWA, Thursday, March 2, 1967.

The Special Joint Committee of the Senate and House of Commons on Divorce met this day at 3.30 p.m.

Senator Arthur A. Roebuck and Mr. A. J. P. Cameron (*High Park*), Co-Chairmen.

Co-Chairman Senator ROEBUCK: Honourable Senators, members of the House of Commons, we have a quorum and I think we had better commence our proceedings. We have had a long and a very great series of meetings at which we have had witnesses, who were our guests, who have given us a wealth of information in masterly briefs and presentations. We did have a program for today but we have none now because of certain changes on the part of our witnesses, but we have got something that is equally important and must be taken care of.

Mr. McCleave promised us that he would look into the law of Nova Scotia, which as members will recollect, is somewhat different from the law in other provinces. He has now prepared a brief but I have only recently received it and have not been able to read it. I presume that is the way with all of you. Let us now call on Mr. McCleave to present his brief and any comments he may wish to make on it. Mr. McCleave will tell us what the law of Nova Scotia is in this matter.

Mr. MCCLEAVE: Thank you, Mr. Chairman, and colleagues in the committee. I do not know whether you want me to read the brief. I think it would be helpful if I simply give the highlights of it.

Co-Chairman Senator ROEBUCK: There are only three pages, Mr. McCleave. Perhaps you would not find it difficult to read them.

Mr. MCCLEAVE: Yes, I can do that.

Co-Chairman Senator ROEBUCK: I received the brief only very recently, as I said, and have not had an opportunity to read it.

Mr. MCCLEAVE: Very well, Mr. Chairman, I will read it.

As Mr. E. Russell Hopkins has pointed out in an outstanding presentation, "Cruelty" as a ground for divorce has existed in Nova Scotia since 1761 (Page 13). Mr. Hopkins dealt with the jurisprudence which has developed concerning cruelty at pages 19 and 20 of our proceedings.

My purpose will be to add somewhat to the opinions of the courts that he placed on record, since it is important to dispel any public notion that "cruelty" is not widely defined so as to embrace marriage breakdown in all its aspects.

Frequently in divorce cases involving cruelty allegations, the offender will be found guilty of the conduct complained of but will say that he or she still loves the petitioner.

In other words, it is a question of lack of intention.

English courts and Nova Scotian courts have wrestled with this problem for years, and there have been significant changes in the law.

In 1939, for example, in *Astle vs. Astle*, 1939 3 All England Reports, Mr. Justice Collins stated "intention or malignity is an essential ingredient in cruelty."

But in less than a decade, in *Squire vs. Squire*, reported in 1948 2 All England Reports, the Court of Appeal unanimously held that malice was not essential in an action founded on cruelty. Lord Justice Evershed specifically referred to the Astle case, and said: "As I read his judgment (Collins J), the Judge was of the opinion that the absence of any spiteful or malignant intention on the part of the wife (as he found to have been the fact) was fatal to the husband's claim. I am unable to agree with this view."

One of the latest decisions of the House of Lords, *Gollins vs. Gollins*, 1963 2 All England Reports at page 966 et seq., is the most authoritative statement on the question of intention. The husband was lazy, gave little assistance to the wife who ran a nursing home, and she was reduced to a physical and mental state where she would not longer be able to maintain herself or her children. She also had assumed several of his debts. Divorce was granted on the ground of cruelty. The House of Lords had to decide whether an intention to injure the other spouse is or is not a necessary element of cruelty. Divorce was granted by justices at Ludlow, reversed by a divisional court of the Probate, Divorce and Admiralty Division, restored by the Court of Appeal, and affirmed by the House of Lords.

Lord Reid put his conclusions in this way:

If the conduct complained of and its consequences are so bad that the petitioner must have a remedy, then it does not matter what was the state of the respondent's mind.

Lord Evershed agreed, and said:

In my opinion, however, the question whether one party to a marriage has been guilty of cruelty to the other or has treated the other with cruelty does not, according to the ordinary sense of the language used by Parliament, involve the presence of malignity (or its equivalent); and if this view be right it follows, as I venture to think, that the presence of intention to injure on the part of the spouse charged or (which is, as I think, the same thing) proof that the conduct of the party charged were "cruel" according to the ordinary sense of that word, rather than whether the party charged was himself or herself a cruel man or woman.

In the Nova Scotian courts, one of the leading pronouncements was by Mr. Justice Currie—now Chief Justice of the Appeal division—in *Clattenburg v. Clattenburg*, reported in 1955 2 Dominion Law Reports. At page 375, he stated that a party seeking divorce on the ground of cruelty "must satisfy the court not only that he or she suffered in the past but also that he or she is in need of protection in the future."

I have dealt at length with the question of intention because I think that when we are dealing with the field of marriage breakdown in this committee this development of the question of intention must be helpful in that regard as well as with regard to the legal concept of what is cruelty.

My second purpose is to acquaint the committee with views of the Justices of the Supreme Court of Nova Scotia on the question of codification of the concept of "cruelty". The views are unanimously not to codify, and I was able to speak to a majority of the six trial judges. The current legislation in the United Kingdom may be found at Page 52, where the words are "treated the petitioner with cruelty." Cruelty is not otherwise defined in the British Statute.

It might be noted that the justices also agree that no one judge should be assigned to deal with divorce. Some years ago this was the practice in Nova Scotia, but is now generally agreed that the orderly development of concepts in what constitutes cruelty will best come about if several judicial minds are responsible for that development.

My third point concerns the number of cases in which relief may be granted to a petitioner because of cruelty. Up to 1950, the number of such cases was small. Recollection at the Law Courts in Halifax is that one or two cases a year would be

heard. The number now is approximately 15 out of some 420 cases being handled each year. We are thus dealing with an addition to the current divorce rate in an approximate order of three to four per cent.

In the second last paragraph I stated that "The number now is approximately 15 out of some 420 cases being handled each year." Since this was written, a check was made by Miss Marjorie Hyde, Deputy Registrar, of 100 tried cases, and she found 16 involved cruelty. The estimate of three to four per cent should therefore be corrected to about 19 per cent. In other words, of the 100 cases, 84 would be on the usual ground of adultery and 16 on the ground of cruelty and the percentage, 19 per cent, represents the proportion of 16 to 84. This is a helpful guide since elsewhere in Canada one would be looking for the expected number of cases of cruelty which do not now exist.

I have closed by thanking the Chief Justice and the Registrar for their kind assistance.

I have given an appendix which was prepared some time ago. The Registrar handed me eight files at random, there was no selectivity about it, and I went through them to pick out the allegations of fact, which were substantiated by evidence, and in some cases by the notes of the trial judge. At any rate, this just gives the committee a list of a few of the types of cases which constitute cruelty in the province of Nova Scotia. I did that so there would be no doubt that we were dealing with unquestionable cruelty, cruelty as such, and not with incompatibility.

Co-Chairman Senator ROEBUCK: Are you going to read the cases?

Mr. McCLEAVE: I had not planned to.

Co-Chairman Senator ROEBUCK: There are only a few of them; I suggest you read them.

Mr. McCLEAVE: All right, Mr. Chairman.

CASE ONE: Woman beaten over a period of two years by her husband, including a kick to her abdomen when she was pregnant. She required medical care after one beating. There were also threats that he would kill her.

She got a divorce on that ground.

CASE TWO: Husband refused normal marital sexual relations over a period of twenty years, resulting in a deterioration of her health. He threatened her with a razor, threatened her because the tea was cold, acted so that she required hospital treatment—not specified in petition as to what these acts were—quarrelled with her and had temper tantrums, sulked, displayed fits of temper and was uncongenial.

Co-Chairman Senator ROEBUCK: That cold tea would be a good defence.

Mr. McCLEAVE: The tendency in divorce petitions is for the petitioner to throw everything he or she can at the spouse and so the tea made its way into the report along with the razor.

CASE THREE: Wife said her husband treated her in a "cruel, harsh and inhuman manner by repeatedly assaulting and abusing her," that while intoxicated he struck her across the face, struck her on the abdomen when she was seven months pregnant—on both occasions the husband was intoxicated—hit her so hard her kidney was punctured, grabbed her by the throat and shook her, attempted to close the door on her hand, knocked her down with a blow on her face, choked her and threatened to kill her, and caused nervous disorder. Evidence by a psychiatrist was presented.

In that case relief was granted.

Co-Chairman Senator ROEBUCK: There is not much difficulty in recognizing cruelty there.

Mr. McCLEAVE: No.

CASE FOUR: Woman complained that her husband used abusive, threatening or offensive language towards her, threatened assault and carried out assaults, so that she

"was in constant fear of some serious bodily injury," assaulted her at least ten times and dragged her across the floor by her hair and ripped clothing from her body, caused her to fear to go out alone the street and kept her door locked.

The relief was granted.

CASE FIVE: Woman complained that her husband used abusive, offensive or threatening language, threatened and carried out assaults, tore her clothing, bruised her about face and body, pounded her head against the wall during a quarrel over money, struck her and their child, dragged her about on the floor, threatened to kill her, waited for her with a loaded rifle, hit her on the eye breaking her glasses and cutting her eye.

The relief was granted.

CASE SIX: Woman complained of her husband's adultery and of his cruelty. She alleged that he treated her in a harsh, cruel and insulting manner, abused her verbally, called her insulting names, and thus impaired her mental and physical health. The decree was granted on the grounds of cruelty. The woman's evidence was supported by that of two other women.

CASE SEVEN: Woman complained that her husband was a heavy drinker and stayed out late at night, complicating her pregnancy because of her strain and worry, some of it induced by his spending habits; that he drank and came home with his clothes torn from street brawls, causing her strain and worry; that after nine years of marriage he commenced to use abusive language, would throw dishes on the floor, threw an open can of paint on the floor, broke windows, played the radio at high volume in the night, attempted to drag his wife to bed with him while she was doing the dishes, and bruised her in the altercation which followed. She complained that he dragged her by her wrist around the house when she attempted to leave him—she was pregnant—threw her on the bed atop a child, struck her on the face; that the child died shortly after birth, that he threw a large coffee table at her; that he knocked down a Christmas tree while intoxicated, that he would not stay with the children on New Year's Eve; that he set a fire in the house by accident while intoxicated; that he persuaded his wife to return to him by threatening to commit suicide; that she was unable to write four exams because of the tension and nervous exhaustion; there was evidence of extreme drinking throughout.

CASE EIGHT: Husband complained of physical assaults, insults, nagging, neglect and ill treatment of the children, and persistent efforts to prevent him sleeping. His health was injured. The trial judge found that much of her conduct was intended to injure her husband physically, and to cause injury to his health, and that her attitude was sadistic, selfish, callous and indifferent.

Co-Chairman Senator ROEBUCK: Playing the radio at night would be sufficient cruelty.

Mr. McCLEAVE: It depends on the station.

In Case No. 8 it was not in the petition but I have knowledge of the fact that at one time the husband woke in the night to find his wife standing over him threatening him with a poker and the divorce was granted.

Co-Chairman Senator ROEBUCK: This is significant, because one cannot read these cases without coming to the conclusion that our Canadian judges are in one important respect somewhat different from the judges in some other countries in that they demand something substantial by way of evidence in the matter of cruelty. If we adopted cruelty as one of the grounds, I think we would have reason to depend upon the moderation of Canadian judges in this matter and not expect them to treat as cruelty such preposterous complaints as burning the toast or reading the newspaper at breakfast in the morning or allowing the tea to cool. I think this is important.

Mr. WAHN: Am I correct in thinking that while there is no judicial definition of cruelty in the province of Nova Scotia the term itself is used there.

Mr. McCLEAVE: Yes, that is right, it is. They have also developed the jurisprudence in accordance with the English practice.

Mr. WAHN: There has been no difficulty in doing that, despite the lack of statutory definition?

Mr. McCLEAVE: That is right. I should add that it is the practice where the mental cruelty picture enters for the courts to require strong evidence, and it has to be the evidence of a psychiatrist.

Mr. PETERS: What do you think the decision would be if there was only one case of cruelty? Would that be a sufficient ground?

Mr. McCLEAVE: Perhaps I could illustrate this with two cases that I have knowledge of. In one case there was only one act of cruelty. Within less than a week of the marriage the groom struck the bride severely on the mouth, breaking her teeth. This was only one incident and the divorce was granted.

It was followed by a case where a husband and wife were married for over thirty years. There had never been any physical violence between them and one day the husband hit his wife on the mouth and broke her teeth. In the first case the judge decided that if this was going to be the sort of thing that would happen where this young woman was so severely injured within a week of marriage, he had better grant the divorce on the ground of cruelty because otherwise the husband might murder his wife or keep on beating her badly. On the other hand, he decided in the second case involving this older couple that one incident of violence in thirty years did not suggest that the offence was likely to repeat itself and he refused the decree.

Senator BELISLE: Do you not think, Mr. McCleave, that in the case of the young couple a civil penalty would have been effective in bringing the groom to his senses? Had that been the decision, I do not think there is any reason to believe that the marriage might not have been saved. I do not think the divorce should have been granted in the first week of married life. In that case there should have been counselling and if the offence had been repeated three times, say, within a month, then I would say the divorce should be granted.

Mr. McCLEAVE: I hope we can come up with some formula for reconciliation and counselling which will work, but that formula will be very difficult to find.

Co-Chairman Senator ROEBUCK: And to administer.

Mr. McCLEAVE: Yes. In that marriage perhaps the judge could have withheld decision to see whether the passing of time would bring that couple together again.

Senator BELISLE: If it is possible for a politician to regret a speech he had made some time ago, surely it is possible for a man to regret an assault he had committed upon his wife within a week of their marriage.

Mr. McCLEAVE: Yes, and to give the lady a chance to get even with him over a long period of time.

Co-Chairman Senator ROEBUCK: He might not have got used to the nagging of the woman in so short a time and later on perhaps he would be able to take it in a way that he could not in the first week of marriage.

Co-Chairman Mr. CAMERON: Might not the judge have been influenced by evidence showing the surrounding circumstances to be such as to lead to the conclusion that this first blow was only a hint of what was to come in the future.

Mr. McCLEAVE: I have no doubt I have simplified the case, but I am sure the facts are as I have given them.

Senator FERGUSSON: The court must be satisfied that the woman is protected in the future and that is certainly a case where she needed protection, when she could be beaten up in the first week.

Mr. McCLEAVE: The original conception of cruelty, which has been fairly well defined, is conduct of such a nature that the other party must be protected against it, and protection has been primarily the purpose in granting a divorce in such cases.

Co-Chairman Senator ROEBUCK: Have you any further questions? Have you any further comments, Mr. McCleave?

Senator FERGUSON: I am interested in the suggestion that a series of cases should not be heard by one judge. This interests me because you have just one judge that deals with divorce cases in our province. He does not deal with cruelty cases.

Mr. McCLEAVE: Under the practice where one judge had continuously heard cases it has been generally agreed that his approach tended to retard the orderly development of the divorce law in Nova Scotia and I mention this particularly because of the remarks of certain witnesses who have appeared before us.

Co-Chairman Senator ROEBUCK: We would need no change in our law to bring about an improvement in the administration if we could get the consent of the Exchequer Court to make several of their judges commissioners. In that way we could circulate the burden of cases and that would accomplish the result we have in mind.

Senator FERGUSON: Would the Exchequer Court Judges act in all provinces?

Co-Chairman Senator ROEBUCK: No, in conjunction with our parliamentary divorce committee.

Senator FERGUSON: That would not affect the situation in New Brunswick, where we have one judge.

Co-Chairman Senator ROEBUCK: It is up to the authorities there to make what arrangements they please. We cannot interfere with that. In that case administration is within the provincial jurisdiction and usually it is carried out by the chief justice who says, "You go to such and such a place and you go somewhere else." There is nothing much we can do about it, but if it were possible in the parliamentary divorce committee for a larger number of Exchequer Court Judges to be made our commissioners, the administration would be greatly facilitated.

Co-Chairman Senator ROEBUCK: The parliamentary committee goes over the finding of the judge. Our committee reads each case after the judge gives his decision, so that it is not entirely up to him. The committee takes some responsibility. In other words, it is not just one man's opinion. On the other hand, one man hears these same cases day after day, month after month, and now year after year, and while he becomes an expert in divorce hearings, it must be exceedingly boring to him. It is also too confining. I would like to see some more judges made commissioners so as to give our present judge a little more experience in other cases. He asked for it when he came before us.

Senator BELISLE: Are you thinking that in the hearing of such cases he becomes immune to petty grievances and looks only to serious offences.

Co-Chairman Senator ROEBUCK: I do not know about what effect it must have on his mind, but in a general way I think it is undesirable that a judge should be kept at one series of cases year after year. How could he feel the enthusiasm that is necessary, or at least advisable, in the hearing of these cases? They must get stale.

Co-Chairman Mr. CAMERON: I should think he would get fed up.

Co-Chairman Senator ROEBUCK: "Fed up" is a good expression. Not that there is any evidence of our commission getting fed up. I merely repeat what he said when he was before us. Is that all, Mr. McCleave?

Mr. McCLEAVE: That is it, sir.

Co-Chairman Senator ROEBUCK: I wish to express my thanks and those of my chairman and of the committee as well for the work you have done, Mr. McCleave, in this connection, and the contribution you have made to our deliberations.

Co-Chairman Mr. CAMERON: I concur in what my co-chairman has said. Mr. McCleave has presented his brief precisely in the manner one would have expected, and I for one have a clearer understanding of the legal concept of cruelty than I had before he gave his explanation.

Co-Chairman Senator ROEBUCK: Honourable senator and members, there is another gentleman who, I think, will be as interesting as the last one and he also has a great deal to tell us. I refer to Mr. Wahn. I should explain that there have been a number of bills introduced into the House of Commons and one in the Senate, and two or three of us discussing this matter thought that we should invite each one who has presented a bill to come and tell us what he has to say with regard to that bill. He may elaborate on it if he cares to do so; that is up to him. Mr. Wahn introduced such a bill in the House of Commons, Bill C-58. It is quite a lengthy bill with a great deal of material in it. Mr. Wahn is here to speak on it. Mr. Wahn, we shall be glad to hear from you.

Mr. WAHN: First, I thank the committee for giving me an opportunity to say a few words about the bill I have introduced in the House of Commons, and to answer questions that any members may wish to ask.

It may be of interest to the committee to know that I decided to sponsor this bill in the House of Commons because of a great many requests from people in my riding for action on divorce reform.

I should also like to say that a great deal of the work of research upon the bill and the review of laws which apply in other countries was done by Mr. R. J. Frost, then a law student at the University of Toronto and now practicing law in that city. He did a great deal of research and prepared a draft of the bill, and I am indebted to him for his assistance.

Since the bill was introduced, together with other bills for the same purpose, I have received a great deal of correspondence from all parts of the country, and almost unanimously there is a clear demand for basic reform in our divorce law. In the years I have been here I have not received as much correspondence on any subject as I have received on this particular question of divorce reform, and virtually all the correspondence that I have received favours strongly a thorough-going reform of our matrimonial law.

As indicated by the title of my bill, "An Act Respecting Marriage and Divorce," the primary purpose of this bill is to preserve the marriage relationship, where the continuance of a normal marriage is considered possible, and to provide a dignified, inexpensive and expeditious method of terminating marriage if it is entirely clear that a normal marriage relationship is no longer possible. The third and final purpose is to make sure that when a divorce does become necessary and a divorce decree is granted, there is proper protection for the children of the marriage.

As I say, the primary purpose is to preserve the marriage if a normal marriage is possible. That purpose is expressed in the provision contained in section 4 to the effect that, except in unusual cases, a divorce action cannot be commenced within three years after the date of marriage. This is a change from the previous law in an attempt to protect the marriage relationship and encourage parties to make a real effort to preserve their marriage.

This is substantially like the provision which has been in existence in English matrimonial law since 1937. It has obvious advantages, and disadvantages as well, but in England it is felt that the advantages outweigh the disadvantages and they have retained the provision, except in exceptional circumstances where it can be waived.

Generally speaking, section 4 of my bill would provide that there should be no divorce granted within three years after marriage. The thinking behind this is that, because of inadequate premarital counselling, many people run into marriage precipitately. The first three years of married life, it is recognized, are the most difficult. That is a period of adjustment, when two people find it difficult to accommodate themselves to each other. It is felt that the rule adopted in England is a wise one and I have followed it, so, that only in exceptional circumstances would divorce be permitted in the first three years after marriage.

Co-Chairman Senator ROEBUCK: Do you know what the practice is with regard to the determination of "exceptional circumstances"? I have not studied what exceptional circumstances are, but this rule would prevent divorce in the case of cruelty.

Senator BELISLE: Except in exceptional circumstances.

Mr. WAHN: There is provision that the court can waive this rule if it would impose exceptional hardship.

Senator BELISLE: That divorce granted in Nova Scotia after one week of marriage would not be possible, then.

Mr. WAHN: No, unless the judge came to the conclusion, as he might, that there were exceptional circumstances. Generally the rule would be, as in England, that no divorce would be granted within three years after the date of marriage, with provision for the court to dispense with the rule in a case of exceptional hardship.

That is one provision of the bill which is designed to preserve the marriage if there is any possibility of there being a normal marriage relationship.

The second provision of the bill so designed is contained in section 5. This provides that before the final divorce decree can be granted either party may request reconciliation proceedings and the judge, if he feels there is a possibility of reconciliation, can suspend the hearing for a sufficient period so that every possible effort can be made to bring the parties together. If within a month there is evidence that no reconciliation can be affected, either party can request that the divorce proceedings continue. This does give some protection against hasty divorces and provides that if there is any possibility of saving the marriage the court can refer the parties to experienced marriage counsellors.

A third provision contained in the bill designed to preserve marriage is a rather technical one found in clause 7. This provides, in effect, that where the parties, after they have been separated, resume cohabitation and are seeking reconciliation, cohabitation for a period of two months or less is not to be considered condonation which would defeat the application for divorce.

I need not go into that provision in detail; it is a technical one.

Co-Chairman Senator ROEBUCK: But it is something we must consider when it comes to the drafting of our report. It is something that is really on the board for our consideration, where we modify condonation to that extent and the parties come together for a short period of time with the purpose of attempting reconciliation. In those circumstances that attempt at reconciliation shall not be regarded as a complete bar to the claims of either party as they existed prior to their coming together.

Mr. WAHN: Those are the main provisions in the bill designed to preserve marriage. It is recognized however that despite our best efforts there will be some marriages which must be dissolved; and it seems to me it is important that steps be taken to make sure that the method adopted shall be as inexpensive as possible, reasonably expeditious, and dignified in procedure.

Clause 3 of my bill relates specifically to the jurisdiction problem which many married women have encountered in the past. This involves the problem of finding the proper jurisdiction, particularly in cases where the wife has been deserted or has moved, or where she has moved from the jurisdiction of her husband's domicile. An attempt has been made under the Divorce Jurisdiction Act to deal with this problem, but it is generally recognized that it is not completely satisfactory. Clause 3 of my bill would extend the jurisdiction of the courts to the matrimonial residence of the parties. That would make it easier for a married woman to bring action.

Senator FERGUSON: How do you define matrimonial residence?

Mr. WAHN: I have made no attempt to define that term. The term residence is defined by judicial precedent and the word matrimonial would indicate the place where the couple had lived for some time as the matrimonial home. There is no specific statutory definition.

A decision had to be made as to grounds for divorce. Traditionally the only ground in most jurisdictions in Canada has been adultery. It seemed to me therefore that historically divorce was based upon the principle that when two people took the marriage vow and became man and wife they did so on the condition that the vow

would be observed; and if in fact the vow is broken, that is to say if one party commits adultery, there is a breach of the marriage contract which entitles the injured party to dissolution.

Mr. PETERS: Suppose there were adultery in the first or the second year of the marriage, would that be considered an exceptional reason for granting the divorce before the expiry of the three-year period.

Mr. WAHN: I would not think so unless there were some other circumstances.

Mr. PETERS: In that case, then, there would be no exception?

Mr. WAHN: No. It is left to the discretion of the judge. The mere fact of adultery would not necessarily justify divorce within the three years.

Mr. PETERS: What would you consider exceptional?

Mr. WAHN: I can see that if there were adultery combined with reasonable fear on the part of one spouse, whether husband or wife, there would be a grounds—for instance, the case of the woman standing over her husband with a poker; that might be sufficient. As the bill is drafted, however, it is left to the discretion of the judge.

The basic theory on which divorce has been granted in the past is that if the contract is violated by one party committing adultery, the other party may proceed.

I was familiar with the doctrine of marriage breakdown, and I had to decide whether to adopt breakdown alone or in combination with the historical theory on which divorce has been based, namely, a breach of the marriage vow.

In my bill specific grounds for divorce are set out in section 6, in subclauses (a) to (i). It seemed to me reasonable to permit a dissolution on any of these grounds. This type of thing is not contemplated when the marriage relationship is entered into. Marriage breakdown is added at the end as subclause (j).

To go through the clauses very briefly. Subclause (a) is adultery. That is the traditional ground. The next is desertion for a period of not less than three years. When people get married it is assumed that they will continue to live together, but if one party deserts the other party for a period of more than three years it is reasonable to allow the injured party to get a divorce.

The next ground is cruelty or other conduct of such a nature that there is no reasonable expectation of a normal marriage relationship.

The next is drunkenness or the use of narcotics. When you marry you are entitled to assume that your partner will not become a drunkard or addicted to drugs.

The next ground, (e), is conviction for crime, where there is imprisonment for an extended period of time. That is set out in detail in subclause (e).

Subclause (f) relates to sexual offences where the defendant has committed or has been convicted of sodomy, bestiality, and so on.

The next is failure to pay maintenance. This subclause provides for any case where the defendant has wilfully and habitually failed for a period of more than two years to pay maintenance to the petitioner as required by a court of competent jurisdiction or as agreed upon between the petitioner and the defendant under an agreement for their separation if the court is satisfied that all reasonable efforts have been made by the petitioner to enforce the order or agreement under which the maintenance was ordered or agreed to be paid. I think it is reasonable to assume that when you get married you will support your wife.

Mr. PETERS: Suppose he stops working through no fault of his own?

Mr. WAHN: According to the bill, it has to be over an extended period, over two years. Perhaps it should be a longer or a shorter period. It is a question whether a two-year period of non-support is too short or too long.

Senator FERGUSON: It would not be wilful if he had no way of obtaining money.

Mr. WAHN: The provision is "wilfully and habitually failed". If he is unemployed through no fault of his own he has not wilfully failed.

The next specific ground is mental illness, and the same principle applies: when you get married you assume the continued sanity of your partner.

The next subclause has to do with absence, where a court of competent jurisdiction has declared the other party dead. This is to give relief in a case where one of the partners has been absent for so long a period of time that the court sees fit to declare that person dead. Perhaps his spouse has remarried. This provision would permit dissolution of the first marriage in these circumstances.

These are specific grounds based on the theory that there has been a violation of the marriage contract or that something has happened which was not contemplated at the time of the marriage but which is of such gravity that the marriage ought to be dissolved.

Finally, there is subclause (j) which is based on the marriage breakdown theory. This provides that divorce may be granted if the petitioner and the defendant have separated and have lived apart for a continuous period of not less than five years immediately preceding the date of the final petition, provided there are no reasonable grounds for believing there will be reconciliation. If the court is of the opinion that there is no possibility of reconciliation and the parties have shown by the very fact that they have lived apart for so long a period that there is no possibility of a normal marriage relationship, there seems to be no point continuing the marriage. This is so even though no one is at fault and there is no marital offence. In short, the bill adopts the theory of marriage breakdown and dissolution is permitted.

Co-Chairman Senator ROEBUCK: I have received from the province of Quebec a letter in which a woman states that she was married twenty-two years ago and has raised quite a family, but for some reason she and her husband have been living apart. She does not claim any offence on the part of the husband. She is in receipt of an allowance from him and he now wants her to take action against him for divorce. She has no intention of doing so because her lawyer tells her that if she does she will release him from any obligation to pay her continued allowance, and from any claim she may have for alimony. For that reason and others she is refusing to take action against him.

Now, suppose you have a provision such as you have described, where the parties have been separated for five years—in this case the lady and her husband have been separated for seven years—I should think that the husband in this instance could qualify, according to your definition. Would you therefore give him a divorce which would relieve him of any liability for his wife? That is not the situation in the province of Ontario because in Ontario she could apply for a divorce and at the same time ask for alimony, which is frequently granted in this province. On the other hand, in the province of Quebec, divorce relieves the husband of any liability whatsoever to his wife. It seems to me we have to take that point into consideration.

Mr. WAHN: I believe we have had a learned memorandum submitted to us by the Justice Department indicating that we have jurisdiction to make provision regarding the children and the payment of alimony to the wife.

Co-Chairman Senator ROEBUCK: You would exercise ancillary rights?

Mr. WAHN: Yes.

Co-Chairman Senator ROEBUCK: Thank you; that is a complete answer.

Mr. WAHN: I would assume that if the parties had been living separately for over five years the court would grant a divorce and make proper financial provision for the protection of the wife and the children of the marriage. These are the only comments I have to make on my bill.

Senator GERSHAW: There came up in the Senate the other day a point which I might mention now. If the law of divorce were to be administered by the existing provincial courts would that include county courts as well as superior courts?

Mr. WAHN: I am afraid I am not familiar with that aspect of the matter.

Senator GERSHAW: It is the superior courts that have that right now.

Mr. WAHN: The idea would be to continue the existing courts.

Senator BELISLE: Our province is divided into districts.

Co-Chairman Senator ROEBUCK: I did not hear what Senator Gershaw said.

Senator GERSHAW: Would this be applicable to both county and superior court judges? In Ontario more than half the courts are in districts and the rest in counties.

Senator BELISLE: Mr. Chairman, I believe I heard you speak of the province of Quebec where, you said, the wife has no recourse against her husband. I believe you said that there was no obligation on the part of the husband, even if the husband is the applicant for divorce, to make provision for his wife.

Co-Chairman Senator ROEBUCK: That is right.

Senator GERSHAW: He is responsible for the children.

Co-Chairman Senator ROEBUCK: Yes. It does not affect his liability so far as the children are concerned.

Mr. PETERS: Is clause (j) of the bill based upon the theory of divorce by consent rather than upon the marriage breakdown theory?

Mr. WAHN: Clause (j) of the bill is based on the breakdown theory in that provision is made that there must be separation for at least five years—I do not know whether that period recommends itself to the committee—and it is also provided that the court must be satisfied that there are no reasonable grounds for believing that reconciliation is possible. That would suggest the complete breakdown of the marriage.

Mr. PETERS: If it is voluntary it is with consent.

Mr. WAHN: I took the view that the parties themselves, after five years of separation, should be the best judges as to whether or not the marriage had broken down. There are those who suggest that social service workers should conduct an inquest on the marriage to decide whether it has broken down. That is another view of the breakdown theory. Others feel that it should be left to a judge. It seems to me that if two people have lived apart for five years, or whatever period is considered reasonable, and if in addition to that the court finds that there is no likelihood of a reconciliation, that is fairly good evidence that there has been a breakdown, and perhaps the best way of determining the breakdown is to leave it to the parties themselves.

Mr. PETERS: The period provided in the bill in the case of desertion is not less than three years and I agree that no one is sure about the period, whether it should be one year or two years or ten. But desertion exists where one party decides to leave the other, and that is for three years. But I gather where two people have agreed, where there is consent and it is voluntary, the period is five years. Why should there be that difference where it is obvious that both are parties to the decision. In the case of desertion it takes only three years to get a divorce, whereas if they both agree it takes five years. My thinking would be the reverse of that. If they both agree I would have no objection. I cannot see why you should penalize these because they have made an agreement for five years.

Mr. WAHN: If one spouse deserts the other, the spouse that deserts would not be able to get the divorce after three years but the deserted spouse could get it. In other words, clause 6 of the bill is really based upon two distinct principles. The first is the matrimonial offence theory. A person who is deserted has the right to claim a breach of the marriage contract and to bring action for the dissolution of the marriage. The provision for divorce after a five-year separation by mutual consent, in my opinion, is based on the marriage breakdown theory. It means that the two persons have decided that the marriage has failed and in fact they have terminated their relationship. If in addition the court finds that reconciliation is impossible it seems to me that the marriage is ended anyway and it might as well be terminated formally.

Co-Chairman Senator ROEBUCK: Perhaps, Mr. Wahn, you would like to say something about condonation, collusion and connivance.

Mr. WAHN: The bill would leave these questions to the discretion of the court rather than being mandatory, and in addition would cover the point I mentioned

before, namely, that cohabitation with a view to reconciliation would not be considered condonation. It is an important change in the law.

Mr. McCLEAVE: Are you wedded to the idea of desertion for at least three years? This might be an extreme hardship on a woman who is deserted. Have you considered the advisability of cutting down that period?

Mr. WAHN: Perhaps some discretion should be introduced. I had great difficulty in deciding what would be appropriate time periods.

The committee adjourned.

APPENDIX "69"

1st Session, 27th Parliament, 14 Elizabeth II, 1966.

The House of Commons of Canada

Bill C-58

An Act respecting Marriage and Divorce

First reading, January 24, 1966

MR. WAHN.

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

Short title.

1. This Act may be cited as the *Canada Marriage and Divorce Act*.

Certain marriages not invalid.

2. (a) A marriage is not invalid merely because the woman is a sister of a deceased wife of the man, or a daughter of a sister or brother of a deceased wife of the man.

Idem.

(b) A marriage is not invalid merely because the man is a brother of a deceased husband of the woman or a son of a brother or sister of a deceased husband of the woman.

Action for divorce.

3. An action for divorce a vinculo matrimonii may be brought in any province of Canada in which there is a Court having jurisdiction to grant a divorce a vinculo matrimonii if

- (i) the parties are domiciled, or have their matrimonial residence, in that province at the date of the filing of the petition; or
- (ii) if the parties were domiciled, or had their matrimonial residence, in that province immediately prior to the time at which the grounds upon which the petition is based arose; or
- (iii) the action is brought by a married woman who either before or after the passing of this Act has been deserted by and has been living separate and apart from her husband for a period of two years or more and is still living separate and apart from her husband at the time the petition for divorce is filed and the husband of such married woman was domiciled in that province immediately prior to such desertion.

Limitation of time

4. (1) Subject to this section, proceedings for a divorce shall not be instituted within three years after the date of marriage except by leave of the Court.

In case of hardship

(2) The Court shall not grant leave under this section to institute proceedings except on the ground that to refuse to grant the leave would impose exceptional hardship on the petitioner.

Interest of children to be considered, etc.

(3) In determining an application for leave to institute proceedings under this section, the Court shall have regard to the interests of any children of the marriage and to the question as to whether there is any reasonable possibility of reconciliation between the parties before the expiration of three years after the date of the marriage.

Possibility of reconciliation

5. (1) In any proceeding under this Act, it shall be the duty of the Court to consider the possibility of reconciliation between the parties to the marriage, and if either party shall request it, or if, in the opinion of the Court, from the nature of the case or the evidence or the attitude of either party, there is a reasonable possibility of reconciliation, the Court may adjourn the proceedings to afford an opportunity for such reconciliation and may nominate or appoint a suitable person with experience and/or training in the field of marriage counselling or, in special circumstances, some other person, to endeavour to effect a reconciliation.

Resumption of the hearing

(2) If, within one month from the date of adjournment under this section, one of the parties requests a resumption of the hearing, it shall proceed.

Evidence of information not admissible

(3) No evidence of any information received or anything said or admission made to any one pursuant to proceedings under subsection (i) of this section shall be admissible in any Court or before any person or body acting judicially.

Disclosure of information to be an offence

(4) Disclosure of any information obtained pursuant to this section except insofar as it is required by the duty of the appointed party, is an offence punishable on summary conviction.

Grounds of divorce

6. A court having jurisdiction to grant a divorce shall, upon a petition by one of the parties to the marriage, decree dissolution of the marriage upon one or more of the following grounds:

Adultery

- (a) that, since the marriage, the defendant has committed adultery;

Desertion

- (b) that, since the marriage, the defendant has wilfully and without just cause deserted the petitioner for a period of not less than three years;

Cruelty

- (c) that, since the marriage, the defendant has committed or been convicted of, cruelty or other conduct of such a nature that there is no reasonable expectation of a normal marriage relationship;

Drunkenness and use of narcotics

- (d) that, since the marriage, the defendant has been guilty of habitual drunkenness or the habitual and excessive use of any narcotic, hallucigen, sedative or stimulating drug or preparation so that there is no reasonable expectation of a normal marriage relationship;

Convictions for crime

- (e) that, since the marriage, the defendant has (i) within a period not exceeding six years suffered convictions for crime in respect of which he has been sentenced in the aggregate to imprisonment for not less than three years; or (ii) has been sentenced to prison for a term of not less than seven years and his sentence is still in effect at the date of the filing of the petition;

Sexual offences

- (f) that, since the marriage, the defendant has committed or been convicted of sodomy, bestiality, incest, rape or attempted rape;

Failure to pay maintenance

- (g) that, since the marriage, the defendant has wilfully and habitually failed for a period of more than two years to pay maintenance to the petitioner as required by a Court of competent jurisdiction or as agreed upon between the petitioner and defendant under an agreement providing for their separation if the Court is satisfied that all reasonable efforts have been made by the petitioner to enforce the order or agreement under which the maintenance was ordered or agreed to be paid.

Mental illness

- (h) that, since the marriage, the defendant has been of unsound mind for a period of not less than three years and is of unsound mind at the date of the filing of the petition without reasonable hope of prompt recovery;

Absence

- (i) that the defendant has been declared dead by order of a Court of competent jurisdiction or has been absent from the petitioner for such a time and in such circumstances as to provide reasonable grounds for presuming that he or she is dead;

Separation

- (j) that the petitioner and defendant have separated and thereafter have lived separately and apart for a continuous period (except for a period of cohabitation of not more than two months that has reconciliation as its primary purpose) of not less than five years immediately preceding the date of the filing of the petition, and there are no reasonable grounds for believing that there will be a reconciliation.

Dismissal of petition

7. The Court may dismiss any petition for divorce on the grounds of connivance, condonation or collusion or if the petitioner's own behaviour has been such as to incite or contribute to the act or acts complained of. Any period of co-habitation of less than two months that has reconciliation as its primary purpose shall not be considered as condonation, whether sexual intercourse has occurred or not.

Rights saved

8. The right of a petitioner to obtain a divorce pursuant to the provisions of this Act shall not be denied by reason of the provision of any contract or agreement.

Repeal R.S., 1952, cc. 84 and 176

9. The *Divorce Jurisdiction Act*, and the *Marriage and Divorce Act*, are repealed.

Coming into force

10. This Act shall come into force on a day to be fixed by proclamation of the Governor in Council.

EXPLANATORY NOTES

The purpose of this Bill is to make provision for divorce in cases where, in fact, there is no reasonable expectation of a normal marriage relationship, while at the same time protecting, in other cases, the marriage relationship and providing for reconciliation of the parties.

The law of divorce will be administered by existing provincial law courts under their own rules of procedure. Present provincial laws with regard to property rights, alimony, guardianship and maintenance of children would continue.

Clause 2: This clause continues provisions now contained in the *Marriage and Divorce Act*, R.S.C. 1952, c. 176.

Clause 3: This clause is applicable only to provinces having divorce courts, namely all provinces except Quebec and Newfoundland.

At present a court in a province may only hear a divorce action if the husband has his domicile in that province except in certain cases covered by the *Divorce Jurisdiction Act*, R.S.C., 1952, c. 84.

This clause is designed to avoid such difficulties by basing the jurisdiction of the Courts not only on domicile but also on matrimonial residence either at the date of filing of the petition or immediately prior to the time at which the grounds for divorce arose and by continuing provisions relating to deserted wives contained in the *Divorce Jurisdiction Act*.

Clause 4: This clause provides that, except in unusual cases, a divorce action cannot be commenced within three years after the date of marriage. This is a change from the previous law in an attempt to protect the marriage relationship and encourage parties to make a real attempt to preserve their marriage.

Clause 5: This clause is new and is based upon the provisions of the statutes of New Zealand and England. It is designed to protect the marriage relationship by providing for reconciliation before divorce becomes final.

Clause 6: This clause extends the grounds for divorce but only in provinces now having divorce courts. The marriage relationship is protected by Clauses 4 and 5 which provide for a reconciliation procedure and also provide that except in certain cases no divorce action can be brought sooner than three years after marriage.

The defined grounds for divorce are based upon the principle that in the cases specified the basis for a normal marriage has disappeared or does not exist.

Clause 7: This clause provides for certain defences to a divorce action at the discretion of the court rather than being mandatory as under previous legislation. The clause specifies however that co-habitation with a view to reconciliation will not be considered condonation as has been the case in the past.

Clause 8: This clause provides that the right to a divorce cannot be prevented by any provision of a contract or agreement.

Clause 9: This clause repeals inconsistent provisions of earlier statutes.

Clause 10: This clause provides that the Act would become effective when proclaimed so as to permit a period during which the provincial Courts may, if necessary, amend their matrimonial rules of procedure.



First Session—Twenty-seventh Parliament

1966-67

PROCEEDINGS OF
THE SPECIAL JOINT COMMITTEE OF THE SENATE
AND HOUSE OF COMMONS ON
DIVORCE

No. 21

THURSDAY, MARCH 9, 1967

Joint Chairmen:

The Honourable A. W. Roebuck, Q.C.

and

A. J. P. Cameron, Q.C., M.P.

WITNESSES: 1 1967

Professor Stephen J. Skelly, Faculty of Law, University of Manitoba.

The Honourable A. W. Roebuck, Q.C., Sponsor of Bill S-19.

Robert McCleave, M.P., Sponsor of Bill C-133.

APPENDICES:

- 70.—Brief by Professor Stephen J. Skelly.
- 71.—Extracts from the Debates of the Senate on Bill S-19, "An Act to extend the grounds upon which courts now having jurisdiction to grant divorces *a vinculo matrimonii* may grant such a relief".
- 72.—Bill S-19, "An Act to extend the grounds upon which courts now having jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief".
- 73.—Bill C-133, "An Act to extend the grounds upon which courts now having jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief".
- 74.—Brief by the Canadian Association of Social Workers.

ROGER DUHAMEL, F.R.S.C.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1967

MEMBERS OF THE
SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS
ON DIVORCE

FOR THE SENATE

Hon. A. W. Roebuck, Q.C., Joint Chairman

The Honourable Senators

Aseltine	Connolly (<i>Halifax North</i>)	Flynn
Baird	Croll	Gershaw
Belisle	Denis	Haig
Burchill	Fergusson	Roebuck—(12).

FOR THE HOUSE OF COMMONS

A. J. P. Cameron, Q.C. (*High Park*), Joint Chairman

Members of the House of Commons

Aiken	Forest	McQuaid
Baldwin	Goyer	Otto
Brewin	Honey	Peters
Cameron (<i>High Park</i>)	Laflamme	Ryan
Cantin	Langlois (<i>Mégantic</i>)	Stanbury
Choquette	MacEwan	Trudeau
Chrétien	Mandziuk	Wahn
Fairweather	McCleave	Woolliams—(12).

(Quorum 7)

ORDERS OF REFERENCE

Extracts from the Votes and Proceedings of the House of Commons:

March 15, 1966:

“On motion of Mr. McIlraith, seconded by Mr. Hellyer, it was resolved—that a Special Joint Committee of the Senate and the House of Commons be appointed to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either house;

That 24 Members of the House of Commons, to be designated by the House at a later date, be members of the Special Joint Committee, and that Standing Order 67(1) of the House of Commons be suspended in relation thereto;

That the Committee have power to engage the services of such technical, clerical and other personnel as may be necessary for the purpose of the inquiry;

That the Committee have the power to send for persons, papers and records, to examine witnesses, to report from time to time, and to print such papers and evidence from day to day as may be ordered by the Committee, and that Standing Order 66 be suspended in relation thereto; and

That a Message be sent to the Senate requesting Their Honours to unite with this House for the above purpose, and to select, if the Senate deems it so advisable, some of its Members to act on the proposed Special Joint Committee.”

“By unanimous consent, on motion of Mr. McIlraith, seconded by Mr. Hellyer, it was ordered—That the order of the House of Monday, February 21, 1966 referring the subject-matter of the following bills to the Standing Committee on Justice and Legal Affairs, namely:—

Bill C-16, An Act to provide in Canada for the Dissolution of Marriage (Additional Grounds for Divorce).

Bill C-19, An Act to provide in Canada for the Dissolution and the Annulment of Marriage.

Bill C-41, An Act to amend the British North America Acts, 1867 to 1965, (Provincial Marriage and Divorce Laws).

Bill C-44, An Act to provide in Canada for the Dissolution of Marriage.

Bill C-55, An Act to provide in Canada for the Dissolution of Marriage.

Bill C-58, An Act respecting Marriage and Divorce.

Bill C-79, An Act to amend the Dissolution and Annulment of Marriages Act (Additional Grounds for Divorce).

be discharged, and that the subject-matter of the same bills be referred to the Joint Committee of the Senate and House of Commons on Divorce”.

March 16, 1966:

“By unanimous consent, on motion of Mr. Stewart, seconded by Mr. Byrne, it was ordered—That the subject-matter of Bill C-133, An Act to extend the grounds upon which courts now have jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief, be referred to the Special Joint Committee on Divorce”.

“By unanimous consent, on motion of Mr. Stewart, seconded by Mr. Byrne, it was ordered—That the subject-matter of Notice of Motion No. 11 be referred to the Special Joint Committee on Divorce.”

March 22, 1966:

"On motion of Mr. Pilon, seconded by Mr. McNulty, it was ordered—That a Message be sent to the Senate to acquaint Their Honours that this House will unite with them in the formation of a Joint Committee of both Houses to inquire into and report upon divorce in Canada, and that the Members to serve on the said Committee, on the part of this House, will be as follows: Messrs. Aiken, Baldwin, Brewin, Cameron (*High Park*), Cantin, Choquette, Chrétien, Fairweather, Forest, Goyer, Honey, Laflamme, Langlois (*Mégantic*), MacEwan, Mandziuk, McCleave, McQuaid, Otto, Peters, Ryan, Stanbury, Trudeau, Wahn and Woolliams."

LÉON-J. RAYMOND,
Clerk of the House of Commons.

Extracts from the Minutes of the Proceedings of the Senate:

March 23, 1966:

"Pursuant to the Order of the Day, the Senate proceeded to the consideration of the Message from the House of Commons requesting the appointment of a Special Joint Committee of the Senate and House of Commons on Divorce.

The Honourable Senator Connolly, P.C., moved, seconded by the Honourable Senator Roebuck:

That the Senate do unite with the House of Commons in the appointment of a Special Joint Committee of both Houses of Parliament to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either House;

That twelve Members of the Senate, to be designated at a later date, act on behalf of the Senate as members of the said Special Joint Committee;

That the Committee have power to engage the services of such technical, clerical and other personnel as may be necessary for the purpose of the inquiry;

That the Committee have the power to send for persons, papers and records, to examine witnesses, to report from time to time, and to print such papers and evidence from day to day as may be ordered by the Committee, and to sit during sittings and adjournments of the Senate; and

That a Message be sent to the House of Commons to inform that House accordingly.

After debate, and—

The question being put on the motion, it was—

Resolved in the affirmative."

March 29, 1966:

"With leave of the Senate,

The Honourable Senator Beaubien (*Provencher*) moved, seconded by the Honourable Senator Inman:

That the following Senators be appointed to act on behalf of the Senate on the Special Joint Committee of the Senate and House of Commons to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, namely, the Honourable Senators Aseltine, Baird, Belisle, Bourget, Burchill, Connolly (*Halifax North*), Croll, Fergusson, Flynn, Gershaw, Haig, and Roebuck; and

That a Message be sent to the House of Commons to inform that House accordingly.

The question being put on the motion, it was—

Resolved in the affirmative."

May 10, 1966:

"Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Roebuck, seconded by the Honourable Senator Croll, for the second reading of the Bill S-19 intituled: "An Act to extend the grounds upon which courts now having jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief".

The question being put on the motion—

In amendment, the Honourable Senator Connolly, P.C., moved, seconded by the Honourable Senator Hugessen, that the Bill be not now read the second time, but that the subject-matter be referred to the Special Joint Committee on Divorce.

After debate, and—

The question being put on the motion, it was—
Resolved in the affirmative."

J. F. MACNEILL,
Clerk of the Senate.

MINUTES OF PROCEEDINGS

THURSDAY, March 9, 1967.

Pursuant to adjournment and notice, the Special Joint Committee of the Senate and House of Commons on Divorce met this day at 3:30 p.m.

Present: For the Senate: The Honourable Senators Roebuck (*Joint Chairman*), Aseltine, Baird, Belisle, Denis, Fergusson, Gershaw and Haig—8.

For the House of Commons: Messrs. Cameron (*High Park*) (*Joint Chairman*), Baldwin, Brewin, Forest, Honey, MacEwan, Mandziuk, Otto and Peters—9.

In attendance: Peter J. King, Ph. D., Special Assistant.

The following witnesses were heard:

Professor Stephen J. Skelly, Faculty of Law,
University of Manitoba.

The Honourable A. W. Roebuck, P.C., Sponsor of Bill S-19.

Robert McCleave, M.P., Sponsor of Bill C-133.

The Following are printed as Appendices:

70. Brief by Professor Stephen J. Skelly.

71. Extract from the Debates of the Senate on Bill S-19, "An Act to extend the grounds upon which courts now having jurisdiction to grant divorces *a vinculo matrimonii* may grant such a relief".

72. Bill S-19, "An Act to extend the grounds upon which courts now having jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief.

73. Bill C-133, "An Act to extend the grounds upon which courts now having jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief.

74. Brief by the Canadian Association of Social Workers.

At 5:15 p.m. the Committee adjourned until Tuesday next, March 14, 1967 at 3:30 p.m.

Attest.

Patrick J. Savoie,
Clerk of the Committee.

THE SENATE
SPECIAL JOINT COMMITTEE OF THE SENATE AND
HOUSE OF COMMONS ON DIVORCE

EVIDENCE

OTTAWA, Thursday, March 9, 1967.

The Special Joint Committee of the Senate and House of Commons on Divorce met this day at 3.30 p.m.

Senator Arthur W. Roebuck and Mr. A. J. P. Cameron (*High Park*), Co-Chairmen.

Co-Chairman Senator ROEBUCK: Honourable senators and members of the House of Commons, we have a quorum so let us proceed. We have a very distinguished and thoroughly informed witness today. I read his brief this morning and was much impressed with it, and I am sure you will be when you hear our witness. He is Stephen J. Skelly, Professor of Law at the University of Manitoba. Professor Skelly read law at the University of Hull, England, and graduated in 1963 with upper second class honours. Professor Skelly then did two years research at the University of Oxford, working first under Professor F. H. Lawson and later under Professor O. Kahn-Freund. The research was concerned with divorce law to provide material for a thesis on comparative divorce law and divorce reform, which he is at present completing.

Professor Skelly was appointed an assistant professor at the Manitoba Law School (now the Faculty of Law, University of Manitoba) in 1965, and has taught Domestic Relations since that time. Professor Skelly sat as a member of the committee appointed by the Manitoba Bar Association to prepare a brief for the Special Joint Committee on Divorce Reform.

Professor Skelly has the following articles published: *Survival of a Breach of Promise Action*, *Comparative Study of the Development of Matrimonial Relief*, *Current Law-Domestic Relations*, *Canadian Domicile*, and *Divorce Reform* to appear in the next issue of the *Western Law Review*. The latter article was the basis for some parts of Professor Skelly's brief which he will now present to us.

I have a letter which I think is sufficiently interesting to read to you. It is from Mr. R. Anderson of the firm of D'Arcy, Irving, Haig and Smethurst, Winnipeg. He addresses the letter to me and says:

As appointee to chair the committee to prepare the brief presented on behalf of the Manitoba Bar Association, I wish to express my approval of the brief presented by Stephen Skelly, Assistant Professor at the Manitoba Law School.

The Manitoba Bar Association had the good fortune to have Stephen Skelly as a member of the committee struck to prepare the brief on behalf of the association and I, having chaired the meetings had the opportunity of hearing him express his ideas and I also had the opportunity of reading his brief.

I endorse the majority of his views and though I cannot speak on behalf of the Manitoba Bar Association, I know that most of its members would agree with the majority of his views.

With that introduction—and I could not have a better one than that written by Mr. Anderson—I have great pleasure in introducing to you Professor Skelly.

Professor Stephen J. Skelly, Law Faculty, University of Manitoba: Mr. Chairman, honourable senators, honourable members of the House of Commons, ladies and gentlemen, after that introduction I will do my best to live up to it. I would like to thank you for allowing me to appear before you. I deem it a great honour and I hope I contribute something by so doing. Because my brief is fairly long I did not intend reading it to you. May I take it that the committee have read the brief, Mr. Chairman?

Co-Chairman Senator ROEBUCK: I do not think you can assume that. I have.

Professor SKELLY: What I will do then is to go through it and make my points and explain my reasons for them. I think this is the best approach.

I will begin by discussing the question of jurisdiction. I know that you have already had many witnesses who have argued the various reasons why we should change our basis of jurisdiction, so I will only touch on the faults in the present system as far as it is necessary to make my distinctions with regard to the proposals I am going to make. As I say, I will go through discussing the points, and perhaps if you have any questions you will stop me when I make the point, or if there is anything in the brief which you would like to ask me questions about on that matter I will do my best to answer them at that stage.

First of all then we deal with the question of jurisdiction. Our present system based on provincial domicile is I think dreadful. There are two solutions to this, one of which I think is better than the other. The first solution is to establish a Canadian domicile. This was done in Australia where, in 1959, an Australian domicile was established. They had a very similar situation to our own; each state being a separate domicile but in addition each of the states was legislating individually. In 1959 they produced a uniform divorce act for Australia and a uniform domicile. This is one of the solutions.

This is a solution which we could introduce here; call Canada one country, because after all it is one country. For divorce purposes there is no reason why we cannot do it, so that for this purpose Canada would be one domicile. What would be the advantage of this over provincial domicile? First of all, many of our problems are concerned with the very concept of domicile itself; that is, as you move around you change your domicile, and with provincial domicile you may change as you move from province to province; not necessarily, but it is possible, and is frequently the case. Also, it is frequently difficult to know whether you have or have not changed your domicile, which again is an unfortunate state of affairs.

One further thing in connection with the concept of domicile which produces problems is what is known as unity of domicile between husband and wife. The wife's domicile is always her husband's; she cannot acquire one of her own; wherever he moves she in theory moves with him, whether in fact she remains behind. This again creates problems. There have been attempts, notably with the Divorce Jurisdiction Act, to help in this regard; it has helped but it is still not the answer.

Uniform domicile in Canada would simply mean that when a person enters Canada and would normally establish a domicile in a province he would establish a domicile in Canada. This he will keep until he leaves Canada, wherever he moves within the country. This gets over the problem of moving from province to province and many situations which arise to determine where a person is domiciled; there would no longer be any need for this; this would be done away with.

There is one disadvantage in that we still will not have cured the problem of people who move to the United States or another country. They will still not

come within our concept, and they will still be a problem to us. An answer to this is, I think, my second recommendation; that is, residence within the province. If you reside within the province—forgetting about domicile altogether—for a specified period of time, this itself would be sufficient. It is possible to determine accurately whether a person has resided within the province for a particular period of time if a specified limit is set.

With domicile, it is sometimes difficult to be absolutely certain where your domicile is. We can be fairly certain in many cases, but with some people, like, e.g., servicemen, the question is often a very difficult one to answer. One advantage of Canadian domicile over residence is that if a uniform bill for Canada were introduced and a uniform act passed, so that in theory we give everyone in Canada an equal right to divorce, if for any reason—it does not really matter what the reason is—divorce courts were not established in Quebec and Newfoundland, (where they do not exist now), our concept of Canadian domicile would mean that anyone domiciled in Canada could get relief in any court which had powers to grant a divorce. Therefore, people in Quebec and Newfoundland would not be denied the same rights that everyone else in the rest of Canada had; they would simply have to go to a court in another province and, then if the grounds were sufficient, would automatically have the right to relief there.

Senator HAIG: You would eliminate then the granting of divorce by senate resolution.

Professor SKELLY: There would be no need for this. People of, for example, Quebec would get relief simply by going to Ontario, because we would be dealing with a Canadian jurisdiction and not simply a provincial jurisdiction.

In the case of residence, again this would be an advantage over the present situation. At present, if a person in Quebec wanted a judicial divorce he would have to establish a domicile in another province. If on the other hand we required, say, three or six months' residence, all he would have to do would be to go to the other province and establish this residence, leave the jurisdiction where divorce was not possible and go to a province where it was. This is not a good answer but it is an answer. I put it to you not as the best solution but as a solution. The answer is to establish divorce courts.

Senator HAIG: If you have residence what you are doing is what happens in some of the American states, where you move into another state for a certain period and it is a false residence.

Professor SKELLY: False residence only in the sense that you are considering residence for a specific purpose. I am simply saying that a party is entitled to a divorce if he has resided somewhere for a certain time. It does not matter why he has resided there. I would eliminate the question "Why is he living here?" The question is simply, "Is he resident here or not? Has he been resident for the period required or not?" I know this sounds as though you are just leaving Quebec to go for an easy divorce, but this is not the case. Our divorce laws would be uniform across the country and the obvious answer would be to have divorce courts. I am only saying that if they were not established, we would have a better situation than we have at present, because the whole idea is that if we are to have uniform laws they must apply equally to everyone and everyone must have an opportunity to act upon them. As I say, moving to another province is not the real answer, but it is an answer, that is all.

Co-Chairman Senator ROEBUCK: As I read your brief and as I listen to you now, you are making domicile and residence alternative methods of dealing with the problem. Would it not be possible to adopt them both; that is, to give Canadian domicile, require that from anybody applying to our courts and allow them to apply to the court only of the province in which they are residing?

Professor SKELLY: The only problem I could foresee might be some conflict between one court maintaining it had jurisdiction on the basis of domicile and another court talking about residence, but I do not think that is a real criticism. I think that could be quite a good solution. I must admit it is one that did not occur to me. I really considered these in the alternative rather than as being together. I think perhaps this might be possible.

One further point I could perhaps make is that we have problems with the recognition of foreign divorces. We have to bear in mind that people do go to other places, they come from other places and they may have got a divorce in another country. This problem frequently arises with regard to the United States. Divorces granted in the United States are frequently not recognized in Canada. If we have Canadian domicile this will not help it, because the basis of our recognition is on what is called reciprocity. Would we have given a decree in the same situation, would we have granted a decree if the parties had been asking for it in Canada and not in the place where they actually asked for it. If the answer is "Yes" we would recognize the divorce; if the answer is "No", we would not; it is very simple.

If we have Canadian domicile we will always require the parties to have been domiciled in the place where they obtain the decree. If on the other hand we have residence, we can recognize many of the divorces granted in the United States. This raises problems, or apparent problems, but I do not think it is as bad as it seems. First of all you may say, "If we are going to recognize all the American decrees granted, people are just going to flood to the United States to get a divorce." I think there are two answers to that. First of all, why do people go? It is inconvenient, it is expensive, it causes a lot of trouble. They go because our divorce laws do not take into account the change in social conditions, they do not give divorce where it is needed.

I am not an advocate of easy divorce. I am an advocate of divorce where it is needed. Divorce is a necessary evil; it must be given where it is needed, not made available to anyone who wants it. Let us take an example which sometimes arises. Two parties obtain a divorce in the United States. They obtain a divorce in a state which has residence as a basis of jurisdiction.

Senator ASELTINE: Are you recommending fictitious residence?

Professor SKELLY: By residence you mean?

Senator ASELTINE: Going to the United States, living there two or three weeks and having a divorce.

Professor SKELLY: No. I am just trying to show why this would not be the result of my suggestion. If I may continue, two people obtain a divorce in a state in the United States where residence is the basis of jurisdiction. The husband perhaps remains in the United States, remarries and intends to spend the rest of his life there; the wife comes to Canada. In Canada we would not be able to recognize that divorce unless we could establish that the husband at the time of the divorce was domiciled in that state. The United States says, "This woman is single"; Canada says "This woman is married. We will only give her a divorce if she is domiciled in Canada." The United States will not give her a divorce because she is single as far as they are concerned. This woman is condemned to spend the rest of her life married in Canada and single in the United States; she can never remarry unless she wishes to move to the United States.

I am suggesting that if we have liberal grounds—and when I say liberal I mean divorce grounds which provide justice in the circumstances, they allow divorce where it is necessary—then people will not be tempted to go to the trouble and expense of going to the United States to obtain their divorce. In fact, if our divorce grounds are adequate people will not need to go. If we were not going to make changes the only solution would be to have Canadian domicile, but if we were going to make changes I think we would certainly be better off with residence as a criterion rather than domicile.

Therefore, my first point is residence for a specified period. In my draft bill I suggest six months, perhaps three months would be sufficient, but this is merely residence. There is no other hidden reason; there is no question of, "Does he intend always to reside here?" The question is simply, "has he or she lived here for the period specified?" In most cases the practical situation would be that, "The wife has lived here for many years. She wants to obtain a divorce. The husband is miles away somewhere else, perhaps in another country. Should we give her a divorce or shouldn't we, or does she have to chase after the husband?" My solution would be that in the majority of cases we would give her a divorce because she has resided here for a specified period. If people in Canada have realistic grounds for divorce they will not go to the trouble and inconvenience of going to the United States because they will gain nothing, since in the majority of cases with enlightened divorce legislation they could obtain relief here.

Mr. PETERS: I am thoroughly confused now, maybe because of the example and my lack of knowledge of the domicile clause. If, for instance, Mr. and Mrs. Smith want a divorce, Mr. Smith moves to Las Vegas, Nevada, where two weeks' residence would give them a divorce—

Professor SKELLY: I think it is six weeks.

Mr. PETERS: Six weeks then, if the money holds out that long. They establish for the purpose of divorce six weeks' residence collectively—she does not have to go because she is already there according to our domicile—and he decides to stay there. How does the court decide she is not really divorced in Canada?

Professor SKELLY: The first question would be: at the time of the divorce was the husband domiciled there? Without going into a great discussion on domicile, which is a very complex and difficult topic, I would say you can acquire a domicile if you have the right intention, simply by putting your foot in the country or state in which you intend to reside. If he goes there with the intention of spending the rest of his life there he will establish a domicile; but what usually happens is that he goes there simply to get a divorce and then moves to another state.

Mr. PETERS: Granted he does, or does not, it does not really make any difference. I am just curious how our courts at the present time will decide her marital status.

Professor SKELLY: The courts would say first of all, "Was he domiciled there at the time of the divorce?" If he was domiciled at the time of the divorce, then we will recognize the divorce; she is a single woman; if he was not domiciled there at the time of the divorce, then we would not recognize it.

Mr. PETERS: He is obviously domiciled for at least six weeks because the state demands that; the fact he got a divorce indicates that domicile or residence was established there for six weeks. Say he decides to stay there; that Nevada divorce is still not legal in Canada; he can stay there ten years.

Professor SKELLY: All you have to do is to decide whether at the time of the divorce petition, the petitioner, in this case the husband, was domiciled in the particular place where it was granted. This is what they must establish. Domicile means, "Do you intend to reside here permanently?" The question simply is, "At that time did he intend to reside there permanently?" If the answer is "Yes" we will recognize it; if the answer is "No" we will not; that is all.

Mr. PETERS: I should not be asking this, except that I am curious. What has been our experience with the legal interpretation of establishing this?

Professor SKELLY: Establishing domicile?

Mr. PETERS: We are using a very bad example, at least an extreme example, with Nevada. I was under the impression that no Nevada divorce was recognized in Canada.

Professor SKELLY: We will recognize it if a domicile is established but usually it is not. As I say, it depends on your intention. It is interpreted according to the circumstances. If the husband takes all the belongings, sells the house where they are living, moves everything to Nevada, buys a house and settles there, then the court will usually say he has established a domicile there, if he remains there from then on because a decision on domicile is taken at a subsequent date. Years later we say, "Well, he is still there, he went there with all his things, he established domicile." It only requires putting your foot on the soil with the correct intention. If you go there simply to obtain a divorce and move on, the court will say you did not establish domicile and will not recognize it. It all depends on whether you establish domicile or not.

Mr. PETERS: It is still hypothetical. Let us say he moves to Michigan from Nevada after he gets his divorce and he does not re-establish Canadian domicile. What happens then? He is going to stay in Michigan for ever; at least, that is his intention.

Professor SKELLY: You say he goes to Nevada, obtains a divorce, moves to Michigan and establishes domicile in Michigan?

Mr. PETERS: Yes. The divorce is recognized in Michigan.

Professor SKELLY: Yes, on the basis of full faith in credit.

Mr. PETERS: But it will not be recognized in Canada.

Professor SKELLY: No, so therefore the woman is still married as far as we are concerned. I will not spend too much time on jurisdiction because it is not my major consideration, but I take it we now have in mind the concept of jurisdiction.

Senator ASELTINE: The point has been bothering the committee very much.

Professor SKELLY: The question of jurisdiction?

Senator ASELTINE: The question of judgment and domicile.

Professor SKELLY: If you have any questions on it I will certainly give whatever answers I can. Perhaps I can summarize it briefly. Canadian domicile is much better than the present situation.

Senator BAIRD: I think I agree.

Professor SKELLY: There is no doubt that Canadian domicile is much better than our present situation; there are very few arguments against it.

Senator ASELTINE: But that does not help you when dealing with marriages that take place in Las Vegas.

Professor SKELLY: When you have a divorce taking place in another country—

Senator ASELTINE: You cannot change your domicile unless your mind is made up not to return.

Professor SKELLY: You must have the intention of residing permanently.

Senator ASELTINE: You cannot go down there for six weeks, establish domicile and then come back to Canada after the divorce is granted and remarry, even though you have Canadian domicile.

Professor SKELLY: It is possible to establish domicile, I would say, even in six weeks. The usual case is where the wife intends to return; the husband remains and the wife returns; the husband can establish domicile and remain there.

Senator ASELTINE: That is it. They never do remain where they get their divorce; they come back.

Professor SKELLY: I would not doubt that you could establish domicile within that period.

Senator ASELTINE: I have had three or four cases just like that. There was one case in Saskatchewan, even though they went to the states and got married again and then came back to Canada, to the previous domicile, we had to take action to dissolve the marriage in Saskatchewan, at great expense. I think the committee would like to be able to establish some reasonable law of domicile. Perhaps the solution is Canadian domicile.

Professor SKELLY: I have given them in the alternative as two proposals.

Perhaps I can move on to my next proposal, which concerns legal aid. I do not propose to say very much about it. I would only like to emphasize that there is a need for legal aid. I would quote some statistics which may or may not be indicative of the position in Canada; they are quoted from England because at short notice statistics were not available from anywhere else. In 1965, in England there were 41,000 divorce petitions, of which 27,000 were supported by legal aid, so you see the need which is felt in England to support these petitions. I would suggest that in Canada also there is a need to see that a person is not prevented from obtaining a divorce simply because he does not have the means to do it.

Co-Chairman Senator ROEBUCK: Is not that provincial jurisdiction? We have never gone into that type of thing, assisting people with legal aid, while the provinces have. For instance, the Province of Ontario has very recently passed a bill with regard to legal aid, and they intend to spend a very great deal of money in connection with it.

Professor SKELLY: The only reason I took this up was because certain submissions have been made to the Government of Manitoba on legal aid, but they have not included divorce in this matter. I would just like to make it known that I think it is necessary that this should be considered, and it is as essential as many others.

Co-Chairman Senator ROEBUCK: You are not proposing that we establish a great system of legal aid in the dominion?

Co-Chairman Mr. CAMERON: It is not in the draft bill.

Professor SKELLY: I do not think it would be a thing which this committee or the federal government would be expected to do. I agree it is more on the provincial level. I would just like to make it known that I think it is necessary and should be done. I do not know how the federal government could, not necessarily give a lead, but give some indication to the provinces that they feel this is an important consideration.

Co-Chairman Senator ROEBUCK: I think you have given all the information that is possible.

Mr. PETERS: I think it is the fact that the federal government is now providing legal aid in the Senate Divorce Committee. In reading the reports over the years I have found a number of people in very poor circumstances have come without legal counsel and on occasion the committee has waived the private member's fee, which is really the court fee, so although it might be stretching a point we are applying a type of legal aid. Maybe it is exemption rather than aid.

Mr. MANDZIUK: That does not extend to aid in the courts of Ontario.

Mr. PETERS: I agree it does not, except I think it is the costs they are waiving rather than legal fees, but I think the court itself has made a decision to rebate the initial payment on a number of occasions.

Professor SKELLY: I would like now to move on to what I think is a most important consideration, and that is the grounds for relief; the grounds for divorce in fact. It is very important that something be done about our grounds for divorce. I think they are archaic, they are out of date, they are causing a great deal of injustice, and unnecessary injustice, because in many instances they achieve nothing, they prevent people obtaining a divorce, they force them to do

things they should not be expected to do, they force them to commit adultery, or force them to pretend to commit adultery.

If a marriage has broken down, if the parties find they cannot live together and are living in a common-law union with someone else, what does it prove to say, "If we don't give them a divorce they may go back together?" I think this is ridiculous. They will not go back together. If they are living with other people, if they have children by these other people, if they have responsibilities that they feel for these other people more than the persons they are legally married to, then nothing on earth will send them back together.

Mr. MANDZIUK: Professor, if people separate and one or both is living in common-law with someone else, you have got perfect grounds for divorce; there is adultery there and there is no difficulty. I think the committee would be interested to know what other grounds you suggest.

Professor SKELLY: There are situations where, for one reason or another, one of the parties does not wish to bring an action. Without going into that, I would like to progress to the main theme. As I said earlier, my intention is not to make divorce easier as such, but to try to bring relief to the parties who need it. I would like to quote you the words of Viscount Simon, the Lord Chancellor, in *Blunt v. Blunt*, a decision of the House of Lords in 1943, which was a very important decision in the realm of divorce law. I think this sums up entirely my attitude towards the need for relief. He said:

The interest of the community at large is to be judged by maintaining a true balance between respect for the binding sanctity of marriage and the social considerations which make it contrary to public policy to insist on the maintenance of a union which has utterly broken down.

Our aim is to balance the needs of society to protect the sanctity of the institution of marriage, and the public policy which makes it wrong to force two people to go on living together who no longer have a valid marriage, who no longer have a marriage that means anything at all. It is a meaningless bond. This is our task, to balance these two.

We want to protect the sanctity of marriage. There are two ways of protecting it. We protect it by giving divorce to people who need it. Equally, we protect it by preventing people getting a divorce who do not need it. That may sound rather high-handed, but I think there is a need to prevent people getting a divorce who in fact do not need a divorce. That is the general attitude towards the sanctity of marriage, that we should prevent people getting out of marriage. There is another way of protecting the sanctity of marriage, and that is by allowing divorce where it is necessary. If there is a cancerous growth in the human body we do not leave it there; we cut it out, we destroy that part, we sacrifice that part to protect the whole. This is what I suggest we need to do with the institution of matrimony; we must take out the marriages which no longer benefit society, because marriage has two aspects, it benefits the parties and it benefits society generally. If a marriage is no longer benefiting the parties it is no longer benefiting society generally, and surely the thing to do is to take it out, to let the rest of the marriages benefit from removing this part.

I have suggested two types of reform, one of which I call a modified conventional development, and the other is simply marriage breakdown. I think marriage breakdown is the ultimate answer, but I am not sure that we are ready for marriage breakdown. There are practical considerations, so I would first like to deal with what I call my modified conventional development.

The conventional development would be, I think, along the lines of the 1937 Matrimonial Causes Act in England; that is, to add cruelty, desertion and permanent insanity to the already existing adultery. This was the development which took place there. That would be the conventional thing for us to do if we were going to follow the English legislation. Australia and New Zealand

branched out very early; they introduced a long list of grounds, and in addition they have what is known as the separation ground which says that if the parties have lived apart for a certain period of time they should be entitled to a divorce irrespective of who is at fault.

Senator HAIG: Do they sign an agreement prior to this separation or is it just physical separation?

Professor SKELLY: This comes before the court; the court gives a decree, which is a divorce, but it is on the basis of living apart for a period of time.

Some people argue that we should add cruelty, desertion, insanity and this separation ground to our law and call that our divorce law. Well, this is an answer and it would be better than the present situation, but to me this is not really the ultimate answer.

Now let us look at these grounds. I would advocate retaining adultery; I would advocate accepting cruelty, but I do not think it is a good idea to accept desertion, insanity and separation. First of all, what is wrong with these grounds? They are all artificially formulated grounds; they are all grounds which we establish a formula for and we say, "Try to fit your facts to this particular ground" with very little consideration for the real picture of the marriage; just, "Have you done this? Have you done that?"

Permanent insanity is, I think, very important, because there are many people in Canada committed to a life sentence with a partner who is permanently insane, perhaps not confined but not in a state to give the other party any companionship, any feeling that there is a marriage there at all. They have no way of getting out of this because usually the other party cannot commit adultery.

If we introduced permanent insanity as England has done there is one major problem, and that is that this is not working in England. There are a very small number of divorces granted on the ground of permanent insanity. This is due to the advance in medical science. You must get a doctor to stand up in court and say, "This man is permanently insane, he is incurable", which is what the act requires. But the doctors, perhaps in their wisdom, do not believe that anyone is permanently insane, that anyone is incurable; they believe there is always a chance. It is very rare, therefore, to get a doctor to stand up in court and say "This person is incurable," so this does not work.

The proposal I make is that we have a much wider ground which would cover these three—that is, desertion, insanity and the separation ground—and this ground would be called lack of consortium. Now, what do we mean by consortium? Consortium means living together as husband and wife and all that goes with this relationship. One of the problems of having these three grounds as separate grounds is that in each case you have to show which category your situation fits into; you have to show whether it is desertion, whether it is separation, whether it is insanity. My question is: why do we need to do this? I think my ground of lack of consortium would cover the three.

The situation in Australia is that for separation as a ground there needs to be actual separation of the parties, so you must first of all show the degree of separation; if the parties are living in the same house you must show that they are living as two households. It is one of those little games we lawyers play to keep the public fooled most of the time. You must show that there are two households. It is not sufficient to show the parties are living separately unless you can show they are living in separate households. This, I would suggest, is again a little pointless. If we are to have desertion and separation we have to show whether the parties separated because they consented to separate or whether they separated because one of the parties wished to do it without the other party's consent; that is, we have to decide whether it is desertion or separation. I have already shown you the faults of the insanity ground.

If we say to the courts that the ground for relief is lack of consortium, that means if the parties for a period of years—I have suggested three years; perhaps you may think that is too long; I think it is certainly not too short and may be too long; perhaps you may say that two years is sufficient—if for a period of time there has been no consortium between the parties—they may have lived apart because they have separated by consent, they may have lived apart because one has deserted the other, they may have lived in the same household but really not lived together as man and wife, but lived there for purely economic reasons, because the husband refuses to make proper maintenance for the wife, or because the husband will not make proper provision for the children the wife has stayed there although she would like to have left—if for any reason there has not been a proper marriage between the parties for a period of two or three years, whatever period is set by parliament, then they would be entitled to relief.

There would be certain safeguards which I will mention in a moment, but that would be the basis and it would be for the courts to decide—as in the case of cruelty in England they were left to decide what was cruel—what constituted lack of consortium. They may think refusal of sexual intercourse for three years would be sufficient. I would certainly think it sufficient if the parties had lived separate for three years.

What we are trying to do is to decide “Has this marriage broken down?” but we are not just using the general ground of marriage breakdown. We are providing the courts with a way to measure, some way to decide “Has it happened or has it not happened?” I am not sure that the courts are ready to be told, “Give relief just where the marriage has broken down.” I think if we give them some sort of test this will happen, and if we say a ground shall be no consortium for a period of years they will have some measure, some way of determining what has happened to the marriage, whether it has broken down. So it is a test for breakdown; it is not breakdown itself.

There may be situations where the marriage has broken down; it will not fit into our test, but basically we are concerned with a fairly wide test, a test which I think will enable us to show in many cases whether it is a valid marriage, whether it is worth while that the parties should be kept together or whether we can allow them to separate and give them relief.

Having this ground, why do I also retain adultery and cruelty? The Lord Chancellor appointed a committee to consider the Archbishop of Canterbury’s committee’s report, *Putting Asunder*, and they came out with the decision that you could not just have one ground of, say, separation or something of that nature, that you needed something for the people who required a divorce now because the situation was particularly bad. I am thinking basically of cruelty. Where there is cruelty the wife may need relief now; she does not want to wait three years, she wants relief immediately. This is why I have retained adultery and cruelty, in case the situation is very bad, that the courts will be able to give relief; but the majority of our cases will fall within the concept of lack of consortium.

When separation was introduced in Australia as a ground it was thought that this did a great deal of good; just introducing separation as a ground cut down many of the problems which existed. I would like to quote a statement by Sir Stanley Burbury concerning the effect of introducing separation as a ground. Let me just illustrate it a little. The situation in Australia when the ground of separation was introduced was that there were a large number of grounds, many more than in England; all types of situations were formulated, and my contention is that you can never formulate enough grounds to cover every situation which will arise, there will always be something you have not

thought of. Despite this large number of grounds, when separation was introduced in Australia Sir Stanley Burbury made the following statement:

The introduction of separation as a ground has I believe removed a strong incentive to perjury and in many cases has avoided the unreality under the label of desertion (actual or constructive) of attributing the breakdown of the marriage to the fault of one party.

I would draw your attention particularly to the opening words:

The introduction of separation as a ground has I believe removed a strong incentive to perjury.

Remember, in Australia there were many grounds for relief, but despite this he felt that the introduction of separation as a ground—and in Australia it is five years' separation—still cut down the number of cases where perjury existed. I therefore think if we have just these two grounds and in addition this wide ground of lack of consortium we are to a large extent cutting out the need for people to perjure themselves.

You may think it necessary to reduce the lack of consortium ground to two years. I would agree. I thought three years was an outside limit. Perhaps two years would be enough to show that the marriage has broken down. Perhaps even one year is enough to show the marriage has broken down, if the parties have not lived together as husband and wife during that period. This would be a matter for those who draw up the final act.

Co-Chairman Senator ROEBUCK: You would leave some discretion, I presume, to the judge too.

Professor SKELLY: There is a discretion, as we shall see in a moment, which I think applies to these three grounds I have suggested. In fact, they are in a sense bars. I would do away with the present bars because to a large extent they are meaningless, they are archaic rules which really have no application now. I would introduce instead three new bars. The first one would be that there must be no reasonable hope of a reconciliation being effected. This would be an attempt—a small attempt but an attempt—to refuse relief for one isolated act of adultery if the evidence generally is that the parties could still make a go of the marriage. I wish to avoid the situation where just one isolated act of adultery will be sufficient to give a person a divorce, when in fact if the parties are told "We think there is a hope of reconciliation" they might very well go back together and make a go of it. I think there are such situations. This is an attempt to give divorce to people who need it and not just to anyone who asks for it.

My second suggestion for a bar is that the decree should not be granted if it will be harsh and oppressive to the respondent, that is the party against whom the decree is to be made. What do we mean by this? This is an expression which has been used in the Australian and New Zealand legislation, and they have taken it as meaning something which is really bad. The situations which have arisen where they have allowed this have been where it may prejudice the respondent's employment if a decree is granted against him, or if he is going to lose something under the testators family maintenance legislation of that particular place. Basically it is not simply because a decree is being granted but because there is something outside this concept. Just because relief is given against him, whether he is guilty or innocent does not matter.

When dealing with the last suggested ground, lack of consortium, we are dealing with a non-fault ground, a ground where fault is not important. It is important only at the stage of deciding whether it is harsh and oppressive to the respondent. The court may decide as the respondent has been perfectly innocent, as the respondent has done everything, as this may affect his career in some way, to refuse a decree. The court will be given a discretion there to decide

whether it is harsh and oppressive to the respondent. That is where the discretion will come.

Having decided that the ground has been made out, that there has been adultery, cruelty or lack of consortium, they will then decide: is there any hope of reconciliation? Is it harsh and oppressive to the respondent? If the court is satisfied neither of these possibilities arise, then it looks at the third bar, which is really a procedural one but a very important one: is this in the best interests of the children? In particular, has proper provision been made for the maintenance and custody of the children? This is very important. I think the paramount interest is the children. We must think of the children first. If there are no children of the marriage we have a much simpler situation. If there are children we must decide whether it is better to separate these people or keep them together. This is a paramount consideration.

Having satisfied those three bars the court would be entitled to grant relief. However, I have one further provision, which I must admit is lifted from English divorce law, but I think it is something which deserved a certain amount of consideration. In England it is not possible to get a divorce within the first three years of marriage. It is thought that this prevents people rushing in and out of marriage. When the Morton Commission in England reported in 1956 they made the following statement with regard to this three-year bar:

The purpose of the restriction is to encourage husbands and wives to face and resolve their differences in the period of adjustment which necessarily takes place during the first few years of married life, and thus to reduce the number of broken marriages. Whether in practice it has had this effect can only be a matter of opinion, since the statistics available are of instances where the restriction has failed in its purpose and not of instances where it has been successful. We consider that on the whole the restriction has had a stabilizing effect on marriage.

Perhaps three years is too long, I do not know, but I certainly think this is a valid consideration. It is something which can show people—and I think it is a preventive measure which is needed here—the importance of the step they are about to take. At the end I would like to say a few words about other preventive measures which I think should be taken, but I think this could be a valid consideration, that the parties be prevented taking this step for a period, and I have included a clause to this effect in my draft bill. If there is exceptional hardship or exceptional depravity, something really bad, the court can consider it, but basically relief would not be granted within this three-year period; you would have to wait, you would have to try to make a go of it.

Co-Chairman Senator ROEBUCK: Would syphilis be a ground for waiving the three-year period?

Professor SKELLY: First of all you would have to bring it within one of the grounds; you still have to have relief on the basis of one of the three grounds stated. It would not come within the lack of consortium ground because we have the three-year requirement at present, which may be reduced. It may be considered cruelty if the husband forces the wife to have sexual intercourse with him when he has contracted venereal disease; this could be cruelty and could very well be considered an exceptional hardship or exceptional depravity by the husband. I do not know of a case so I cannot give you a "Yes" or "No". I would say, having looked at the cases which have been decided on the point, it would be possible. Really it is to make people think what they are doing when they take the step of entering into matrimony. How serious is it? Very serious I would say; probably the most serious decision you make in the whole of your life, and people should realize this. Those are my three bars to relief, safeguards or bars, whatever you like to call them.

Senator GERSHAW: What about the so-called "gunshot marriages", where there is a marriage just to give the baby a name and then they break up? There are a lot of them.

Professor SKELLY: There are a lot of them. I feel very strongly about them; I think they are a very bad thing, but I do not want to be led aside. I could easily get into the realm of illegitimacy, which is another thing that has to be considered soon. Why do we have to call a child illegitimate? What did it do to be given this label? Why should the act of two other people give a child this stigma? Why should not all children be children?

To get back to the main point, I do not think that would come within exceptional depravity or exceptional hardship, and I would not want it to, because I would want to discourage this type of marriage, I would want to discourage people getting married just to give a child a name.

Mr. MACEWAN: Why?

Professor SKELLY: Because I think it is wrong and because I think it causes a great deal of harm to the parties involved. The percentage of marriages where it succeeds, where they marry and say "We will try" and it works, are very small. The majority of them seem to come to a miserable end. I think it would be much better for the parties to stop and think about it and for the child not to be legitimated in this way rather than go into marriage and use it just as a means of legitimizing a child. I would like marriage to be regarded as a much more sacred and important thing than merely a means of giving a child a name. Are there any other questions on these grounds?

Mr. MANDZIUK: Do you recommend that cruelty can be a completely separate ground for divorce, and how do you define cruelty? Are we leaving it up to the judges to set precedents and define cruelty? How does it work in other jurisdictions?

Professor SKELLY: In England, for example, where cruelty has been a ground since 1937, I think it has been a very valuable ground. It is a ground which gives a great deal of flexibility to the law. It has enabled the law to stay in touch with changing social conditions, because the law can adapt itself, and it has given the court the ability to adapt itself in that way.

Co-Chairman Senator ROEBUCK: That is if you do not define it.

Professor SKELLY: That is if you do not define it. No one has ever attempted to define cruelty, except I think perhaps the Canadian Bar Association. Apart from the Canadian Bar Association very few people have attempted a definition of cruelty; no judge has ever attempted one, because it is impossible to cover every situation which exists.

Co-Chairman Senator ROEBUCK: Because it will expand or contract.

Professor SKELLY: Yes. There are certain criteria we can lay down. First of all we say there must be injury to health. This was established in 1897 in a very important case, *Russell v. Russell*. There must be injury to the petitioner's health. The petitioner must have suffered some injury or be in apprehension of some suffering. This must be shown. You cannot get a divorce simply because you do not like something. You must have suffered injury to health, and usually you need a doctor's certificate to this effect. The courts have interpreted this as meaning it does not matter what injury to health; if the conduct is very bad they will accept a very mild injury to health. First of all then there must be injury to health, this must exist. Secondly, is the conduct sufficiently bad? We use the expression "grave and weighty". What do we mean by "grave and weighty"? This was first used by Lord Stowell in 1790, and since then we have hung on to this term. We mean something wider than the normal wear and tear of married life, something a married person does not expect to take on when entering into the institution of marriage, something which is outside the normal wear and tear.

We have left it to the courts to decide what is outside the normal wear and tear, but up to now they have acted very responsibly. I am now talking about the English courts.

Mr. MANDZIUK: Would you say the American courts are not stretching it further than the legislation anticipated?

Professor SKELLY: I would say the American courts have gone a little far. After all, we do follow most English decisions or the English concept with regard to the Wives and Children's Maintenance Act; that is preliminary litigation where you have provision for the wife's maintenance etcetera, separation; we follow the English meaning of cruelty here, and if we use it as a ground for divorce I see no reason why we should not carry on with this; I think this would be a natural trend.

I think that having got these two criteria, these two basic things, the courts can then be left alone to do what else they will. Australia has followed the English decisions, and so has New Zealand. Some of the states of the U.S.A. have, but not many; they have gone on in their own happy way. I think we would certainly follow the English decisions and I would think it would be safe to say that cruelty would have the same meaning here as it has in England. I think this is the realistic approach. It is mental as well as physical cruelty, but it is nothing extreme. Courts are not prepared to give relief if there is not some justification for it; they do not give it because someone says, "He squeezed the toothpaste in the middle"; there is more to it than that.

Senator GERSHAW: Do you say it is dangerous to try to define cruelty?

Professor SKELLY: I think it is impossible to define it.

Senator GERSHAW: It is worse if we do not define it.

Professor SKELLY: No, I would not say it is worse if we do not define it. I would say we are quite safe in not defining it. I do not think anything can go drastically wrong, because I think the courts are responsible and they will interpret it in such a way that we would do the right thing. I do not think we would go any wider than the English, Australian or New Zealand courts have done. They are very fair about it, they do not give relief unless it is justified, so I think it is quite safe. The ground of adultery we have at present, so I think there is nothing I need say about that.

Co-Chairman Senator ROEBUCK: We have some experience along those lines in Nova Scotia, and also in connection with judicial separation; and of course it is the English decisions that we follow and not the American.

Professor SKELLY: Perhaps I might move on to my second basis for relief, which is marriage breakdown. This, I feel, is the ultimate solution. Perhaps first I might make a few comments about the disadvantage of the grounds I have already suggested. It may sound as though I am shooting myself down, but these disadvantages are in relation to pure marriage breakdown, not in relation to anything else. There are the reasons why I think pure marriage breakdown is better.

What disadvantages are there to the idea of combining an offence with the marriage breakdown ground? This is what in fact we are doing. There are problems. One is concerned with guilt or innocence. With regard to the other the question of guilt or innocence does not arise. If the parties appear before the court on a marriage breakdown ground the court is concerned not with who is guilty or innocent, but simply whether the marriage has broken down. When dealing with adultery or cruelty the court has to decide whether the respondent is guilty or innocent, so we have different criteria and the court has to keep this in mind. One day the judge may be dealing with guilt or innocence, the next day he may be dealing with marriage breakdown, and keeping this clearly in mind does sometimes cause problems for the judiciary. When dealing with a marriage

breakdown situation either party may petition. In the case of a fault ground, an offence, only the innocent party can petition. So you have these differences which when run together in one divorce law tend to cause little problems.

Secondly, I am against formulating grounds as such. We are still formulating grounds. The Australian and New Zealand legislatures, and the American states in particular, have on the whole a long list of formulated grounds, they have anything up to 22 or 23 grounds for relief. This has been found not to be the answer, because they still cannot cover all the situations that arise, they still cannot make allowance for everything that crops up.

Take our present situation. We have, for instance, a little slot in a door which is labelled "adultery". If you can push the facts of your case through that slot we do not want to know anything more. Does it go through the slot or does it not? If it does it is adultery. We can make more of these slots and label one "cruelty," which has a slightly different shape, another "desertion" or anything else. We have a number of different shaped slots so that if our facts do not fit the adultery one we try the cruelty one, and if they do not fit there we try the desertion one. Really all we are doing is making divorce easier. We are not really making it something that is being given when it is needed necessarily, we are just making it easier to obtain.

I have attempted here to limit this to a certain degree, because one of our bars is that there must be no hope of reconciliation. We look at the case and say, "Is there a hope of reconciliation?" If there is we are not going to give relief. We are not just saying, "Try to push your facts through some slot." We are saying, "We are going to look at it a little more fully, we are going to see what the real situation is; we want to know in reality what is happening; not whether you did this specific thing but what is really the picture." One isolated act of adultery will at present get you a divorce, but it may be meaningless if you look at the whole marriage. The parties may have been married ten years; the husband in a mad moment when away one weekend at a convention commits an act of adultery; the wife becomes incensed and insists on a divorce, whereas if she had swallowed her pride and thought a little more about it she might very well have got together with the husband and worked out a solution by which they could keep the marriage intact.

I am suggesting that by creating more and more grounds we are simply making divorce easier. I have attempted here, by saying there must be no hope of reconciliation, to make it a little more difficult, to try to sort out the cases where divorce is needed from those in which it is not needed. I think there will still be a tendency to say, "Has an offence been proved? If it has we will let it go through", and the court may not look into it as closely as we would like, rather like the procedure at present with undefended petitions on the ground of adultery which go through very rapidly. Everyone knows this. If you visit a court and watch you can see them going through in perhaps ten or fifteen minutes; they do not take very long.

I would like to think we were doing a little more than this, that we were slowing things down a little and looking at it a little more carefully, because I think marriage is our basic institution and it is not benefited by giving divorces freely; it is benefited by giving divorce where it is necessary, and we must always keep this in mind.

As I say, my solution to this is marriage breakdown. The court is simply told, "If the marriage has broken down you will give the parties relief. If it has not broken down you will refuse relief." I agree this is a very vague term. Certainly it is very vague. If we start laying down rules we get back to the situation where we have formulated grounds again. If we say, "The marriage has broken down where this, that and the other happens" we are really getting back to the situation where we have adultery, cruelty and desertion, because we have

gone no further than that. If we have marriage breakdown it is essentially a ground which is very wide and leaves almost everything to the discretion of the judge; the judge is left to decide "Has this marriage broken down or hasn't it?"

Senator HAIG: In your petition you have to allege certain reasons for the marriage breakdown, and you have to prove them.

Professor SKELLY: Certainly. You would say, "This, that and the other happened. We have been married so long. These things took place. I feel we can't go on living together", and the judge would then have to assess the situation and decide whether this really was a situation which could not continue or whether he could say, "No, I do not think the marriage has broken down." Certainly all the facts would have to be before the court, but we would not say to the judge, "He must prove this, that and the other before you give relief" because on the whole every situation is different, every family situation is a little different from another. Consequently we cannot lay down rules to apply to everyone. This is what they have tried to do in the United States, and also in Australia and New Zealand, to have a long list of grounds to try to compensate for every situation, but it has failed because you cannot do it.

What marriage breakdown is in fact is simply saying to the court, "Look at all the facts. We leave it to you to decide." Can a judge do this? Is a judge equipped to do this? I think he is. When he is asked to decide a question such as, "Do you think there is a reasonable apprehension of injury to health, as judges in England are today in cruelty cases, he is able to judge from the circumstances whether there is or is not. I think that in the same way a judge here could say, "I think this marriage has broken down" or "It has not broken down". I would advocate certain additional training, such as psychiatric training and sociological training, specially designed for the judge to bring him a wider knowledge of the problems which exist and how to read the real situation into the facts presented to him. I think a great deal can be done in this way.

I get great support from the committee of the Archbishop of Canterbury which, as I am sure you are all aware, in the publication *Putting Asunder* said that marriage breakdown was the answer—"Throw out all matrimonial offences and let us have marriage breakdown." The Lord Chancellor, not wishing to rush into anything too hastily, established a committee to discuss this report, and having discussed it the committee decided this was impracticable, even if it was desirable to do it. One of the reasons they put forward was that there simply was not the machinery to deal with the number of petitions that would come before the courts, that the cost involved and the number of petitions would be too great for the courts to deal with.

First of all, I do not think cost should come into it. If we recognize that marriage is as important as we make out, then in some way we have to make the money available. Secondly, on the question of the number of petitions, in England in 1963 there were 32,000 decrees granted, whereas in Canada there were only 7,600, so there is an enormous difference in volume. The number would certainly increase, but I still think we could form enough courts and have enough people available to do a proper job, analyze the situation and decide whether in the particular case the marriage had broken down.

I would like to read a statement by Lord Walker who made a dissenting statement in the Morton Commission report. He believed that marriage breakdown was necessary even then, back in 1955. He made the following statement:

The true significance of marriage as I see it is lifelong cohabitation in the home for the family. But when the prospect of continuing cohabitation has ceased the true view as to the significance of marriage seems to require that the legal tie should be dissolved. Each empty tie—as empty ties accumulate—adds necessarily harm to the community and injury to the idea of marriage.

I think that is a very important point, and one I made earlier. When a marriage has broken down it is far better to destroy that marriage, to allow the parties to get out of it, than to say "Irrespective of the situation we say you are going to live together." If *de facto* there is no marriage, why *de jure* should there be marriage? If in fact the parties are no longer living together as husband and wife and have rejected the bond of marriage, why should we legally say they are still married?

Mr. OTTO: Do you say the breakdown of a marriage is a question of fact or is it a question of mind between the two parties?

Professor SKELLY: When I say it is a question of fact, I mean from the surrounding circumstances we shall have to interpret their situation. The judge will be required to look at the factual situation and decide—not just from the husband saying the marriage has broken down but from all the evidence available whether the marriage has broken down so that he can give relief. Essentially, I am not recommending divorce by consent; I am not saying two people can get together and say, "We consent to a divorce." I am saying they can consent as much as they want, but the judge will be the one to decide whether the marriage has broken down.

Mr. OTTO: You are arguing at cross purposes, because the breakdown of a marriage can only be in the minds of the two parties; it cannot be either in the minds of the two parties or in the mind of the law, because these are two opposite views. In other words, the law might say or the regulations might say the marriage has broken down (because of cruelty,) but in the minds of the two parties there might not be a breakdown; in fact, it may be an accepted part of marriage. How can you reconcile those two views?

Professor SKELLY: First of all let me deal with your question on cruelty. I am not saying that in every situation where there is cruelty the marriage has broken down, because if I said that there would be no need for me to put in the bar that there must be no hope of reconciliation. Essentially I am saying that there may be cruelty, but whether the marriage has or has not broken down will be determined on the question "Is there any hope of reconciliation?"

On your second point, we are not doing exactly what the parties want. We are trying to protect the institution of marriage and in protecting the institution of marriage we may have to say to some people, "You may think you have got a broken marriage but we don't think you have, because you may not have given it sufficient chance, you may not have given sufficient to the marriage, you may not have contributed enough. If you contribute a little more we think it will work." You may say this is a high-hand attitude—

Mr. OTTO: Let us suppose this is so. Where then do you put the court? The court is to iron out differences between two people or between the state and people. If this is the case—and this has always been the case—what right has the court to interfere between two people who have already made up their minds? This is not the function of the court. The court cannot, and does not have any authority to, interfere between me and my mind or what I think, or between my friend and I in whatever we may think. It only has a right and duty in relation to another individual where our right and obligations are in conflict. I am asking you, how do you justify the court's involvement at all in the question of marriage breakdown?

Professor SKELLY: I would say that marriage is not a simple contract. Marriage is more than a simple contract; marriage concerns the question of status and the courts are concerned with questions of status. This is why the court has the right to intervene. It is not a private contract. If someone purchases an automobile from someone else the court will not mind what terms they make.

Mr. OTTO: You say marriage is not a simple contract?

Professor SKELLY: It is not a simple contract.

Mr. OTTO: Because all the evidence we have had, including that of the clergy, seems to be that it is no longer an ecclesiastical matter, it is a contract.

Professor SKELLY: It is a contract but it is not a simple contract. It is not a contract entered into by two parties without any effect on society at all, because it affects a change in status. Once the parties have married they have a different legal position and that is what the law is concerned with, their status. When I say "simple contract" I am not using that expression to differentiate between anything which is religious and anything which is not religious. I am using "simple contract" in the legal sense, which means that it is not a contract which two parties can enter into and the law cannot interfere with; it is a contract which governs status and one which the law has an interest in, because their legal position is changed by this union.

That is why the law is interested in it, and that is why the law is trying to protect the status of these parties and the status of marriage generally, because the law has an interest in this question of status; not in a private contract I agree, in what you might call a simple contract between two individuals, but in a contract which governs status the law has an interest. This is the law's "in" you might say, this is the law's right to get in there because status is involved, not simply a question of a personal contract between two people, otherwise you could terminate it by mutual consent, you could say to one another, "We have decided to terminate this contract" and the law would have to say, "Fine"; if it was a simple contract that would be all that was necessary, but the law says there is a question of status.

Mr. OTTO: You say status involves property?

Professor SKELLY: Not just property. These people are now different legal entities in the sense that this woman had a different standing in the eyes of the law—"This man has certain responsibilities towards her because she is his wife and she towards him because he is her husband."

Mr. OTTO: What the courts are saying is that this is a change in status which will affect other elements of our law.

Professor SKELLY: Many other aspects, but these are just two examples that I have given you. The law recognizes the changes because of the fact that a woman is married; the husband has certain responsibilities for the contracts his wife enters into. You see, this is the law's concern. But the law goes a little further and also attempts on behalf of society to protect the institution of marriage because this is the mandate, you might say, given to it by the legislature.

Co-Chairman Senator ROEBUCK: So that we keep the record straight, I do not think any of the lawyers who have appeared before us—I think I can confine it to the lawyers; I do not think the others have been very definite in the matter—have said that marriage is a contract, certainly not a simple contract. My own knowledge of the subject is that it is a condition brought about by a contract, but marriage itself is not a contract. Two people can enter into an agreement or contract to bring about the condition of marriage.

Professor SKELLY: Your engagement contract is, of course, a simple contract and it is enforceable if you break it. You can opt out of it in that you can terminate it by mutual consent. If you break it you can be sued. Who would say that for a breach of the marriage contract you can be sued? It does not follow, it is not the same thing. Your contract to marry is a simple contract; your contract of marriage is not a simple contract, it is a question of status.

Co-Chairman Senator ROEBUCK: "Condition" is a better word than "status" I think.

Professor SKELLY: I would certainly accept that. I was dealing with the practical application of it. I think it is possible to apply this; I think in Canada we could do this. Whether we are ready for it or not is a different question. It is a very drastic change. Let us face it, any change here would be a very drastic change, but this would be a drastic change for any country, even countries which have had developed divorce laws for many years, so I think perhaps it may be too much. However, it is something we should keep in mind when drawing up our present legislation. I say this in the hope that we will have present legislation. I think it should be kept in mind because it is a natural development and one which will have to take place.

Countries which have already gone almost as far as the extent I suggested in my modified conventional development have found they still have not got the answer. England introduced the extended divorce grounds in 1937. In 1963 a member of parliament called Leo Abse tried to introduce a bill which had separation for seven years as a ground for divorce; this was not accepted. I think everyone here would agree that seven years' separation is an awfully long time. Australia requires five years' separation, New Zealand requires three years' separation, and in the United States the period of separation varies from two to ten years.

This marriage breakdown legislation that we are considering is very new and would involve a major step forward. This is why I have given you the alternative, which I consider is perhaps a more practical approach at this time; but we should not forget that marriage breakdown is, I think, the ultimate solution, and perhaps we might be ready for it. The question is just how far we can go at this stage.

Mr. BREWIN: Why do we have to go through the experience of other countries? What reason do you see for us not jumping into the solution you apparently recommend? Do you want us to be very, very slow and backward, or what?

Professor SKELLY: I would think you had read the article mentioned at the beginning which I have written, *Divorce Reform*, if it had already been published because you use my very words, you quote me almost exactly. Why should we experience the mistakes others have experienced? Cannot we step out on our own? Yes, I think we can. I am not against this.

Mr. BREWIN: You just doubt whether we are as progressive as you are.

Professor SKELLY: I would not like to say that. I am too humble to suggest that.

Mr. BREWIN: Incidentally, you may be right if you do think that.

Professor SKELLY: I think the academics would say this is the answer at this time. Whether the politicians would agree is another matter. Therefore, as an academic I step warily and give you what I think is a better solution than might be given by just accepting the grounds England and Australia have adopted. I think my modified conventional development would be an excellent step; it would produce a great deal of good here; it would be something which has not been tried anywhere else; it would be entirely new. It would not be the ultimate solution, and I would not suggest it would be the final step; I think a further step is called for, but it would be so much better than the present situation that it would be really wonderful even to institute that.

Co-Chairman Senator ROEBUCK: Do you think the people of Canada are ready to take so drastic a step as abolishing all offences as grounds for divorce and bringing it down to the one single proposal of marriage breakdown?

Professor SKELLY: It is very difficult for me to comment, being a relative newcomer to Canada, being so young, and perhaps not having my finger on the pulse of the nation. I think the question is more; is parliament prepared to give

the judges this power? Does parliament feel it can give a judge the power to decide for himself? The legal profession may feel a little doubt, because they may say, "How are we going to advise our clients? How are we going to know when a marriage has broken down?" This is a legitimate question, but I think there is a legitimate answer in that a certain amount of case law will build up, and in the same way that you can tell at the moment that there is cruelty you would be able to say whether a marriage had broken down.

I think the criticism which is thrown around a great deal is not valid and that it is possible to get around it. I believe the people of Canada would accept this. I go no further than that. I think Canada is ready for this; it would do a great deal of good and would put us in the forefront, I would say, of countries in the world which have really enlightened divorce legislation. It would show that we are prepared to try, we are prepared to see if we can bring in something new, take the chance and make our own mistakes. If there is a mistake we will live with it, but we should not just follow along behind everyone else. It would be a dreadful thing if we simply adopted the 1937 legislation and left it at that, because it would mean that thirty years later we would have the same problem that England has at present. It is best to have one big flourish and provide the legislation we really need.

Co-Chairman Senator ROEBUCK: Not thirty years but thirty minutes.

Professor SKELLY: I do not know whether there are any other questions on the grounds. I do not know that I have any more to say about those.

There is one point I should perhaps make at this stage before I go on to deal with two other minor matters, and that is the question of what you might call preventive divorce. I think a great deal could be done to bring home to people who are getting married the serious step they are taking, the importance of the step they are taking. One of the greatest problems is with regard to young people who rush into marriage. I know several people who have married when very young and subsequently found that it did not work. They married at perhaps seventeen or eighteen, everything was fine for five or six years and then suddenly they found that unmarried friends of theirs of the same age were going here, there and everywhere, having a wonderful time, and they stop to think, "I've got a wife and child. I've got no money. We're up to our necks in debt. Was it all worth it?"

There is one thing we might consider. Whether or not this would be considered a federal matter I do not know. I think it is a federal matter, but there is some controversy among the constitutional lawyers as to whether it is or not. That is the question of the age of marriage. I think it is within the power of the federal government to enact that the age of marriage should be such-and-such. At present we have a very strange situation. There has been no federal legislation so the provinces have attempted to introduce some age limit, which I think constitutionally they are not permitted to do.

The provinces have said, "You shall not enter into marriage unless you are sixteen." This is a question of capacity; we are dealing here with the capacity of the party entering marriage, and I think this does not come within the power of the provincial governments. Most of the provincial legislation skirts around the question. They say, "A licence shall not be issued. A ceremony shall not be performed." They talk about the marriage being void, but they say that if there has been sexual intercourse beforehand of it there has been cohabitation afterwards the marriage shall be valid. You cannot have a void marriage which is validated; a marriage is void or it is valid. You can have a voidable marriage which can subsequently be validated, but a void marriage—which is the wording of many of the acts—is not a marriage at all. Either it does not exist or it exists. There is no way of saying you can make a void marriage into a valid one.

The provincial governments have attempted to raise the age. At common law the age of marriage in Canada is twelve for a girl and fourteen for a boy, this is subject to any statutory changes. The provincial governments have tried to raise the age to sixteen, but they have only done it by saying "You shall not enter marriage. You shall not get a licence. The ceremony shall not be performed". Once the ceremony has been performed it is very doubtful whether they can do anything. I think the federal government could say that the age of marriage shall be eighteen, or perhaps seventeen, but I think a lot of good would be done by raising the age of marriage to make people think a little longer and stop them rushing into marriage.

Leaving aside the age question, I think a lot could be done by education in the universities. Many people, having married, have their little problems and think to themselves, "We are the only people who have ever had this problem. It has never happened to anybody else. We can't go on any longer. This is the end of it." Many marriages break up because of problems connected with sex; the parties are unable to understand the other's problems, they are unable to understand the other's needs, they do not appreciate the other party's situation. I think a great deal could be done in the universities and schools to educate people in sexual matters, in matters connected with marriage, the problems that may arise; show them what can happen; say, "Look, this has happened to other people. These problems have arisen—questions of finance, of just getting along with someone else. When you enter marriage realize these things could happen to you, but don't think there is no solution to them; there are solutions." Many of these things start as very small incidents and escalate until they become very, very big, and at that stage it is almost too late. I think we should consider doing something at the school and university levels.

Co-Chairman Senator ROEBUCK: That, of course, is purely provincial and we would not even attempt to advise in connection with it.

Professor SKELLY: Perhaps I could leave it as something that I think should be done.

Co-Chairman Senator ROEBUCK: It will be all right to put it on the record, as long as it is understood that we are not interfering in education.

Professor SKELLY: Thank you. I go on to my two final points, one of which concerns annulment. We have in Canada a ground which renders a marriage voidable for impotence. Impotence covers the situation where the party is unable to consummate the marriage. Another situation which arises is known in England as wilful refusal, where one of the parties wilfully refuses to consummate the marriage. This is a ground for annulment in England; it is not a ground for annulment here. We interpret very widely the meaning of impotence until we include everything except actual wilful refusal. We talk of invincible repugnance. One party refuses, but if there is wilfulness, if there is malice, unless you can show that for some mental or physical reason the other party is refusing you are stuck.

I advocate introducing a ground which would be wider than this, wider than just impotence, which would include wilful refusal, so that if a party wilfully refuses it would be just the same as if there was impotence in that the other party might obtain an annulment on this basis. I think this is something which is fundamental to a marriage and something which has been considered fundamental to marriage. If a party wilfully refuses to consummate the marriage the court would be entitled to say the marriage was invalid.

Finally there is the question of maintenance for divorced wives. Many people obtain a divorce in order to remarry. If the wife intends remarrying there is no financial problem because we assume her new husband will support her. However, if the husband intends to remarry there often is a problem. Frequently he is unable adequately to support two families. He may marry again, and

although the court may make an order against him to maintain his former wife human nature causes him to maintain the wife he now has and perhaps neglect his former wife. If he does not remarry but just forms a common-law union he will provide for the woman he is living with rather than the woman he is required by the law to provide for. This is seen over and over again. The law can do all sorts of things but it is very difficult to make a man send his money to the former wife.

My suggestion perhaps goes a little too far, but it is that we should try to control this through the government, in that a body would be formed to be responsible for seeing that divorced wives were maintained. An order would be made against the husband in the same way as it is at present, but the husband would pay to this body or institution and the wife would be paid by it, so that if for any reason the husband did not pay the wife, she would not be left without means, she would not be left to try to proceed against him. She would still receive the amount of money she was entitled to. The government body would then proceed against the husband and they would be responsible for making him pay. They would be in a much better position than the wife to see that he paid. The wife would be without the problem of chasing around trying to bring an action against the husband. If the husband was unable to make sufficient funds available because he simply had not got the money the country should take the responsibility for providing for the wife.

Co-Chairman Senator ROEBUCK: Have you considered whether that would be within our jurisdiction?

Professor SKELLY: I think maintenance is normally tied up with the question of divorce. Your terms of reference were rather wide and I thought perhaps it would come within them, but I am wrong.

Co-Chairman Senator ROEBUCK: I am thinking of our constitutional jurisdiction. That would not be ancillary to divorce, you know. The divorce might have been granted a long time before that and it might be quite separate from the divorce. True she is a divorced woman, but I do not think that would be close enough to the divorce itself to be ancillary to it, would it?

Professor SKELLY: I must admit that I am not an expert on Canadian constitutional law; I do not know sufficient about it to say. It seemed to me that it would be ancillary to divorce, but perhaps it might be argued that it was not. Again, perhaps if necessary that could go down as my statement rather than a recommendation to the committee. This is an idea that I felt could be applied usefully so as not to leave the deserted wife to have to chase around in order to get money from her husband; to make sure she always gets her money to keep the children and keep herself some body or organisation should be responsible for getting the money from the husband. This is what happens to a large extent now with welfare people; they often finish up maintaining the wife.

Co-Chairman Senator ROEBUCK: It is five past five, if you can bring it to a close now.

Professor SKELLY: In summing up, what I would like to say would be that we need reform; we need reform of our grounds of divorce, and I hope this in some way will help when legislation is drafted.

Co-Chairman Senator ROEBUCK: Do not take my interruptions as a criticism at all. I was only protecting the record, that is all. Are there some questions?

Mr. McCLEAVE: Have you discussed this idea of the state paying alimony with any other people?

Professor SKELLY: No, I have not. It is an idea I get from England where, not necessarily in the case of deserted wives, wives who are left without any maintenance are maintained by the state and then the state recovers from the husband. It may cause many administrative problems, I do not know, but it did

seem that it would help the wife, who often has children to look after, and save her having to chase around to try to bring an action against the husband.

Mr. McCLEAVE: What has been the experience in England in seeing whether any of the tax moneys expended on the wives could be recovered from the husbands? How much recovery is there?

Professor SKELLY: I do not think it is very good. On the whole they do not recover a very large proportion. I am afraid I have not got any figures to hand, I was not able to obtain any. I know they are available in England but I was not able to obtain them here. They certainly do not get it all back; I would not say they got the majority of it back; I would say they lose quite a lot of money over it. The important thing I think is that we have to maintain the wife whatever happens; either the welfare people or someone else will be maintaining her and the state has a better chance of getting the money from the husband than the wife would have, because they have better machinery for dealing with these things.

Mr. McCLEAVE: Would you be able to find out in dollars and cents and send the figure to the chairman or the clerk?

Professor SKELLY: Yes, I could find it out. I have contacts in England who could obtain this information for me.

Co-Chairman Senator ROEBUCK: Is there anything further? If not I am going to call on my co-chairman to express our opinion of what we have been hearing.

Co-Chairman Mr. CAMERON: I would say, Mr. Skelly, that you have fully lived up to the advance notice given by Mr. Anderson of the Manitoba bar. We have all listened to your presentation with a great deal of interest. You have indicated a great human understanding of the problems involved. You have indicated some new and novel suggestions which the committee had not considered before, and all in all you have made a very, very splendid presentation. It will be very beneficial to the committee when they come to study the evidence and prepare a report. I am sure we are all very greatly indebted to you.

Co-Chairman Senator ROEBUCK: Then I think the chair can accept a motion to adjourn. We had some further matters on the program, and I think I headed them; that was some statements from those who had introduced bills, but it is ten minutes past five now and I doubt if we should go into that portion of our program at this late hour. What does the floor feel about that?

Mr. McCLEAVE: I think we could hear half an hour from our distinguished chairman and sponsor of Bill S-9. That would clear up the distinguished sponsor of Bill C-133 at the same time! They are identically the same bill.

Co-Chairman Senator ROEBUCK: I suggested some time since that Mr. McCleave should talk about that bill, but he threw it back on my hands. I have very little to say about it. That bill was introduced one year and a few days ago, and at that time I was endeavouring to be so conservative that I might get by. I introduced the grounds of divorce that have been experimented with and used in England so that we had behind it the jurisdiction of England. A whole year has gone by since then. We have heard a great many very valuable briefs and presentations, and surely we have learned something in the interval, so I am ready to forget that bill and look forward rather than back. Perhaps Mr. McCleave, who introduced an exactly similar bill in the commons, will have something to add to that, but that is all I wish to say about it.

Mr. McCLEAVE: Mr. Chairman, I think you have put our case in a nutshell. We decided these were the three most commonly accepted grounds for divorce among divorce reformers for many years, and that if quick action was wanted in this field of divorce reform we at least would have something with which parliament could work. However, since then we have seen a broadening of public climate in this matter and many other excellent grounds for divorce have been

suggested. I am wholly in accord with the views you have presented. I think we can come out from this committee with something of a much wider nature.

Co-Chairman Senator ROEBUCK: Mr. Brewin, would you like to address us on your bill now?

Mr. BREWIN: Mr. Chairman, to be very frank, in a way I would prefer to address the committee on some other occasion. I am prepared to go ahead, but it is nearly quarter-past five now. My bill covers a little unfamiliar ground in that all the other six or seven bills before us expand the grounds of divorce whereas my bill opts for the other approach. I have really tried to put into legislative form some of the recommendations on marriage breakdown.

Co-Chairman Senator ROEBUCK: Your bill is later in time.

Mr. BREWIN: It is quite a lot later in time, and I have had the advantage of listening to the proceedings in this committee. I am willing to proceed, but if the committee would prefer it I would not mind putting it off till the next or some other occasion.

Co-Chairman Senator ROEBUCK: I think you are right in doing that. The other one was Mr. Basford, but he is not here.

Co-Chairman Mr. CAMERON: He was here and I suggested that he come back at half-past four, but he has not come back so I assume he could not come.

Co-Chairman Senator ROEBUCK: In that case let us adjourn.

The committee adjourned.

APPENDIX "70"

SUBMISSION
to
THE SPECIAL JOINT COMMITTEE
OF THE
SENATE AND HOUSE OF COMMONS
ON
DIVORCE
by
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26th January, 1967.

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FOOTNOTES

APPENDIX I Cruelty

APPENDIX II Draft Bill

A. SUMMARY OF RECOMMENDATIONS

1. (a) Jurisdiction in Divorce proceedings should be based on either:
 - (1) Residence of the Petitioner in the Province for a specified period; or
 - (2) Domicile of the Petitioner in Canada.
- (b) Jurisdiction in Nullity proceedings should be on the same basis as in Divorce proceedings.
2. Legal Aid should be available in actions for Divorce, Annulment and Separation.
3. The Basis for Divorce should be either:
 - (a) a combination of the Matrimonial Offence and a Non Fault ground; or
 - (b) Marriage Breakdown.
4. The Grounds for Annulment should remain as they are at present, except that "Impotence" should be replaced by a wider ground, to be known as "Failure to Consummate".
5. Responsibility for the maintenance of divorced wives should be taken over by the State.

B. JURISDICTION

6. The concept of domicile and its development and application as a jurisdictional criterion has caused, and will continue to cause, a great deal of unnecessary inconvenience and frustration, and in some cases even prevent a person obtaining a divorce, who would otherwise be entitled to one.

7. Jurisdiction in divorce cases in Canada, based on Provincial Domicile is particularly unsuitable. In conjunction with the concept of the unity of domicile of husband and wife, great injustices are worked.

8. The basic rule is, of course, that the petitioner must be domiciled in the Province where he or she petitions. Because of the concept of unity of domicile, the critical question is always, where is the husband domiciled? This is often difficult to determine. If it can be determined it may be a Country or Province many miles from that in which the wife is resident.

9. The Divorce Jurisdiction Act 1930 (s.2) provides some assistance to the wife but to bring the facts of her case within it she must show that she was deserted by the husband from the place where he was domiciled. Also, two years must have elapsed before she can petition, and she will still only be able to petition in the place she was deserted from.

10. There are two solutions to this problem with their respective merits. Either create a Canadian Domicile for the purpose of Divorce, as Australia created an Australian Domicile for this purpose in 1959. Or make residence of the petitioner within the province sufficient to give the courts of that province jurisdiction.

11. The advantage of Canadian Domicile is that, assuming a uniform Divorce Act is passed for Canada, even if Quebec and Newfoundland do not set up divorce courts, this would not prevent the law being the same for everyone. A person normally resident in either of these provinces could cross the border into an adjoining province and the courts of that province would have jurisdiction. Also many of the problems connected with the concept of domicile would be eliminated.

12. The advantage of residence as a basis of jurisdiction is with regard to the recognition of foreign divorce decrees. Our basis of recognition is, of course, reciprocity. If residence was our basis of jurisdiction we would be able to recognize many decrees granted in the United States which we cannot at present recognize.

13. Not only is it essential that a change be made in our basis for jurisdiction in divorce matters, but also with regard to jurisdiction in nullity proceedings where the situation is far worse because the Common Law rules are so confused. It is suggested that whatever basis we adopt for divorce jurisdiction should also be applied to nullity proceedings.

C. LEGAL AID

14. A comprehensive system of legal aid for matrimonial actions must be available. Although a different economic situation may exist in England and Wales from that in Canada, nevertheless, I believe that the fact that out of approximately 41,000 divorce petitions in England and Wales in 1965, approximately 27,000 were supported by Legal Aid¹, is some indication of the need. The aid should be on a graduated basis according to the income of the parties involved, and a committee should decide whether valid grounds for relief existed before aid is given. It is important also that the fees paid to lawyers for such work is virtually equivalent to the fee a private individual would pay.

D. GROUNDS FOR RELIEF

15. The conventional development would, I suggest, be along the lines of the English Matrimonial Causes Act, 1937, which added cruelty, desertion, and insanity as grounds for divorce to the then existing ground of adultery. It also introduced the concept of what was called dissolution of the marriage where a person might be presumed dead subject to certain conditions if he or she had been unheard of for 7 years, and the marriage could then be dissolved for all purposes.

16. To this might be added what is called a "separation" ground which has been introduced in Australia and New Zealand and in 22 American States and may soon be introduced into England. By a separation ground we mean that after the parties have lived apart by consent for a specified period of years, a divorce may be granted subject to certain safeguards. The periods specified range from 2 to 10 years. This is a non fault marriage breakdown ground, the question of guilt and innocence having no application.

17. (1) *Modified Conventional*. Divorce should be possible where the respondent is guilty of either adultery or cruelty. The bars which at present exist with regard to adultery would be abolished.

18. In addition, I would advocate the introduction of a non-fault marriage breakdown ground, but wider than the separation one mentioned. Divorce should be possible where there has been no consortium between the parties for a period of three years or more immediately preceding the commencement of the proceedings.

19. To succeed a petitioner proceeding on any of the above grounds would have to show that there was no reasonable likelihood of a reconciliation being effected and that the granting of the decree would not prove "harsh and oppressive" to the respondent; and is in the best interest of the children of the family. (A decree would certainly not be considered in the best interest of such children if proper arrangements for their custody and maintenance had not been made). The court must refuse relief if any one of these is absent.

20. The third requirement is intended to emphasize that the interest of the children is paramount. The expression "children of the family" is chosen particularly because it has a wider connotation than simply children of the marriage. It includes not only a child of the parties, but a child of one of them who has been accepted as one of the family by the other.

21. A further restriction on the freedom of divorce is, I believe, desirable. In order to prevent people rushing into marriage and equally quickly rushing out again, it might be enacted that divorce shall not be possible during the first three

years of marriage except in a case of exceptional hardship suffered by the petitioner or exceptional depravity on the part of the respondent.

22. This provision was introduced into England by the Matrimonial Causes Act, 1937, and its retention recommended by the Morton Commission,² who stated that:

The purpose of the restriction is to encourage husbands and wives to face and resolve their differences in the period of adjustment which necessarily takes place during the first few years of married life, and thus to reduce the number of broken marriages. Whether in practice it has had this effect can only be a matter of opinion, since the statistics available are of instances where the restriction has failed in its purpose and not of instances where it has been successful. We consider that on the whole the restriction has had a stabilizing effect on marriage... (para. 215)

23. Adultery would continue to have the meaning it at present has in Canada. The meaning attached to cruelty is dealt with in Appendix I. The meaning of the new ground, "Lack of Consortium" is dealt with below.

24. *Lack of Consortium.* What do we mean by consortium? Consortium is generally considered to mean living together as husband and wife and all that goes along with such a relationship. This is admittedly a vague term but lack of consortium would certainly cover a situation where the parties were living apart either with or without consent, and where they were living in the same house but neither performing any services for the other. The court would have to determine from then on how significant was the loss of a particular service or failure to allow a particular right or perform a particular duty, e.g. sexual intercourse, and whether this justified a divorce. It would be possible for the courts to take a harsh or liberal attitude to this built-in discretion, but it is hoped and expected that whatever interpretation they applied would reflect the attitude of society at that particular time to divorce.

25. This ground would be intended particularly to cover the three grounds of desertion, insanity, and separation which are considered by some people to be the natural addition to adultery and cruelty to make up our new divorce grounds. Desertion covers situations where the parties are living apart against the will of one of them. Separation covers cases where the parties are living apart by consent. Insanity as a ground of relief as it exists at present in England suffers from one major disadvantage due to the scientific development which has taken place in the field of treatment of mentally disturbed people. The ground as it exists in England is that after your spouse has been under care and treatment for five years on your proof that he or she is incurable a divorce can be granted. The main problem which arises was discussed by the Morton Commission who pointed out the difficulty in most cases, of getting medical evidence to show that a person is incurably insane, in fact the present tendency amongst doctors qualified in this field appears to be to regard everyone as curable, it being just a question of time until they can be cured.

26. Under the ground suggested here it would in most cases be possible to show that there was no consortium between the parties and then it would be up to the court to decide whether there was any possibility of consortium being restored. It appears that in many cases expert medical witnesses are sympathetic to the petitioner's plight but are not prepared to state that the respondent is incurable. If, on the other hand, the onus is reversed, i.e. they were called upon to state that he is in fact curable, the likelihood of the courts granting a decree might be increased.

27. The grounds of desertion and separation taken individually are rather narrow and made inflexible by technicalities. In Australia in 1959 an attempt was made by the legislature to bridge the gap between simple desertion and

constructive desertion in which lies many of the worst situations described by A. P. Herbert as "holy deadlock". Even with the new provision there are still cases which do not come within the concept of desertion, and justice is only done by falling back on the separation grounds. In an article in 1963, Sir Stanley Burbury (C. J., Sup. Ct. Tas.) commented:

The introduction of separation as a ground has I believe removed a strong incentive to perjury and in many cases has avoided the unreality under the label of desertion (actual or constructive) of attributing the breakdown of the marriage to the fault of one party.³

In many cases, however, you have to decide whether the separation is by consent or amounts to simple or constructive desertion. In either case it is necessary to show that the parties have lived separate and apart.

28. Instead of going through all the elaborate semantic exercises often required to show there is desertion, when the necessary degree of separation is not present, why not set out by removing the requirement for actual separation. If the parties can prove that the *consortium vitae* has been terminated, usually this will be by showing that they have lived apart, isn't this enough? Isn't this what we are really trying to determine? The Australian and New Zealand courts have become involved in the question of "is physical separation alone enough to come within the section? Can parties be separate and apart under the same roof?" The test proposed in one case was "Destruction of the *consortium vitae*". If this is the test used to determine whether the parties are living separate and apart, and living separate and apart is the test to see if their marriage has broken down, then we have a test for a test. Isn't it much more logical to have one test. Has the *consortium vitae* been destroyed. If it has, the marriage has broken down.

29. *Safeguards.* The first requirement, that the court must be satisfied that there is no reasonable likelihood of a reconciliation being effected, follows naturally from the idea that we are concerned here with marriage breakdown, and not the matrimonial offence. We have to ask ourselves "has this marriage broken down irretrievably"? Our test is, has there been any consortium between the parties in the last three years? If there hasn't then a presumption is raised that the marriage has broken down. If, however, it appears that there is a reasonable likelihood of a reconciliation, the presumption has been rebutted and the court must refuse relief.

30. The second safeguard is that the effect of the granting of the decree must not be unduly harsh or oppressive to the defendant spouses. This provision appears in the 1959 Australia Act where it is also an absolute bar.

31. What amounts to "harsh and oppressive" in this context has been discussed in several recent Australian cases. It is clear that the mere granting of the decree on the separation ground cannot *per se* be "harsh and oppressive" to the respondent or else the object of the legislation would be defeated. Also the respondents belief in the indissolubility of marriage, an agreement at the time of the marriage that it was "forever", and loss of status as a married woman by the respondent against her wish, have not been held sufficient to amount to "harsh and oppressive".

32. In the case of *Painter v. Painter*⁴, the full court of South Australia stated that:

...whatever view one may hold with respect to the sanctity of marriage the laws ought not to regard the 'contract' as entitling either party to hold the other suspended, like Mahomet's coffin, in a state which is neither marriage nor freedom. The words "harsh and oppressive" are certainly emphatic, and, in our opinion they connote some grave or—at the least

—some substantial detriment, and some real—as opposed to a fanciful injustice to the respondent, following on the making of the decree.

Unless she will be seriously and unjustly affected it cannot be said that the decree is harsh and oppressive.

33. When therefore, will relief be refused on this basis? It has been held that it would be harsh and oppressive, where the effect was to deprive the respondent of rights that would accrue on the death of the petitioner under the Testators family maintenance legislation. But apart from financial hardship, which can be offset by financial adjustments at the time of the petition, when else might this arise? Possibly when a person's chance of employment would be affected by a decree, but it is difficult to envisage any other situation. It is a discretion given to the court to try to overcome the injustice which might result in the odd few unforeseen situations which may arise. A discretion helps the court keep up with changing social attitudes.

34. The discretion given to the court is not to withhold a decree if it feels that for some personal reason it should be withheld. The statute gives three reasons for withholding a decree. It is not a discretion to the court to do what it wants. If there is no chance of reconciliation and the decree would not be harsh and oppressive to the respondent and provided it is in the interest of the children, they must grant relief. Even though the Judge feels the husband is an absolute rotter who has taken advantage of the wife and now that it suits him to do so, seeks to repudiate the relationship, he must grant a decree if the facts justify it and if none of the bars arise.

35. Despite all that has been said, however, I believe this is not the ultimate answer to our problems. There are disadvantages to the above reform.

36. *Disadvantages.* One of the most obvious problems will be the introducing of a non-fault ground alongside offence grounds. The offence is based on guilt and innocence. There is usually no need to prove marriage breakdown, all that is necessary, e.g. is to show an isolated act of adultery. There is no need to show that reconciliation is impossible. But only the innocent spouse can petition. The non-fault ground is based on marriage breakdown; if the marriage has not broken down relief is not possible. It must be shown that reconciliation is not possible, but on the other hand either party may petition. There is no need to consider the question of guilt or innocence.

37. An example of this problem can be taken from the Australian Law. Five years separation by consent and proof that resumption of cohabitation is impossible is necessary to get relief on the non-fault ground. However, two years desertion without proof of breakdown or that resumption of cohabitation is impossible is also sufficient. It also provided problems for the judiciary, evidenced in Australian cases where one day a judge may be dealing with guilt and innocence in connection with a matrimonial offence, and next with a non-fault ground where guilt and innocence are irrelevant. This particular problem would be reduced in the suggested reform for Canada.

38. A further criticism is that the use of a verbally formulated "ground" does tend to defeat its own object, i.e., to give relief on marriage breakdown. The tendency is to try to fit the facts to the particular formula as is the practice with the offence and not really to investigate whether or not the marriage has broken down. This can be seen particularly where a separation ground exists. If the necessary number of years separation have occurred the court tends to leave it at that. The reform suggested here would be less vulnerable to this because of its generality.

39. It is impossible to develop the matrimonial offence to cover all possible unfortunate situations that can arise. Even the addition of the non-fault ground suggested does not provide the ultimate answer. The Legislatures of Australia

and New Zealand and of many of the American States have attempted to provide such an extensive and comprehensive conglomeration of offences in an attempt to cover all possible contingencies but have found this impossible. The confusion caused by such a multiplicity of grounds of relief can easily be imagined.

40. Finally, and I believe, the most important criterion is that to add more grounds of divorce simply makes divorce easier without improving the law. If you regard the artificially formulated ground that we at present have, namely adultery, as a slot in a door, you are told by the law, try to push the facts of your case through that slot. It doesn't matter how much they are out of context or what the overall picture is, will they pass through that slot. If we revise the grounds for divorce all we are doing is producing more slots of different shapes. We now say, if it won't go through the slot marked adultery, try the one marked cruelty, etc. We are doing nothing to refuse relief where it is not justified. We are just making divorce easier.

41. The reform suggested would carry with it some attempt to prevent a divorce where the marriage had not broken down. A party would be prevented from obtaining a divorce unless he could show that there was no likelihood of reconciliation. But we would still be relying on artificially formulated grounds, and the tendency to apply the slot principle. It is hoped, however, that the consortium ground, being of a general nature might minimize this.

42. Despite these criticisms I believe the reform suggested would produce a situation in Canada so much better than the present situation that comparison is virtually impossible. It would be a very desirable and enlightened reform, relative to our present position.

43. II. *Marriage Breakdown*. The basic unit of our society is the family. The family of one husband and one wife and the children they seek to bring up. This unit is designed to bring to husband and wife the companionship most human beings need in life and the true united fulfillment of their sexual desires. Also in the partnership the husband is normally expected to bear the economic burden while the wife bears the domestic ones. Our object is to produce a stable, normal, happy environment, free as far as possible from tension, in which children may best be brought up.

44. Why do we grant a divorce? Logically we should only grant one where an attempt at such a state of affairs, as described above, has failed. (Where the marriage has completely broken down, if in fact there ever was a marriage to break down in the first place.) We would do this not simply to help the parties out of what may by now have become a hopeless plight, but to protect the institution of marriage itself. If a part of a plant becomes diseased you cut it off to prevent the whole plant being destroyed. If a cancerous growth appears in the human body you isolate it and destroy it if possible to protect the rest of the body. Lord Walker made this very point in his dissentient statement in the Report of the Morton Commission. He stated that:

The true significance of marriage as I see it is life-long cohabitation in the home for the family. But when the prospect of continuing cohabitation has ceased the true view as to the significance of marriage seems to require that the legal tie should be dissolved. Each empty tie—as empty ties accumulate—adds necessary harm to the community and injury to the ideal of marriage. (Page 241.)

45. If a marriage has ceased to exist *de facto*, is it not eminently reasonable to suggest that it should cease to exist *de jure* too. Can anyone really suggest that if two people have accepted that their marriage is a hopeless failure and are now living completely separate lives, perhaps in common law unions, that the refusal of a decree by the courts will really turn this back into a living, useful productive marriage. If two people want a divorce badly enough they can always

find a way. They can arrange either that one of them commits adultery or perjury. But should they have to do this. What useful purpose can this serve? Can it really be argued that such a state of affairs makes marriage more stable. Can the turning of honest citizens into criminals really be justified on this basis? Isn't there something much more fundamental that has been overlooked. Shouldn't respect for the institution of marriage be created by work done prior to the marriage. Instil into people the idea of the sanctity of marriage before they enter into it. Perhaps raise the age at which a person may marry. But set out to produce good marriages. This is what will stabilize the institution; not refusing divorces to people whose marriage is a hopeless mess and who in many cases would marry again and perhaps produce a marriage which would be a credit to society.

46. It is an accepted fact that preventative measures are far more desirable than measures intended only to cure. When we refuse a divorce, however, we are, in the majority of cases, not providing even a cure but just a meaningless bar to a new life. It is not accepted that availability of divorce produces a major increase in the number of divorces granted. There will, of course, be an increase in the first year or two while the parties to the many broken marriages who have been denied relief in the past obtain release from what in many cases may have become a hideous meaningless bond, which has bound them together. As has been pointed out already, if two persons want a divorce badly enough they will find a way, but this raises a further point. How far does this wholesale evasion of the law adversely affect the general public's respect for the law. Law is a vital institution in society. It surely can do the law no good in the eyes of the ordinary member of the public when its attitudes are so far out of line with the present social ideas. What must be one of the most frequently quoted misquotes is becoming rather overworked. "The law is an ass."

47. The solution, I believe, is to give relief where it can be shewn that a marriage has irretrievably broken down. But how do we know when a marriage has broken down? This will be a question of fact in any particular case. To lay down rules as to when a marriage has or has not broken down would mean a return to "verbally formulated grounds" which we are trying to avoid. We do not want to get back to the position where we say, don't tell us whether your marriage has or has not broken down, just tell us whether the facts fit this artificial test or not.

48. The court would have to take on an inquisitorial function in order to discover all facts pertinent to the case at hand. It will be essential that all cases have been thoroughly examined and that this doesn't develop into a rubber stamp system which at present exists in many undefended adultery cases.

49. The object will be to try to put all the facts into perspective. Whereas at present, taken out of context, an isolated act of adultery may provide a ground for divorce, in context it may be far less significant. It may, in many cases, be evidence that the marriage has broken down but it will have to be looked at with all the other evidence available. The court will have to ask itself "has everything been done by these parties to make a go of the marriage? Have they consulted marriage counsellors, have they talked it over with anyone? Have they even talked it over with one another? Do they understand each other's problems?" If after considering all the possible angles, the court is satisfied that the marriage has broken down, then, with due regard for the welfare of any children, they must grant a divorce. If on the other hand they feel that reconciliation is possible they must refuse a decree.

50. There would thus be two major improvements on the present system. Divorce would only be allowed where it was really desirable to grant relief and would be refused where the parties had perhaps not given the matter proper

consideration or in general where reconciliation was, in the eyes of the court, possible. It would have the fundamental advantage that we were only making divorce easier for the people who really deserved it. It should be understood clearly that this is not to advocate divorce by consent. Divorce by consent essentially involves that the parties agree that they shall be divorced and that is the end of it. Here they can agree to all they like but it will be the courts who decide whether or not a divorce will be allowed.

51. One of the other major criticisms of all non-fault grounds is that it is unjust and inequitable to allow a "guilty" spouse to petition. We have to put "guilty" in quotes because the very theory of the breakdown (non-fault) ground is that guilt or innocence does not come into it. Nevertheless what is the answer to this criticism? This can best be answered by another question. Why do people oppose divorces? Basically there are two reasons—economic reasons and reasons of status. As far as economic reasons are concerned, the respondent can be protected by specific requirements that adequate financial arrangements be made before a decree is granted. The second, the loss of status of a married woman isn't quite so easy. It is not possible to provide a complete answer to this because of course no degree of financial compensation can help. The position must be kept in perspective, however, and it should be remembered that it is not common for all the wrong to be on one side, all the right on another. If the Court is satisfied that the marriage has irretrievably broken down, and they grant a decree thereby rendering the respondent a divorced person, is his or her lot really worsened? Society will quickly realize that divorce on the breakdown ground is not the same at all as on the old offense grounds. The stigma which may at present attach will soon be forgotten.

52. This idea of guilt, innocence, wrongdoing, innocent spouse only petitioning, etc., are products of the matrimonial offence doctrine. If the only way one could obtain a divorce for hundreds of years was on this basis, ideas become accepted which, when considered fully, don't naturally follow. This argument will of course apply to all non-fault grounds. It is now recognized in Australia, New Zealand, and I think in the light of the recent report of the Law Commission in England too, that a non-fault ground is an essential part of the divorce law. Society cannot have it both ways. Divorce is a very important matter and it is difficult to avoid some suffering.

The idea that there should be one ground for relief, i.e. marriage breakdown, is fine in theory, but can it work in practice?

53. *Practical Application.* I would suggest that it can work in practice and take support again from the Report of the Archbishop of Canterbury's Committee. The recent Law Commission⁵, however, stated that in practice it would not work so that there is some opposition to this ground. The Law Commission stated that:

it would not be feasible, even if it were desirable, to undertake such an inquest in every divorce case because of the time this would take and the cost involved. (Para. 120(5))

54. Is the time and cost really so important when such fundamental questions of human happiness are at stake. I do not think so. I am convinced that such a system could be successfully operated. In Canada we have two advantages in particular, over many other countries. The first advantage is that we have not committed ourselves to any definite development. Secondly, an advantage we have particularly over England is that we have far fewer divorces per year. While in England and Wales there were 32,052 decrees granted in 1963⁶, in Canada there were only 7,681⁷. I believe it would be possible to establish enough courts to operate this system properly.

55. There are other practical questions, however, one of the glaring ones being, is it possible for a Judge to determine when a marriage has broken down? I believe it is. It is in fact the type of question that he has to decide every day. When he is asked, "do you think this person will suffer injury to health if this particular conduct is continued?" he is required to make a prediction on the facts before him: when he is asked to determine questions of cruelty and constructive desertion, with the legal semantics now involved in such questions he has a similar problem.

56. I believe, however, that the old attitude, procedures and rituals involved in obtaining a divorce on offense grounds must be dispensed with. Also, special training (e.g. in psychology, etc.) should be given to the persons who act as judges in these cases and such people should only be involved in this branch of the law. There must, in addition, be an abundance of well trained marriage counsellors readily available to give informal advice to parties whose marriage is in trouble. It is essential that these people be properly trained and that there be an adequate number and that an adequate amount of money is available in order free to consult a counsellor at any time without undue formality, without a marked car calling at the door, and without having to visit a building in which to obtain the best people possible for such work. People must be made to feel the courts are housed.

57. The success of the general ground of marriage breakdown is contingent on the development mentioned above. No expense should be spared to produce the necessary state of affairs. It will be a costly project but one which I believe is essential to the maintenance of our society.

E. GROUNDS FOR ANNULMENT

58. The distinction between void and voidable "marriages" should be retained. It is not considered that they can be treated in the same way. The grounds which render a marriage void, i.e. bigamy, consanguinity and affinity, lack of consent, and non-age and formal defect, are essentially public in that they represent directly society's interest in the institution of marriage. Impotence, which at present renders a marriage voidable is surely something which is the concern of the parties alone and hence cannot be regarded in the same way as the void grounds.

59. The only other question is whether wilful refusal to consummate should be introduced as a ground for rendering the marriage voidable, as it is in England. The present trend appears to be to treat it as a ground for divorce arguing that it is something which happens after the ceremony of marriage and not a defect at the time of the ceremony, as are the other nullity grounds.

60. The grounds of impotence and wilful refusal are so intimately related that it seems ridiculous not to treat them both in the same way. In Canada at present we interpret impotence very widely to cover any refusal to consummate which is not actually wilful. The answer, I believe, is to replace Impotence by failure to consummate as a ground rendering the marriage voidable. This would cover Impotence (mental or physical) and also wilful refusal.

F. MAINTENANCE

61. Many people obtain a divorce in order to remarry. If it is the wife who wishes to remarry this generally does not create financial problems, but if it is the husband who wishes to remarry it is often quite different. If the husband is wealthy he can afford to support two families. However, many men who wish to remarry do not have the means to support two families. Even if the husband does not want to remarry he may nevertheless be living common law with some woman and again may not be able to afford to support two families. He may be legally compelled to maintain his divorced wife but in reality he will support the woman he is living with.

62. If we make divorce available to all we must be prepared to make it possible for all to exercise fully the rights given by the decree and remarry if they so wish. It is also important to ensure that no one suffers as a result.

63. The Government should be responsible for the maintenance of divorced wives. This is not to suggest that they would not be entitled to claim as much from the husband as he could afford to pay, but the wife would receive her money from the State—she would not have to rely on her husband's paying the maintenance and bring an action or actions if he failed to do so. She would never be without money. If the husband failed to pay the Government would bring the action. It would be an offence against it, not the wife.

64. In reality this would change the present situation in one respect only, and that would be that the wife could rely on receiving her maintenance regularly and would not be without maintenance for many months while bringing proceedings or attempting to find her ex-husband to bring proceedings.

65. This type of procedure is employed by the Welfare Societies in England where wives are deserted. There is no reason why this should not also be done here under the same provisions.

66. In the unlikely event that the husband had, during the time of the marriage, been unable to support himself and had been supported by the wife, the state should again take over the responsibility with provision to collect from the wife where possible.

67. The amount of maintenance should be assessed by the Court granting the divorce, in the same way as at present.

68. *A Plea.* The Divorce Statute under which many of us operate has its 110th birthday on August 28 of Canada's Centennial year. The law in the Maritimes is even older. Because of the drastic change in social attitudes and conditions in this period, it is radically out of date.

We must have reform.

Respectfully submitted,
Stephen J. Skelly.

FOOTNOTES

¹ Civil Judicial Statistics for England and Wales.

² Cmd. 9678.

³ (1963) 36 Aus. L.J. 283.

⁴ [1963] S. A. S. R. 12.

⁵ Cmnd. 3123.

⁶ Registrar General's Statistical Review for 1963, Part III, table 28.

⁷ Canada Year Book, 1965.

APPENDIX I

Cruelty

1. Cruelty as a matrimonial offence is not necessarily the same thing that the layman would refer to as cruelty. The English Court of Appeal has emphasized, however, that cruelty means conduct which is at least what the layman would call cruel and that the word has no esoteric Divorce Court meaning. No exact definition of cruelty has ever been formulated by the Courts nor any comprehensive list of situations where cruelty will be held to have taken place. The test is essentially a subjective one. Does this conduct by this particular man to this particular woman or vice versa, amount to cruelty. Nevertheless certain requirements have been laid down which must be satisfied before cruelty as a matrimonial offence can be established.

2. Cruelty as it is at present interpreted as a ground for relief is not confined to physical violence. It was at first considered that it consisted of three elements which had all to be present before a spouse could be said to be guilty of the matrimonial offence of cruelty. The first requirement was that the person complaining (the petitioner) had to have suffered injury to health (mental or physical). The only exception being where there was a reasonable apprehension of injury resulting if the conduct complained of was continued. This was established by the House of Lords in 1897 and is considered a fundamental requirement even today. Whether or not injury to health has resulted can be determined with relative certainty by medical evidence. It appears that any degree of injury is sufficient if medical evidence of its existence or likelihood is available.

3. The second requirement, which is attributed to the judgment of Lord Stowell in a decision in 1790, is that the conduct complained of must be "grave and weighty". This sounds a somewhat vague expression but it has been used to distinguish between conduct which is an element of cruelty, and that which is "the normal wear and tear of normal life". From two recent House of Lords decisions, *Gollins v. Gollins* ([1963] 2 All E. R. 966) and *Williams v. Williams* ([1963] 2 All E.R. 994) it would seem that the conduct must be such that no reasonable person would consider that the petitioner should be called upon to endure it.

4. The final requirement was that for there to be matrimonial cruelty there must be present a certain mental element. It was thought that before a spouse could be guilty of cruelty he or she had to intend to injure the other spouse. For many years various forms of legal gymnastics were performed to try to get around this requirement. In 1963, however, in the cases of *Gollins v. Gollins* and *Williams v. Williams*, the House of Lords faced squarely the question and decided by a majority of three to two that an intention to injure was not an essential requirement for there to be matrimonial cruelty. It is essentially a question of fact in any particular case whether there is cruelty or not. Conduct between two particular spouses may be considered amusing, insignificant or just good clean fun, whereas between two others it might result in injury to one of them.

5. In *Gollins v. Gollins* and *Williams v. Williams* various attempts were made by their Lordships to explain what was meant by cruelty. Bromley in his latest edition of Family Law, picks out two particular statements which I believe sum up the present situation. The first is Lord Pearce's statement that:

It is impossible to give a comprehensive definition of cruelty, but when reprehensible conduct or departure from the normal standards of conjugal kindness cause injury to health or an apprehension of it, it is I think, cruelty if a reasonable person, after taking due account of the temperament and all the other particular circumstances, would consider that the conduct complained of is such that this spouse should not be called upon to endure it. (Page 992)

The other is the statement by Lord Reid that you would be guilty of cruelty: . . .if without just cause or excuse you persist in doing things which you know your wife will probably not tolerate, and which no ordinary woman would tolerate. . . whatever your desire or intention may have been. (Page 974)

The conclusion I think is that if the petitioner's health has been injured or there is a reasonable likelihood of this, if the respondent carries on in the way he has been doing, and if his conduct is sufficiently bad that it is deserving of the term grave and weighty, then the intention of the respondent is irrelevant. Such a case would be *Williams v. Williams* where the respondent was suffering from

insane delusions. In many cases however, the conduct may not itself be sufficiently grave and weighty unless a certain intention on the part of the respondent is present. Intention will in future go to the weight of the conduct rather than exist as a separate element of cruelty.

APPENDIX II

DRAFT BILL

SECTION 1. Any court having jurisdiction to grant a divorce *a vinculo matrimonii* may hear a petition for divorce or annulment, where the petitioner has been resident within the province in which the action is brought for a period of at least six months or more immediately preceding the presentation of the petition.

SECTION 1. (*Alternative*) Any court having jurisdiction to grant a divorce *a vinculo matrimonii* may hear a petition for divorce or annulment, where the petitioner is domiciled in Canada at the time of the petition.

SECTION 2. (1) Subject to Section 1, any court having jurisdiction to grant a divorce *a vinculo matrimonii* may hear a petition for divorce by either the husband or the wife on the ground that:

- (a) the respondent has since the celebration of the marriage:
 - (i) committed adultery; or
 - (ii) treated the petitioner with cruelty; or
 - (b) there has been no consortium between the parties for a period of three years or more immediately preceding the presentation of the petition.
- (2) The court *must* refuse to grant a decree if:
- (a) there is a reasonable possibility of a reconciliation being effected; or
 - (b) the granting of the decree would prove harsh or oppressive to the respondent; or
 - (c) such a decree would not be in the best interest of the children of the family (e.g. A decree would not be in the best interests of the children of the family if proper arrangements for their custody and maintenance had not been made).

SECTION 2. (*Alternative*) (i) Subject to Section 1, any court having jurisdiction to grant a divorce *a vinculo matrimonii* may hear a petition by either husband or wife on the ground that the marriage has irreparably broken down.

(ii) The Court *must* refuse to grant a decree of divorce *a vinculo matrimonii* if such decree would not be in the interest of the children of the family. (e.g. A decree would not be in the interest of the children of the family if proper arrangements for their custody and maintenance had not been made).

SECTION 3. No decree nisi of divorce shall be made nor a decree nisi of divorce made absolute within the first three years of marriage, except where the petitioner has suffered extreme hardship or the respondent is guilty of exceptional depravity.

SECTION 4. A marriage will be voidable where it has not been consummated due to either Impotence, (physical or mental), or Wilful Refusal.

APPENDIX "71"

(Extracts from the Debates of the Senate)

THURSDAY, March 3, 1966.

DIVORCE (EXTENSION OF GROUNDS)

BILL

SECOND READING—DEBATE ADJOURNED

Hon. ARTHUR W. ROEBUCK moved the second reading of Bill S-19, to extend the grounds upon which courts now having jurisdiction to grant divorce *a vinculo matrimonii* may grant such relief.

He said: Honourable senators, at the outset may I have your indulgence to say a word of welcome to the new senators who have joined us recently, and to express the hope that they will find satisfaction in the duties they have undertaken and pleasure in the good fellowship which they will find in this chamber. I wish them long life and success in their sojourn among us in their new environment, the Senate of Canada.

In addressing myself to the bill now under consideration, I would point out that this is not the first time an effort has been made in the Senate of Canada to widen the grounds upon which the courts of Canada may grant dissolution of marriage.

Hon. Mr. REID: Would you mind explaining what *a vinculo matrimonii* means?

Hon. Mr. ROEBUCK: The Latin word *vinculum* singular, or *vinculo* plural, means bonds, ties—I suppose in modern language we call it “handcuffs.” So *vinculo matrimonii* are the bonds of matrimony or, more accurately, the bonds of marriage. There are two types of decrees of courts, one from bed and board and the other from the bonds themselves. This is complete divorce in other words, *a vinculo matrimonii*.

I was going to say that as long ago as 1938 the late Senator McMeans introduced a bill entitled the Divorce and Matrimonial Causes Bill, and the debate on that bill you will find commencing at page 84 in the *Debates of the Senate* of that year. You may accept my assurance that it is well worth reading.

Senator Aseltine will remember that occasion, for he had the honour of seconding that bill as long ago as 1938, and he made an address in support of the bill—and, I need not add, an excellent one. Senator Farris spoke on that occasion, and my deskmate, Senator Hugessen, was a member of the committee that considered the bill. If my information is correct, they not only reported it but did so unanimously. Perhaps Senator Hugessen will correct me if my information is incorrect. The bill was passed by this house. What happened to it thereafter, I am not sure, but I think it probably died on the Commons Order Paper, for there seems to be no further record of it. Had I been a member of this chamber at that time I would, of course, have voted for that bill. However, I did not enter the Senate until 1945, some 21 years ago.

That bill was followed by another introduced in 1955 by Senator Aseltine, which was also entitled the Divorce and Matrimonial Causes Bill. It went a little further than the bill introduced by Senator McMeans, but it really was a similar bill. The debate on that bill you will find commencing at page 210 of the *Debates of Senate* of that year, 1955. I trust my colleagues will pardon me if I give a good

many reference as I go along so that the research I have done will be of use to those who may wish to read the material which I have read.

The motion for second reading of that bill was, of course, led by Senator Aseltine and in a masterly address. I have read what he said on that occasion and I am impressed with the mass of information he had marshalled and the breadth of his knowledge of the subject.

You will note the bill I have the honour to introduce is entitled the Divorce (Extension of Grounds) Act, 1966. It is not a matrimonial causes act, in the sense that it does not intend to enact a comprehensive matrimonial or divorce or marriage law for application in all Canada, as did those bills of my distinguished predecessors. Senator Aseltine's bill covered seven and a half pages, and it dealt with many phases of matrimonial relationships, such as the presumption of death, judicial separation, avoidance for non-consummation, and legitimacy; all, by the way, subject of consideration which I rather fancy we will later take up some time.

Mine, on the contrary, is a simple bill. It would not affect the law of Canada on divorce or other matrimonial matters as they exist today, with the exception only that it would extend the grounds upon which the courts now having jurisdiction to grant divorces *a vinculo matrimonii* to three further grounds: desertion for three years, cruelty, and of unsound mind, which I will describe late. And note, please, it has no application in the provinces of Quebec and Newfoundland.

I believe there is yet another difference between the bill which I have now laid before you and those introduced by my predecessors. Senator McMeans and Senator Aseltine produced a great deal of evidence of public opinion in favour of divorce reform, and there was undoubtedly considerable public support for it at that time, but it would seem from what later happened in Parliament, that they were in advance of their times. I am not so surprised at Senator Aseltine, for I have found him way out in front on many occasions.

Hon. SENATORS: Hear, hear.

Hon. Mr. ROEBUCK: And ably so, I hope that times now have caught up to me in the introduction of this bill because, honourable senators, it seems to me that public opinion, as I find it in Canada, is now such that the time has come for extending the grounds upon which the courts may grant divorces, and also that restricting the ground to this one item of adultery is archaic, that it produces many evil consequences, and that it denies to many suffering from broken marriages for which they are not responsible the relief they so greatly require; further, that it leads to many immoral practices, such as "common law" marriages, adultery for court purposes, and the fabrication of evidence—and I think I could add other things besides those.

Hon. Mr. CHOQUETTE: Perjury and collusion.

Hon. Mr. ROEBUCK: Yes, thank you for the addition—and a good many other things.

How many "commons law" marriages there are in Canada I, of course, do not know, and I think no one else does. There are no D. B. S. statistics on the matter.

When he was speaking in support of his bill Senator Aseltine estimated that there were 20,000, and someone in the Ontario Legislature quite recently, in a report published in the *Star* of February 23 last, estimated the number to be 250,000. Well, there are only four million marriages in Canada, so it seems to me that estimate is high.

Hon. Mr. ASELTINE: I think 50,000 is about correct.

Hon. Mr. ROEBUCK: Perhaps so; 50,000 is a substantial figure. It is impossible for us actually to know because we have taken no surveys of that nature. Fifty thousand "common law" marriages is something that should stop us for a moment to consider what it means from the human standpoint. Fifty thousand "common law" marriages in the dominion of Canada—I do not know how many there are in fact, but certainly there are very many, and very many too many.

I know from my own personal experience that there are simply thousands of people in this country who have been faced with living celibate for the rest of their lives, or the rest of the life of their opposite spouse, or, alternatively, firstly, of seeking divorce in the United States which is, of course, in almost all instances not recognized in this country, is very unsatisfactory, is illegal without question, and although in some respects socially recognized is to be avoided; secondly, of bringing about in some way an act of adultery on the part of the opposite spouse, or waiting to take advantage of such immorality on his or her part, or, as was just suggested to me a moment ago, fabricating the evidence; thirdly, of living themselves in adultery in what is euphoniously known as a "common law" relationship. I have not mentioned a possible fourth alternative—I do not know whether it is an alternative or not—of free love or promiscuous intercourse, for those who have a taste for that sort of thing.

I suggest to you that this is an intolerable condition of law in this country. It is what this bill attempts in a modest way to correct, at least to some extent, by adding to this ground of adultery the further grounds of cruelty, desertion for three years, or five years of insanity while confined in an institution which I will define a little more fully later on. As I say, it will have effect in all provinces other than Quebec and Newfoundland.

I have in my hand a book entitled *Marriage Breakdown, Divorce, Remarriage—A Christian Understanding* in which, if you turn to page 113, you will read this passage:

It is agreed:

That this General Council—

That is, the General Council of the United Church of Canada.

—urge the Federal Government to appoint a Royal Commission on Divorce to consider (a) Such grounds for divorce, in addition to adultery, as wilful desertion for three years, gross cruelty (both physical and mental, carefully defined), and insanity that fails to respond after five years of treatment in an institution.

I might tell you that I did not read that paragraph until after I had drawn this bill, but it does show a remarkable similarity of thought between myself and the General Council of the United Church of Canada.

Hon. Mr. CHOQUETTE: Except for mental cruelty. I was going to ask my honourable friend about paragraph (b) of clause 2 (1), which reads:

has since the celebration of the marriage treated the petitioner with cruelty.

I was wondering there is it should not say "physical or mental or both."

Hon. Mr. ROEBUCK: May I leave the answering of that question to the time when I shall be discussing these particular features of the bill itself? A quick reply is that the added words are not necessary, because this clause is phrased in the very words of the English act, and we have a great mass of judicial decisions awaiting us that would apply in the interpretation of this clause. I might tell you that in the English Act and in the English administration both physical and mental cruelty are prohibited.

I have another book here that is perhaps not as impressive, but it is certainly well done. It is entitled *Canada's need for Divorce Reform*, by Rev-

erend C. Bernard Reynolds, M.A., B.D. of Victoria. I would prefer to leave a description of this book to Senator Farris who comes from that part of Canada and who, no doubt, knows Reverend Reynolds well. This book makes a most powerful case for reforming the situation as it now exists in Canada.

A somewhat similar resolution to that of the General Council of the United Church was passed recently by the Canadian Bar Association. There have also been many, many editorials on the subject in the newspapers. I have one here from the *Toronto Daily Star* which is headed: "Bring Divorce Laws out of Victorian Age." I will not go into it further because there are so many newspapers all over Canada which have expressed similar opinions.

The *Toronto Daily Star* reported—this is not an editorial but a report—on February 24, 1966 in these words:

Justice Minister Lucien Cardin told a reporter that he has detected a new "climate of religious and social tolerance" towards divorce which would enable Parliament to liberalize the law.

I hope he is correct in that statement.

I have said that this bill will not change the law of divorce or of matrimonial causes other than in the additions which, up to this moment, I have only outlined. I think it would be useful in our consideration of the bill for me to say something as to what the law is now in the dominion of Canada, because it is complex and not without difficulty in both discovering it and understanding it. Let me commence, then, with the Province of Nova Scotia.

The law of Nova Scotia on divorce is expressed in two pre-Confederation statutes passed in 1864 and 1866. Honourable senators will find them set out, if they wish more detailed information, in *The Law and Practice of Divorce in Canada* by Cartwright and Lovekin at page 469. This a well-known textbook on divorce, and is an authority on the subject. You may take from the act cited there this phrase granting power to the courts of Nova Scotia prior to Confederation:

The court shall have jurisdiction over all matters relating to prohibited marriages and divorce, and may declare any marriage null and void for impotence, adultery, cruelty, pre-contract, or kindred within the degrees prohibited in an Act made in the thirty-second year of King Henry the Eighth—

I do not wonder that somebody smiles to discover that the law of Canada relates back to an act passed in the reign of King Henry VIII.

Hon Mr. BENIDICKSON: On divorce.

Hon. Mr. ROEBUCK: Yes, on divorce at that. Well, he ought to know about it, of course.

Nova Scotia is the only province in Canada in which cruelty is a ground for dissolution of marriage. New Brunswick, British Columbia and Prince Edward Island all rely on pre-Confederation law which continues in force by virtue of section 129 of the British North America Act.

Manitoba, Saskatchewan and Alberta operate under acts which were passed for their incorporation as provinces, and they all give authority to their courts in accordance with the law of England as it existed on the 15th day of July 1870.

An Ontario act was passed by the dominion Parliament enabling the Supreme Court of Ontario to annul or dissolve marriages in accordance with the law of England as of the 15th day of July 1870. That may be found in the Statutes of Canada passed in 1930. On the other hand, the courts of Quebec and Newfoundland have no jurisdiction whatsoever.

The law of England with regard to divorce, as it existed in July 1870, was enacted in the Matrimonial Causes Act of 1857, 20-21 Victoria, Chapter 85. It is set out practically in full in *The Law and Practice of Divorce in Canada*, by Cartwright and Lovekin, at page 540. It allows a wife to apply for a divorce against her husband on the following grounds: incestuous adultery, bigamy with adultery, rape, sodomy and bestiality. That is the law so far as the statutes are concerned which we read into the law of Canada.

We have not hesitated, honourable senators, to amend the Imperial Act of 1870, to remedy in part the barbarity of those times.

In 1925 Parliament passed the Marriage and Divorce Act, to be found in the Revised Statutes of Canada 1952, chapter 176, which allows a wife to sue her husband for divorce on the grounds of simple adultery, and not adultery mixed with some other cause, in those courts in Canada having jurisdiction to dissolve marriages *a vinculo matrimonii*; and it places the husband and wife on pretty much the same grounds in basic law.

By the way, that act also removed the marriage disability of brothers and sisters of deceased wives and husbands.

Now, while clause 26 of section 91 of the British North America Act gives jurisdiction to the dominion Parliament on marriage and divorce, yet Parliament has for the past 99 years refrained from passing any comprehensive legislation with respect to divorce. There are four acts, and four only, dealing with this subject of divorce in all that time. The first of these Acts is that already quoted, 176. The second Act is the divorce Jurisdiction Act, Statutes of Canada 1930, the Marriage and Divorce Act of 1925, Revised Statutes of Canada, 1952, chapter 15, to be found in the Revised Statutes of Canada 1952, chapter 84.

That is an important act which we have used frequently in the Divorce Committee, and which is now being used here and elsewhere. It permits a married woman after two years of desertion by her husband to apply to the courts of her province on the ground of adultery, notwithstanding that her husband since the desertion has moved his domicile elsewhere. It is a humane and useful act.

The third act is the Divorce Act of Ontario, Statutes of Canada 1930, chapter 14, or Revised Statutes of Canada 1952, chapter 85, giving to the Supreme Court of Ontario power to dissolve or annul marriages in accordance with the law of England as it existed on the 15th day of July 1870.

Finally, there is a British Columbia Divorce Appeals Act, Statutes of Canada 1937, chapter 4, or Revised Statutes of Canada 1952, chapter 21, which gives to the Court of Appeal of the Province of British Columbia authority over the provincial courts of that province in divorce and matrimonial causes.

That is all; and does it not indicate hesitancy on the part of Parliament, having such broad powers to deal with a subject of such grave importance in the lives of our people?

Perhaps I may summarize in this way. There are four provinces that rely on pre-Confederation statutes—British Columbia, New Brunswick, Nova Scotia and Prince Edward Island; three that rely on provisions in the act of their own incorporation—Manitoba, Alberta and Saskatchewan; one, a special act, that of the Province of Ontario; then there are two where there is no jurisdiction.

Honourable senators, before turning to the bill itself, I should say that the bill was drawn in collaboration with Senator Croll—and it is unfortunate that he is absent from the chamber—who seconds the bill. He is entitled to the credit of initiating the present effort of the Senate to bring to many suffering souls in Canada, marital peace and a measure of common sense and humanity.

I understand that Senator Croll worked on this subject for two years, without my knowledge, notwithstanding the burden which he has borne as

Chairman of the Special Committee on Aging. This was before I had determined that the time was ripe for Senate action.

The bill was also drawn in collaboration with Mr. Robert McCleave, M.P., who until the change of Government in 1963 was Chairman of the Private Bills Committee in the Commons, having charge of divorce bills. I worked in closest association with him in those difficult times, and I owe a debt of gratitude for the co-operation he gave us in the Senate. Mr. McCleave has introduced in the Commons a bill similar in all respects to mine, and he has described it as such.

Hon. Mr. BROOKS: How many bills of this nature have been introduced in the Commons this session?

Hon. Mr. ROEBUCK: Eight—and this is the ninth. I will come to that in a moment.

Let me now turn to the bill itself. You will note that the title as I have described it is, "Divorce (Extension of Grounds) Act, 1966". It is not a matrimonial causes act, changing in a comprehensive way the law of marriage and divorce throughout Canada. It is not that and is not intended to be that.

Honourable senators, you will observe that clause 2 affects only those courts having jurisdiction to grant divorce *a vinculo matrimonii*, that is those provinces other than Quebec and Newfoundland.

Hon. Mr. DESCHATELETS: Would the honourable senator permit me a question?

Hon. Mr. ROEBUCK: Yes.

Hon. Mr. DESCHATELETS: It has to do with the Provinces of Quebec and Newfoundland. Those provinces have no courts with jurisdiction to deal with divorce matters. If this bill passes, will a citizen from Quebec or Newfoundland be able to take advantage of these new grounds through a private bill, as is done now?

Hon. Mr. ROEBUCK: No. I think the answer is no, but it must be a qualified no. You will understand that a bill of divorce passed by the Parliament of Canada may be on any grounds, or no grounds at all, limited only by the practice which we have observed. We have complete power to do as we please in this matter, because the British North America Act gave us that power. So far we have exercised the power only in accordance with the law of England as it was on the 15th day of July, 1870. We have seldom, if ever, stepped aside from those grounds; that is, nullity because of non-consummation caused by the inability of one or other of the parties, and divorce on the grounds of adultery, sodomy, bestiality. We have never yet, as far as I know, passed a bill on the grounds of desertion or cruelty.

Hon. LIONEL CHOQUETTE: May I intervene? I do not think my honourable friend has grasped the question of the honourable Senator Deschatelets. What he wants to know is this, as I gather from his question: If this bill passes both houses, will anyone from the Province of Quebec or the Province of Newfoundland be able to avail himself of any of those four grounds? I think the answer would be "yes".

Hon. Mr. ROEBUCK: The answer is no. As far as the bill is concerned, and so far as the new act, if the bill becomes an act, is concerned, they will not be able to avail themselves of it, except in this way, that I do hope that the widening of the grounds to a more reasonable extent will result in honourable senators, such as the honourable senator who asked me the question, taking action on behalf of their provinces amending this bill to extend it to those provinces.

We in this chamber, and in the Commons as well, have been careful in the years gone by never to pass laws which seem to be oppressive to the Province of

Quebec. It is not our desire to force anything on any province. I am fairly confident that we have public opinion with us in the common law provinces. I hope we have it with us also in the provinces of Quebec and Newfoundland. I am anticipating some action on behalf of the representatives of those provinces in connection with this matter. Does that answer the question?

Hon. Mr. DESCHATELETS: Yes.

Hon. Mr. CHOQUETTE: Not to my satisfaction, I must say.

Hon. Mr. ROEBUCK: Where have I lapsed?

Hon. Mr. THORVALDSON: Honourable senators, so as to clarify this somewhat further, may I ask a supplementary question? Supposing this bill passes Parliament and supposing Quebec and Newfoundland continue to apply to Parliament for divorces, will these grounds apply to those two provinces?

Hon. Mr. ROEBUCK: No.

Hon. Mr. HOLLETT: Why not?

Hon. Mr. BENIDICKSON: May I ask the honourable Senator Roebuck this question: would the Senate Standing Committee on Divorce not be influenced by the passage of this bill?

Hon. Mr. ROEBUCK: I think the answer is no. The committee so far and, as I forecast, in the future, will grant divorces according to law and according to the practice of the past. That is what we have tried to do over the years. Observe this, that these resolutions which I have been laying before you in such great numbers of late, are passed in accordance with the Act of Parliament passed in 1963, the Dissolution and Annulment of Marriages Act, which limits us to the causes expressed in the English act of 1870, and in the Canadian act which I have already referred to, which however adds no grounds to the English act. All those cases that you see here are limited, and all within the four corners of the law of England of 1870, and we have no power to go beyond that. We have the power, as I have just said, to pass a bill on any grounds that we see fit, because we are supreme in the Parliament of Canada; but so far we have restrained ourselves in that respect and have observed our limitations carefully and rigidly, as we are with regard to the resolution powers provided in the Act of 1963.

Hon. Mr. ASELTINE: Would it not clarify the whole problem if the word "now" were inserted after the word "court", to make it read "in any court now having jurisdiction"? It could not possibly apply to Quebec and Newfoundland.

Hon. Mr. ROEBUCK: No, it does not apply to those provinces because of the insertion of the word "now".

Hon. Mr. ASELTINE: That is the question that has been asked—does it apply to Quebec or Newfoundland? It would put it beyond all question if in the first line of paragraph 2 the word "now" were inserted after the word "court".

Hon. Mr. ROEBUCK: So as to read "In any court now having jurisdiction to grant divorce *a vinculo matrimonii*"?

Hon. Mr. ASELTINE: Yes.

Hon. Mr. ROEBUCK: That would make it still more sure that it did not apply to the Provinces of Quebec and Newfoundland, which I think a complete reading of the clause also makes clear.

Hon. Mr. ASELTINE: In the bill that you mentioned which I had something to do with, it was described that way. It did not apply to Quebec or Newfoundland, either.

Hon. Mr. ROEBUCK: Let me read the clause:

In any court having jurisdiction to grant divorce *a vinculo matrimonii* any husband or wife may commence an action praying that the marriage may be dissolved, on the following grounds in addition to any ground upon which the marriage may now be dissolved, namely—

Hon. Mr. CHOQUETTE: That does not include the Senate. We decided some time ago that the Senate committee hearing divorce petitions is considered as a court; and I say that it is absolutely useless to pass this measure if we have only in mind to say to the provinces which are already dealing with divorces: "We are giving you the privilege of accepting these grounds"—such as we said in 1930 in the case of Ontario, for instance. We can delegate our power to Ontario courts to deal with divorces. Now, is that the procedure you intend to follow for those who are interested in this bill, to pass these grounds and offer them wholesale to the provinces who are already dissolving marriages?

Hon. Mr. ROEBUCK: Yes.

Hon. Mr. CHOQUETTE: I think the people are under the impression that we want to add to the grounds right here in the Senate to start with.

Hon. Mr. BENIDICKSON: For Newfoundland and Quebec.

Hon. Mr. CHOQUETTE: Yes. That would be the purpose. May I add one more word? I am sure that my friend has already explained that the Senate has unlimited powers, and surely they will accept these four additional grounds. What is the use of saying no?

Hon. Mr. ROEBUCK: I intend to move later on that this bill be referred to a committee, and if my friend will move in that committee to extend these grounds to Quebec and Newfoundland, and if I feel that there is public opinion in those provinces which justifies my action, I would be delighted to vote for it.

It is not included in this bill because I am very careful not to do anything that looks like coercion with respect to those two great provinces. Now, let me go on.

Hon. Mr. GROSART: Could I ask the honourable senator one question in that connection? I have understood him to say many times in the Senate that the basis of the granting of a divorce by the Senate, to take a short cut, is the right of the individual to petition the Crown. Does the honourable senator suggest that by the passage of this measure we will be in the situation where a petitioner from Newfoundland or Quebec petitioning the Crown will be told, "We have a different law for the rest of the country and a different law for you"?

Hon. Mr. ROEBUCK: That is what we have now and have had since Confederation.

Hon. Mr. GROSART: My understanding is that the petitioner from Newfoundland or Quebec now petitioning the Crown is being put in the same position in respect to the right to dissolve a marriage as any other Canadian. Is that not the situation now?

Hon. Mr. ROEBUCK: You mean that there is a public opinion in these provinces that desires to be placed on the same grounds as the rest of Canada? Is that what you are asking me?

Hon. Mr. GROSART: No. I am suggesting that that is the situation now, that a petitioner from Quebec or Newfoundland proceeding by way of petition to the Senate is actually obtaining the same rights with regard to the dissolution of marriage as any other Canadian citizen.

Hon. Mr. ROEBUCK: He is not on the same ground at all. The citizen of Ontario goes to the courts of Ontario and, while the rules are much the same, his right to divorce is just as it was in England in July, 1870. If he is domiciled in these other two provinces he may come to the Senate and get pretty much the same decision.

Hon. Mr. GROSART: May I try to make my question clear. Are we not at the present time by our procedures in the Senate granting to these petitioners the right to be treated exactly the same as any other Canadian? Is not that the present situation?

Hon. Mr. ROEBUCK: Yes, from one point of view that is right. In all these provinces divorce is granted only on the grounds of adultery, with the exception only of the Province of Nova Scotia.

Hon. Mr. BROOKS: And we in the Senate cannot deal with questions relating to children.

Hon. Mr. ROEBUCK: We can. We have not done so up to this time. I am perfectly satisfied that the care of children, the division of property between the parties and alimony are ancillary to divorce. We have never exercised that power for the reason that the courts of the provinces in question have been dealing with this subject satisfactorily, and there is no need for us to go into it. Furthermore, we have no machinery here for enforcing our decrees. Therefore, in common sense, we have left these matters to the courts of the provinces.

Hon. Mr. HOLLETT: Could we not include a definition of the word "court" to include the Senate of Canada? After all a citizen of Newfoundland should be able to get a divorce on these particular grounds as well as a citizen of Ontario. Why not include the Divorce Committee of the Senate of Canada in the definition of the word "court"?

Hon. Mr. ROEBUCK: I would be delighted to do so if there is a demand for it from your province.

Hon. Mr. WALKER: I think the honourable Senator Roebuck is very wise in refraining from including Quebec in his bill at this time. They have their own feelings there in this matter and I am glad that they have not been included in this bill.

Hon. Mr. ROEBUCK: Thank you.

Hon. Mr. GROSART: May I continue to try to clarify my question. Would the effect of this bill not be that the Crown, acting through the Senate Committee on Divorce, would be almost obliged to grant these petitions on the same grounds as govern divorce in the other provinces? Would not that be the effect? I should make clear that I am not opposing the bill, but I want to be clear in my own mind that the consequences of this would be that petitioners from Quebec and Newfoundland would, in effect, be getting dissolution of marriages on the same ground. Would that be the effect?

Hon. Mr. ROEBUCK: I hope it will be the effect, but it would require an amendment to the act. We are not doing that now, but we may have to amend it, and perhaps before we conclude this debate.

Section 2 of the bill sets forth three additional grounds. These words are taken holus-bolus, almost verbatim, from the Act of the Imperial Parliament as it is now in force in England and as it was in force back in 1870. It is the act which has been in force in England since 1937 when Colonel A. P. Herbert, whom some of you may recognize as the author of the book *Holy Deadlock*, introduced his Matrimonial Causes Act. The substance of Colonel Herbert's bill is now embodied in the Matrimonial Causes Act of 1950, which is to be found in *Rayden on Divorce*, ninth edition, page 1381.

The purpose of using the wording of the English act is twofold. First, we in Canada have learned by long experience the wisdom of following the British draftsmen. They have proved themselves very skilful in the choice of words, and they have produced much wise and effective legislation. Secondly, there has developed in the United Kingdom since 1937 a vast body of jurisprudence interpreting and applying this legislation. Drawing this legislation the same wording, we feel will be of great assistance to our courts which, no doubt, will use and undoubtedly follow the English jurisprudence on this question, but in the interpretation of the words and in the administration of the act.

Honourable senators, let us look now at the grounds themselves. The first is:

“(a) has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition;”

There is no difficulty in understanding what desertion means and it does not require much interpretation. It has been held in the leading case of *Froud v. Froud* (1904) Probate 177, that “desertion” and “desertion without cause” are the same offence. I recall when we were discussing Senator Aseltine’s bill he agreed that that meant unjustified desertion. There is no difficulty in applying that phrase. The second ground is

(b) has since the celebration of the marriage treated the petitioner with cruelty;

Now, *Rayden on Divorce* says that the law of cruelty is comprehensively defined by the House of Lords in *Collins v. Collins* (1963) 2 *All England Reports*, 966, and *Williams v. Williams* (1963) 2 *All England Reports*, 994.

As I read these cases I picked this statement made by Lord Reid, one of the distinguished members of the Court of Appeal in England at that time. In *Collins v. Collins*, at page 969, Lord Reid said—

Hon. Mr. HUGGESSEN: Is he interpreting the word “cruelty” under the English bill?

Hon. Mr. ROEBUCK: Under the same wording as in the English act. He said:

No one has ever attempted to give a comprehensive definition of cruelty, and I do not intend to try to do so... if one spouse sets out to hurt the other and causes injury to health, the means whereby that happens can hardly matter.

He adds that it is something “well beyond the ordinary wear and tear of married life.” He says further that “you cannot define cruelty; but you can recognize it when you see it.” In this case “a husband fully responsible for his conduct, knowing that it was injuring his wife’s health and yet persisted in it, not because he wished to injure her but because he was so selfish and lazy in his habits that he closed his mind to the consequences.”

This is a borderline case, and there are many, of course, but I submit that any Canadian judge of normal intelligence would find no difficulty in recognizing conduct which would fall within this definition of “cruelty” on the part of one spouse which is intolerable to the other spouse and which makes continued cohabitation reasonably impossible.

The last ground is unsound mind, and I shall read it:

(c) is intractably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition.

I will read the next clause in a moment.

The Oxford Dictionary in volume 1 at page 1035 defines “intractably” as: “Uncontrollable, refractory, an unmanageable person.” The Imperial Act says: “Incurably of unsound mind.”

But it seems to me that this is pledging the future. Who can say what medical science will produce in the years to come and what may be accomplished? Five years in a mental institution in an intractable condition of mind should, I think, be sufficient to release the bonds of an unfortunate marriage.

Subsection 2 defines the care and detention required by the act:

For the purposes of this section a person of unsound mind shall be deemed to be under care and treatment only while he is

- (a) detained in pursuance of an order or inquisition completely made or had under authority of a statute in force in the province concerned or as a criminal lunatic; or
- (b) receiving treatment as a voluntary patient pursuant to any statute in force in the province concerned, being treatment which follows without any interval a period of such detention as aforesaid.

It seems to me if any person is detained for five years as an intractable lunatic, that should be sufficient for us to act without trying to forecast the future.

Hon. Mr. PEARSON: May I ask a question?

Hon. Mr. ROEBUCK: Yes, senator.

Hon. Mr. PEARSON: Does that mean, at least five years?

Hon. Mr. ROEBUCK: Yes, at least five years.

Hon. Mr. WALKER: May I ask a question of the honourable senator? Dealing with clause 2, subsection (1) (b), "cruetly", is the definition which you read from Lord Justice Reid's judgment, to be considered under the circumstances to include habitual drunkenness?

Hon. Mr. ROEBUCK: I do not know.

Hon. Mr. WALKER: Because that is not included in the English act, is it?

Hon. Mr. CHOQUETTE: It would open the door to many such things, I suppose. It would open up the door to incompatibility, as far as that goes.

Hon. Mr. ROEBUCK: I said I did not know. If a drunken man abused his wife, the fact that he was drunk would not influence any judge in deciding that he was guilty of cruetly. If he just becomes a sot, it might be something different, but I do not know. However, you will notice there are many causes expressed in the newspapers and elsewhere that are not included in this bill, for obvious reasons. I have tried to make it a simple bill. If we can pass this bill the time may come when amendments may be made to it intelligently, modifying or extending it. In the meantime, it is the English act as simply as it can be expressed.

Of course, it is necessary to provide the opposite pleas. Section 3—which, by the way, is taken directly from the English act—says:

If the court is satisfied by the evidence that the case of the petitioner has been proved on any of the grounds added by section 1, and, where the ground of the petition is cruelty, the petitioner has not in any manner condoned the cruelty, and that the petition is not presented or prosecuted in collusion with the respondent, the court shall pronounce a decree of divorce, but if the court is not satisfied with respect to any of the aforesaid matters, it shall dismiss the petition: Provided that the court shall not be bound to pronounce a decree of divorce and may dismiss the petition if it finds that the petitioner has during the marriage been guilty of adultery, or if, in the opinion of the court, the petitioner has been guilty

- (a) of unreasonable delay in presenting or prosecuting the petition; or
- (b) of cruelty towards the other party to the marriage; or

- (c) where the ground of the petition is cruelty, of having without reasonable excuse deserted, or having without reasonable excuse wilfully separated himself or herself from, the other party before the cruelty complained of; or
- (d) where the ground of the petition is unsoundness of mind or desertion, of such wilful neglect or misconduct as has conducted to the unsoundness of mind or desertion.

These are quite close to the pleas that are well established in petitions based on adultery.

Hon. Mr. BROOKS: May I interrupt the honourable senator?

Hon. Mr. ROEBUCK: Certainly.

Hon. Mr. BROOKS: This is very interesting, and I know all honourable senators are very much interested in it, but it seems to me there is considerable further explanation the honourable senator would like to make. I know there is a previously arranged meeting some honourable senators wish to attend shortly after 5 p.m., and it occurred to me that the honourable senator might adjourn the debate.

Hon. Mr. ROEBUCK: Far be it from me to stand on any rights under such circumstances.

Hon. Mr. BROOKS: It is a very important matter, I may say.

Hon. Mr. ROEBUCK: I do not like to divide an argument, but if I could be placed first on the Order Paper tomorrow, I will move the adjournment of the debate.

Hon. Mr. BROOKS: Thank you.

On motion of Hon. Mr. Roebuck, debate adjourned.

TUESDAY, May 10, 1966.

DIVORCE (EXTENSION OF GROUNDS)

BILL

SUBJECT MATTER REFERRED TO JOINT

COMMITTEE ON DIVORCE

On the Order:

Resuming the debate on the motion of the Honourable Senator Roebuck, seconded by the Honourable Senator Croll, for second reading of Bill S-19, intituled: "An Act to extent the grounds upon which courts now having jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief".—(Honourable Senator Croll).

Hon. John J. CONNOLLY moved in amendment:

That the bill be not now read the second time but that the subject-matter thereof be referred to the Special Joint Committee on Divorce in Canada and the social and legal problems relating thereto.

The Hon. the Acting SPEAKER: It is moved by the honourable Senator Roebuck, seconded by the honourable Senator Croll:

That Bill S-19, intituled "An Act to extent the grounds upon which courts now have jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief" be now read a second time.

In amendment, it is moved by the honourable Senator Connolly (Ottawa West), seconded by the Honourable Senator Hugessen:

That the bill be not now read a second time, but the subject matter thereof be referred to the Special Joint Committee on Divorce in Canada and the social and legal problems relating thereto.

Is it your pleasure, honourable senators, to adopt the motion in amendment?

Hon. Arthur W. ROEBUCK: Honourable senators, of course I thoroughly approve the amendment to my original motion. It is what I asked for in the course of my address when I brought the matter to the attention of this house. I asked that the Government, the Commons and ourselves, join in a joint committee for a thorough study of this matter.

Speaking to the amendment—and I hope that the lines of the rules will not be too closely drawn—I would like to make some general observations and in particular answer a number of questions that have been raised in the course of this long debate.

In the first place, let me express my thanks to all those who have taken part in this debate for the effort they have made to throw light upon our future path, for the thought they have given and the interest they have shown in this very important subject, and to those who have asked questions concerning the matter, for the concern they have manifested.

It has been a matter of great satisfaction to me that all those who have spoken have, I believe without exception, expressed approval of the effort that we are making to improve what is generally agreed among us is an unsatisfactory situation in a good many, if not all, respects. I do not mean that they approve in any way of the principle of divorce. That is not the principle of this bill. Were this bill to become law, it would affect only those jurisdictions which now have courts in operation enforcing certain rules with regard to divorce, and which have recognized this principle of divorce for a great many years.

The principle of this bill, as I see it, honourable senators, does not touch the question of divorce itself. The principle of the bill is the improvement of the administration of the law with respect to divorce. It is to remove certain abuses in the administration of the law and to make it more reasonable, more considerate and more honest. For the sympathy that has been expressed for the effort that we are making, I am grateful. I am also grateful for the approval that has been expressed in the press almost generally all over Canada. I am also grateful for the approval that has been expressed in many letters which I have received—and the correspondence has been fairly heavy—since this bill was introduced. There seems to be an overwhelming sentiment throughout Canada at the moment for what is the substance—with little exceptions here and there—of the bill which I have had the honour to introduce.

Honourable senators have no doubt noticed that the Anglican Synod met in London a short time ago and passed a resolution which I may say without going into too much detail, in general approves the substance of this bill. And I have no doubt that all here have recognized what took place in the State of New York very recently. From time immemorial the State of New York has restricted its grounds of divorce to adultery only, and very recently that ancient and, I think, archaic restriction has been abolished and the State of New York has adopted, in many respects a more liberal, shall I call it, rule than would be the case were this bill of mine to be adopted.

I trust that those honourable senators who have spoken and asked questions will pardon me if I fail to respond to all the comments that have been made in the course of this fairly long debate. Of course, my time is limited in reply by common sense, but some vital points have been raised which I think call for a somewhat comprehensive rejoinder on my part.

The first one I shall mention is not so insistent, but Senator Aseltine, having assured me that he would support this bill one hundred per cent, added that he thought the bill which he introduced in 1955 was a better bill than mine. Well, I am very ready to admit that that bill was well and skilfully drawn. I am not much interested in comparisons between these two bills, but I am interested in the reasons that Senator Aseltine advanced as to why his bill was better than mine, and I wrote down a list of some twelve matters which he mentioned in the course of his address. They were as follows: rape; sodomy; bestiality; death; judicial separation; avoidance by non-consummation; unsoundness of mind; alimony; venereal disease; pregnancy of the bride; domicile; certain procedural rules and regulations. He said that these were all mentioned and dealt with in his bill but were not to be found in mine.

Honourable senators, let me tell you why these matters are not to be found in my bill. To begin with, rape is adultery on the part of the aggressor—not, of course, on the part of the victim—and is considered as such by the courts and I am sure would be so considered by us. So it is not something we need to legislate on now; it is already covered.

Let us take next sodomy and bestiality. I suppose it is not generally known among us, but the fact is that both these matters are included in the grounds for divorce in the English law of 1870, and in consequence are within the jurisdiction of the Senate at the moment under the Dissolution and Annulment of Marriage Act, and they are within the jurisdiction of all the provincial courts which rely upon the English law of that day. So there is no need for us to touch that at all at the moment. They are very seldom used, but they are there.

The next is the right to declare a missing spouse to be dead. That is within provincial jurisdiction, and it is not at all necessary for us to consider it here. It is now dealt with, I think, in all the provinces. I know that in the Province of Ontario applications are frequently made for a declaration of the decease of a certain person, and those are dealt with by the courts under provincial legislation.

The next matter was that of judicial separation. That may be within federal jurisdiction, but I do not know. It has always been considered to be within provincial jurisdiction, and has been so dealt with by the Province of Quebec for many years. The Province of Ontario has avoided any rules with regard to judicial separation, and has relied on agreements of separation. I am not sure about the other provinces, but I am sure that practice and law and a proper understanding of the British North America Act would place the matter within provincial jurisdiction.

Voidance on the grounds of non-consummation is also within the law of England of 1870, and is a matter that has come before this body many times. It is already dealt with, by both the Senate Committee and also by the provincial courts which rely on the law of England, as most of them do.

Soundness of mind was differently expressed in my bill as compared with that of Senator Aseltine of 1955, but it is dealt with.

Venereal disease is horrible, but due to the advances made in medicine it is not now the incurable curse it was some years ago. It may be evidence of adultery on the part of the spouse accused. Should the committee to which the substance of this bill is referred consider that venereal should be included, then I

would have no objection to its doing so, although I do not think we would have very many applications on that ground.

The next item was pregnancy on the part of the bride for which the groom was not responsible and which was unknown by the groom at the time of the marriage. I suppose a good deal could be said on both sides of the question as to whether divorce should be granted on such a ground. There are those who think that marriage cures the past and that the parties embark on a new course. If it can be shown that there is a substantial demand for the addition of this ground, then I would not have any serious objection to it. However, I do think that the bill goes far enough without taking in matters of that kind.

Alimony, in my opinion, is a matter ancillary to divorce. The words of the British North America Act are "marriage and divorce", which are placed within dominion jurisdiction. Alimony is ancillary to the granting of divorce. But, on the other hand, alimony has been taken care of by the provincial courts all over Canada ever since Confederation, and they have done a satisfactory job with respect to it. There would be various serious objections from the Province of Quebec and the other provinces if after all these years we intervened and took this matter into our own hands. Furthermore, let me say, we would be undertaking something for which we have no machinery. There are no sheriffs or sheriff's officers, or other such machinery of the courts, attached to the dominion Parliament. It is quite clear, and I feel sure that most honourable senators will agree, that we should leave that matter alone.

Then comes the question of domicile. Senator Aseltine had some very fine paragraphs in his bill with respect to it. It does seem to be most unfair that the general rule be that the domicile of the husband is the domicile of both the husband and wife, and certainly it is unfair that when a man deserts his wife her domicile should follow him like his shadow. This has been appreciated by the dominion Parliament, and in 1930 there was passed the Divorce Jurisdiction Act, which provided that when a woman has been deserted for two years, although the rule is that domicile follows the husband, she may nevertheless claim divorce from him in the courts in the province in which she still resides and in which she was deserted.

The Divorce Committee has always recognized the right of the woman, if she has been deserted for more than two years, to claim divorce in any of the provinces. There is no objection taken now to the delay of two years, but if it is thought to be too unjust, and I can see some serious objections to it, the proper procedure is to amend that act. It should not be included in a bill such as that now before us.

Those are all the differences that have been mentioned between the bill of 1955 and this one of 1966. I am perfectly sure that were Senator Aseltine and I to sit down together to draw up a bill there would be very little difference between us.

A good deal has been said in the course of this debate, and elsewhere for a long time, about the fabrication of evidence and collusion in cases before the courts. In my opening remarks I said that generally speaking, with some inconsequential exceptions, the one ground for divorce in all of Canada was adultery. I was taken severely to task by a critic whose name I need not mention. I was told I was wrong, that there were two grounds. I questioned this, and was told that in the first place there is adultery, and in the second place there is perjury.

I will not agree for one moment that perjury is a ground for divorce. I will concede, however, that it is a means sometimes used, very wrongly and fraudulently, to obtain a decree of divorce on the grounds that are recognized. But I ask you: Is not the frequency with which collusive and perjured cases

come before our courts and before our own Commissioner very much exaggerated? It is so easy to throw out general charges of this kind.

It was said on the floor of this house that 50 per cent of the cases were collusive and were decided on perjured evidence. I intervened at the time to say that that percentage was much too high. Feeling that it was an unnecessary downgrading of our courts, I asked our Commissioner to make an investigation in order to separate the goats from the sheep.

It is perfectly obvious that when we find people living together in what has always been known as a common law relationship—although there is no common law about it; that is the phrase used—there is no suspicion of collusion or perjury when the facts showing how they are living together are laid before the court. When adultery is proven to have taken place on repeated occasions in the home of the respondent or the co-respondent, it is not a matter you would suspect of having been concocted. It is in these one-night stands in hotel and motels that suspicion is aroused. For that reason, I asked for an analysis of how many cases of that kind are or are not reasonably open to suspicion and this is what our Commissioner had to say:

As requested by you I have made an analysis of the last 200 uncontested divorce petitions which I have recommended for approval, this being a sufficiently large number to provide a representative sample, with a view to determining how many of these would be based on evidence of one-night adultery in a motel or hotel and which could conceivably have been arranged by connivance between the parties.

I classified the evidence into four categories as follows:

Cases where there is a common law relationship or evidence of continuing adultery with the same co-respondent—134.

Cases where adultery took place on one or more occasions with the same co-respondent either in respondent's own residence or in that of co-respondent—33.

Cases where the adultery took place in a hotel or motel, the husband being the respondent—28.

Cases where the adultery took place in a hotel or motel with the wife being the respondent—5.

These figures proved surprising even to me, since it is apparent that in 67 per cent of all cases there is a common law relationship or continuing adultery. In addition to this, although it would not of course be impossible for collusive adultery to take place at the residence of respondent or co-respondent, this is certainly less likely, and such adultery was proved in 33 cases or 16.5 per cent. Furthermore although there may always be some suspicion where the husband is respondent and the adultery proven is a one-night adultery in a hotel or motel, I think you will agree that it is much less likely to be collusive when the wife is respondent as it is unlikely that she would deliberately provide evidence of adultery against herself to enable her husband to get a divorce, so we can probably rule out these five cases. This leaves only 28 cases or 14 per cent of the total where there would appear to be a reasonable possibility that the evidence might be collusive.

This is not to say of course that I believe that the evidence was collusive in 28 cases out of 200, since had I been convinced of this in any of these cases I would not of course have made a favourable recommendation. In all these cases the evidence indicated the likelihood that the adultery was committed as alleged, and it is certainly not difficult to believe that a man who picks up a woman with intent to have sexual

relations with her would take her to a hotel or motel rather than to his own residence or to her residence which might be impractical if not impossible in many cases. It would certainly be wrong to assume therefore that all evidence of adultery in a hotel or motel is fabricated.

To conclude, therefore, I would doubt whether there was any connivance in as many as 10 of the 200 cases, and even in these cases it could not be detected from the evidence. It would appear therefore that a maximum of 5 per cent of all petitions might involve connivance or collusion, which is a far cry from the 50 per cent figure which one sometimes hears mentioned.

One of the reasons for the introduction of this bill, of course, is to make the courts of the land more honest in this regard. However, I do not like to see a grossly exaggerated estimate that seems to downgrade our courts. I think it is worth while to assure my fellow senators that a reasonable view of what takes place is that not more than five per cent of all the cases presented are open to this suspicion.

Senator Choquette, on March 4 last, during the course of this debate raised a most important and somewhat difficult question. He asked whether the Commissioner's proceedings were not that of a court, and therefore whether this bill should not be amended if we wished to exclude the provinces of Quebec and Newfoundland from its operation.

Section 2 of the bill reads:

In any court having jurisdiction to grant divorce *a vinculo matrimonii* any husband or wife may commence an action praying that the marriage may be dissolved—

And so forth. My friend suggested that that might include the Commissioner's court, and therefore this chamber.

On that occasion, Senator Choquette said:

I recall that a few years ago there was a case heard before the Senate Standing Committee on Divorce in which two private detectives were alleged to have committed perjury. Subsequently, they appeared before Magistrate Strike in the City Magistrate's Court, and he had no difficulty in finding them guilty of perjury. Then their solicitor appealed to the Court of Appeal of Ontario, and that court decided that these witnesses had not committed perjury in the sense that they had not been before a tribunal or properly constituted court; therefore, the appeal was allowed and the action dismissed.

Then my friend, the sponsor of the bill now before us, decided to remedy that situation by introducing a bill, which was subsequently passed, to the effect that henceforth the Standing Committee on Divorce would be considered a court and a tribunal for every purpose.

That bill of some 12 or 13 years ago, providing that thereafter the committee would be considered a court in which someone who gave false evidence could be found guilty of perjury, having been passed, I ask this question: Does the Senate committee—and the more so now that a judge of the Exchequer Court is appointed the Commissioner—hearing divorce actions constitute a court? If it does, then I say the phrase "in any court having jurisdiction" will include the Senate Divorce Committee and all petitions that are heard by the committee or by the Commissioner may invoke any of the new grounds proposed in this bill.

If that is not so, then I suggest that this bill should be amended to read: In any provincial court having jurisdiction to grant divorce...

In the light of the facts I have outlined, it would be most ambiguous to say "in any court".

It is my opinion that the Senate Committee on Divorce has been constituted and recognized as a court for some 12 or 13 years, and that this bill would entitle people in the two provinces that are excluded to come to the Senate and ask for a divorce on these extended grounds. My question is, am I correct in so thinking? I hope I have made myself clear.

I replied that he had made himself very clear, but I reserved my right to consider it further. I said I thought he had raised a point.

Well, remember that it was 12 years ago and one's memory fades to some extent on details of this kind, but in the interval that has passed between the senator's question and this, on reviewing this matter and refreshing my memory, I find: first, that the detectives were not charged with perjury; and, second, that in the amendment to the Criminal Code which we made—at my suggestion—we did not make the Senate or the Senate Commissioner a court, or to use my friend's words, "a court and a tribunal for every purpose". Thirdly, we did not do that and, accordingly, the bill as drawn would not affect the Province of Quebec or the Province of Newfoundland.

And now, in view of the misunderstandings and perhaps the foggiess of memory, I think it is necessary that I make clear just what the situation is. What is the true character of our Commissioner and his proceedings and his status?

It is correct that on November 24, 1954, two private detectives were convicted in an Ottawa court, not of perjury, but rather of fabricating evidence. Let me be perfectly specific on this: Two private detectives were convicted as follows:

With intent to mislead a court of justice did unlawfully attempt to fabricate evidence by means other than perjury or subornation of perjury.

The charge was laid in pursuance of section 117 of the Criminal Code, which reads as follows:

Every one who, with intent to mislead, fabricates anything with intent that it shall be used as evidence in a judicial proceeding, existing or proposed, by any means other than perjury or incitement to perjury is guilty of an indictable offence and is liable to imprisonment for fourteen years.

The accused appealed their conviction and the Ontario Court of Appeal quashed the conviction on the ground that the proceedings before the Senate, or a committee thereof, was not a court of justice within the meaning of the Criminal Code.

We proceeded to cure that matter, and I have the case here which I think is interesting. I refer to *Regina vs Pichette and Santerre*, found in Canadian Criminal Cases, volume 3 of 1955 at page 403.

This is what the judge says with regard to our status, and it is important that we understand our real status.

Chief Justice Pickup:

The appellants are two private detectives who appeal to this Court from their conviction on November 24, 1954, by His Worship Magistrate Strike at Ottawa. The charge was that the appellants, "with intent to mislead a court of justice, did unlawfully attempt to fabricate evidence by means other than perjury or subornation of perjury—

The facts of the case may be simply stated. The appellants, desiring to obtain evidence for the purpose of enabling a married woman to secure a divorce, planned to trap the husband into a false position from which adultery might be inferred or found if evidence was later given in some

proceeding for divorce. This plan was to have a woman go to a room in an hotel, register under an assumed name, and give the room the appearance of the bed having been occupied. She was not required to do anything more. The husband was to be lured by a pretext to the room and, when there, would be found by the two appellants, who would then be in a position to give evidence as to his being found there with the woman. In carrying out this plan, the appellants arranged with woman "A" to obtain the hotel room and perform her part of the plot, which she did. In the meantime, the appellants arranged with woman "B" to call the husband, under an assumed name, which was the name which woman "A" was to use at the hotel, and invite him to come to the room. This was done by woman "B", but the husband was suspicious. Woman "B" claimed to be a friend of the husband's sister, and the husband took the precaution of calling his sister as to the friend whose name he had been given over the telephone. Instead of going to the hotel room as invited the husband went to the police, with the result that the plan at that stage miscarried and it was the police who went to the hotel room, instead of the two appellants who were endeavouring to mislead someone.

The first ground of appeal is that the Crown failed to prove the intent necessary to constitute the crime charged. It is argued that it was necessary, under the charge as laid, to prove an intent to mislead a Court of justice, and that the intent proved in this case was not an intent to mislead a Court of justice but, at most, an intent to mislead the Divorce Committee of the Senate, and Parliament which might act upon a recommendation of the Divorce Committee... This ground of appeal, therefore, turns upon whether or not the Senate committee and Parliament are a "court of justice" within the meaning of s. 177. In my opinion, they are not. The expression "Court of Justice", in the sense in which it is used in this statute, in my opinion, should be given the meaning attributed to the word "court" in Murray's New English Dictionary, vol. II, p. 1091, column 1, under item 11, from which I quote the following: "An assembly of judges or other persons legally appointed and acting as a tribunal to hear and determine any cause, civil, ecclesiastical, military, or naval."

Senator Choquette was correct, that I initiated the amendments of the Canadian Criminal Code to correct that situation. Let me say what we did. In consequence of this decision, we amended the Interpretation Section, which affected section 117 of the Code to include the Senate and such parliamentary bodies in the prohibition against the fabrication of evidence.

Section 99 of the Criminal Code as amended, reads as follows:

"judicial proceeding" means a proceeding (ii) before the Senate or House of Commons of Canada or a committee of the Senate or House of Commons, or before a legislative council, legislative assembly or house of assembly or a committee thereof that is authorized by law to administer on oath,

It is clear, therefore, that the Code as a result of *Regina vs Pichette* and *Santerre* did not constitute the Senate or its committees a court, nor the Commissioner or his proceedings—which by the way, were not in existence or contemplation at that time. Nor does the dictionary do so.

The Oxford dictionary defines "court" as follows:

An assembly of judges or other persons legally appointed and acting as a tribunal to hear and determine any cause, civil, ecclesiastical, military or naval.

Hon. Mr. CHOQUETTE: Now that we have changed the system and we have our Commissioner who does not render a decision but only makes a recommen-

dation, could anyone who takes an oath before him be brought up for perjury and convicted?

Hon. Mr. ROEBUCK: I will go through that a little more fully, because I think it is important to understand our own status.

When the Dissolution and Annulment of Marriages Act was before our Standing Committee on Banking and Commerce on August 2, 1963, the Deputy Minister of Justice, Mr. E. A. Driedger, said that the function of the Senate Commissioner when he is hearing evidence in support of divorce petitions and making recommendations to the Senate is legislative and not judicial in character. I have the report of the committee of that time, and this is what the Deputy Minister said:

In the first place I tried to take particular care to frame this bill so that it would provide for a legislative dissolution rather than a judicial dissolution. One of the very important reasons for that was that if the proceedings are judicial, then they might well be subject to the prerogative writs such as *mandamus*, prohibition, *certiorari* and so on; but if the bill is framed purely as a legislative process then the internal machinery, the internal procedure, is of a legislative character and therefore will be outside the scope of prerogative writs. If we were to put in a clause to the effect that nothing in this bill shall be construed as altering or changing the jurisdiction of some courts, then we are half confessing that it really is a judicial procedure rather than a legislative procedure. By inserting such a clause the courts might say that this man is a judicial officer rather than a legislative officer, because such clause makes it clear that he is and therefore is subject to the prerogative writs.

Senator Power asked:

Mr. Chairman, I would like to know what definition Mr. Driedger gives of legislative action as against judicial action.

This is Mr. Driedger's answer:

My answer, Senator Power, would be this. If it is a judicial act you have preordained laws and the tribunal finds the facts and applies those laws. In the case of a legislative act the tribunal makes the laws, taking into account such facts as it considers desirable. As a legislative act I would include not only acts of Parliament but regulations of the Governor in Council or a minister. Those are what I call legislative acts. . .

The power to dissolve marriage is conferred on the Senate by resolution, and section 3 has a limitation, an administrative limitation on the recommendations that the officer can make. . . he does not actually apply a law.

He only makes a recommendation.

The power and authority of the Senate Commissioner under this act is set out in section 3 of the Dissolution and Annulment of Marriages Act. It reads as follows:

The Senate shall adopt a resolution for the dissolution or annulment of a marriage only upon referring the petition therefor to an officer of the Senate, designated by the Speaker of the Senate, who shall hear evidence, and report thereon, but such officer shall not recommend that a marriage be dissolved or annulled except on a ground on which a marriage could be dissolved or annulled, as the case may be, under the laws of England as they existed on the 15th day of July, 1870, or under the Marriage and Divorce Act, Chapter 176 of the Revised Statutes of Canada, 1952.

I pointed out that our Commissioner has no power except as he finds it in these rules and as set out in the act. He can recommend to the Senate only, but the Senate has no obligation to accept his recommendations. And if the Sen-

ate does dissolve a marriage, it does so in a legislative capacity and by legislative means, not by a decree of a court. If the Senate dissolves a marriage it is the Senate's act and it is not that of a Commissioner. In consequence, I would say to my friend who raised this difficult question that there is absolutely no question whatsoever that the bill as it is now drawn does not extend to the Commissioner or add to his powers.

Now let me attack the question that the honourable senator has just raised: Is the Senate a court in that case? Of course it is not. The bill said, in any court having jurisdiction to grant divorces *a vinculo matrimonii*. Certainly, our Commissioner has no such power. It is true that we may, by passing a resolution, conform in procedure to an act of our own, but it is a legislative act. Of course Parliament has the power to do anything, and so any act of ours will not add to Parliament's jurisdiction. That fact is immaterial at the moment to the question before us.

Honourable senators, if after what I have said with regard to our status as a legislative body rather than a judicial one, if after what the Deputy Minister of Justice, Mr. Driedger, has said, and if after what has been found by the Court of Appeal in Pichette and others, anyone still thinks that we are a court, or that the Senate is a court, or that the Commissioner is a court so that he is included in this phrase, I would be quite willing to add certain words when we get to committee. I think it totally unnecessary, but if it laid the question so that there was no further argument about it, I would be willing to add such words as these:

Nothing in the Act shall affect or be deemed to affect the operation of the Dissolution and Annulment of Marriage Act or to extend the grounds on which the Officer of the Senate designated thereunder may recommend to the Senate resolutions for the dissolution or annulment of marriage.

I say that is quite unnecessary, but if there is anyone who still thinks there is any confusion in this phrase, "a court having jurisdiction" and so on, I would suggest that the committee add this phraseology to the bill.

Honourable senators, I am sorry it has taken so long, but I felt it necessary to put on record what the facts are with regard to our status, whether we are a court or a legislative body or what we are, because I know there is a great deal of confusion, and when the question was raised I was not ready with my answer.

Senators Grosart, Baird and Hollett would like the Senate to be included in this bill, and if my friend was right in his question I suppose it would be. I would also like to see these provinces included, and I would like to see the Senate Commissioner included in the wider powers to be found in this bill, but not until the province of Quebec or its authorities, or the Province of Newfoundland, so intimate to us. If they will do that, I will be very glad to see the bill amended accordingly.

Senator Haig says that one consequence of the bill would be an increase in the number of divorces. I have one comment in that regard. There would, of course, be an increase in the first year or so, because there are those who are waiting for such an opportunity to settle their domestic affairs.

But, let me point out that many of those who would be included in this bill have in the past found means of complying with our restrictive procedures, so that there is not such a large backlog as one might otherwise imagine. There will be an increase, but let us be as realistic in this as we are in other things. It will not be overwhelming.

There is only one thing more I need say. I am sure my fellow senators would like some intimation as to why we are not making better progress. Before we adjourned at the beginning of the Easter recess I did my best to arrange a meeting of the joint committee. Both houses had agreed to it, each one having appointed its members, but I was unable to arrange a meeting because I was told a quorum could not be obtained in the Commons. Immediately we returned I tried to activate the matter, and the chief of our committees branch saw the chief of the committees branch of the other place and asked for immediate action. I was told that he went through the roof, and said that there were so many committees over there that they could not handle them, and they were not going to try to handle any more because they had neither the staff nor the reporters, and that it was impossible to obtain members for another committee.

I sent our Chief clerk of Committees back to tell them that if a meeting was held for just one half an hour, or even ten minutes, we could appoint the chairmen and a steering committee, and we could then go to work organizing the basic task of the committee, so that it would be ready for the time when the Commons would be in a position to carry on this work. I received word shortly after from the co-ordinator of the Commons committees that even that would not be done. I went then to the highest authority and engaged his co-operation in the matter, but still nothing is done. I am hopeful, however, that as soon as one or other of the committees of the Commons has completed its work, which should be quite soon, we may then be able to proceed with the sittings of this committee. I want all honourable senators to know that any delay in connection with the bringing together of this committee is not due to the fault of the Senate or any member of it.

Honourable senators, I thank you for your patience in listening to me. My remarks have been longer than I intended, but I think they were necessary.

Hon. WALTER M. ASELTINE: Honourable senators, I did not know that this motion was going to be put today. I did not know either that my honourable colleague, Senator Roebuck, was going to give us this learned argument, but I want to congratulate him on the manner in which he has done so.

My sole object in rising is to say that I am entirely in favour of the motion. It would be a mistake if the Senate were to divide on this issue at this stage before this bill and others have been considered carefully by the special joint committee.

I was interested in the criticism, if I may call it that, of the bill which Senator McMeans and I introduced in 1938, a duplicate of which I introduced in 1955. I am not going to argue with the honourable senator on all the points he has raised. His remarks indicate that he is convinced that a number of the twelve points I raised in my speech are covered in his bill.

I am only going to say that when we drafted the bill in 1938 we copied it almost entirely from the English act that had been passed in 1937. When we inserted those grounds—if you may call them that—in the 1938 bill, which actually passed this chamber but which was not given second reading in the other place, we were merely following what had taken place in England. It was our opinion that if those things were already in the law as it stood in 1870, the English Parliament would not be passing the bill that it did pass in 1937. That is the reason why I included those twelve points in the bill I presented to this house in 1955.

I think nothing more should be said about these matters at this time. We should leave them to the special joint committee which will be able to obtain expert legal opinions on them. When a measure is brought in, if the committee so decides, I believe the bill will be satisfactory both to Senator Roebuck and to myself.

The Hon. The ACTING SPEAKER: Honourable senators, it is moved by honourable Senator Roebuck, seconded by honourable Senator Croll, that Bill S-19, intituled: "An Act to extend the grounds upon which courts now having jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief", be read the second time.

In amendment it is moved by honourable Senator Connolly, seconded by honourable Senator Hugessen, that the bill be not now read the second time, but that the subject-matter thereof be referred to the Special Joint Committee on Divorce.

Is it your pleasure, honourable senators, to adopt the motion in amendment?

Hon. Mr. ROEBUCK: So far as the debate on the motion is concerned, I wish to adjourn it. This bill still remains. What we are considering now, as I understand it, is the adoption of the amendment to refer the subject-matter of this bill to the special joint committee. I am in agreement with that. What are we going to do with the bill?

Hon. Mr. HAYDEN: It just stands.

Hon. Mr. ROEBUCK: It is before us. I want the bill to stand, and I move that it be adjourned.

Hon. Mr. CHOQUETTE: In other words, the soul departs and the body remains?

Hon. Mr. ROEBUCK: Yes, that is it.

The Hon. The ACTING SPEAKER: As I understand it, the amendment was moved by honourable Senator Connolly, and Senator Roebuck was speaking on the amendment.

Hon. Mr. ROEBUCK: That is right.

The Hon. The ACTING SPEAKER: I am now reading the amendment I have before me. Does any honourable senator object to it?

Hon. Mr. CONNOLLY (*Ottawa West*): I think Senator Roebuck is concerned about whether this bill will appear on our Order Paper again after the committee has reported.

Hon. Mr. ROEBUCK: That is all I am asking.

The Hon. The ACTING SPEAKER: Is it your pleasure, honourable senators to adopt the motion in amendment?

Hon. SENATORS: Agreed.

Motion agreed to.

APPENDIX "72"

First Session, Twenty-Seventh Parliament, 14-15 Elizabeth II, 1966.

The Senate of Canada

Bill S-19

An Act to extend the grounds upon which courts now having jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief.

Read a first time, Thursday, 24th February, 1966.

Honourable Senator ROEBUCK.

1st Session, 27th Parliament, 14-15 Elizabeth II, 1966.

The Senate of Canada

Bill S-19

An Act to extend the grounds upon which courts now having jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief.

Short title

1. This Act may be cited as the *Divorce (Extension of Grounds) Act, 1966.*

Additional grounds for divorce

2. (1) In any court having jurisdiction to grant divorce *a vinculo matrimonii* any husband or wife may commence an action praying that the marriage may be dissolved, on the following grounds in addition to any ground upon which the marriage may now be dissolved, namely, that the respondent "Desertion"

(a) has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition;

"Cruelty"

(b) has since the celebration of the marriage treated the petitioner with cruelty; or

"Unsoundness of mind"

(c) is intractably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition.

(2) For the purposes of this section a person of unsound mind shall be deemed to be under care and treatment only while he is

(a) detained in pursuance of an order or inquisition completely made or had under authority of a statute in force in the province concerned or as a criminal lunatic; or

(b) receiving treatment as a voluntary patient pursuant to any statute in force in the province concerned, being treatment which follows without any interval a period of such detention as aforesaid.

Duty of court

3. If the court is satisfied by the evidence that the case of the petitioner has been proved on any of the grounds added by section 1, and, where the ground of the petition is cruelty, the petitioner has not in any manner condoned the cruelty, and that the petition is not presented or prosecuted in collusion with the

respondent, the court shall pronounce a decree of divorce, but if the court is not satisfied with respect to any of the aforesaid matters, it shall dismiss the petition:

Proviso

Provided that the court shall not be bound to pronounce a decree of divorce and may dismiss the petition if it finds that the petitioner has during the marriage been guilty of adultery, or if, in the opinion of the court, the petitioner has been guilty

- (a) of unreasonable delay in presenting or prosecuting the petition; or
- (b) of cruelty towards the other party to the marriage; or
- (c) where the ground of the petition is cruelty, of having without reasonable excuse deserted, or having without reasonable excuse willfully separated himself or herself from, the other party before the cruelty complained of; or
- (d) where the ground of the petition is unsoundness of mind or desertion, of such wilful neglect or misconduct as has conduced to the unsoundness of mind or desertion.

Rules of court

4. The court may make such rules of court as it may deem desirable or expedient for the exercise and application of the jurisdiction conferred by this Act.

Coming into force

5. This Act shall come into force on a day or days to be fixed by proclamation of the Governor in Council.

EXPLANATORY NOTES

The purpose of the present bill is to add to the existing grounds on which a Canadian court now possessing jurisdiction to grant divorces *a vinculo matrimonii*, the further grounds upon which the High Court in England, pursuant to the *Matrimonial Causes Act, 1950*, may now grant divorces. No change is made in the jurisdiction of the courts of Quebec or Newfoundland, nor is the jurisdiction of Parliament or the application of the *Dissolution and Annulment of Marriages Act* (chapter 10 of the statutes of 1963) in any way affected. Moreover, the existing jurisdiction of the courts in the provinces and territories other than Quebec and Newfoundland is not affected: additional jurisdiction is however conferred in that new grounds are added to the grounds upon which such courts may now grant divorces.

Clause 2: Adds desertion for three years, cruelty and intractable insanity to the existing grounds for divorce.

Clause 3: Deals with the responsibility of the court in considering petitions for divorce on any of the added grounds.

Clause 4: Authorizes the making of the requisite rules of court.

Clause 5: Provides for the coming into force of the Act on a day or days to be fixed by proclamation.

APPENDIX "73"

C-133.

First Session, Twenty-Seventh Parliament, 14-15 Elizabeth II, 1966

The House of Commons of Canada

Bill C-133

An Act to extend the grounds upon which courts now having jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief.

First reading, February 25, 1966.

Mr. McCLEAVE.

1st Session, 27th Parliament, 14-15 Elizabeth II, 1966.

The House of Commons of Canada

Bill C-133

An Act to extend the grounds upon which courts now having jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief.

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

Short title

1. This Act may be cited as the *Divorce (Extension of Grounds) Act, 1966*.

Additional grounds for divorce

2. (1) in any court having jurisdiction to grant divorce *a vinculo matrimonii* any husband or wife may commence an action praying that the marriage may be dissolved, on the following grounds in addition to any ground upon which the marriage may now be dissolved, namely, that the respondent

"Desertion"

- (a) has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition;

"Cruelty"

- (b) has since the celebration of the marriage treated the petitioner with cruelty; or

"Unsoundness of mind"

- (c) is intractably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition.

- (2) For the purposes of this section a person of unsound mind shall be deemed to be under care and treatment only while he is

- (a) detained in pursuance of an order or inquisition completely made or had under authority of a statute in force in the province concerned or as a criminal lunatic; or

- (b) receiving treatment as a voluntary patient pursuant to any statute in force in the province concerned, being treatment which follows without any interval a period of such detention as aforesaid.

Duty of court

3. If the court is satisfied by the evidence that the case of the petitioner has been proved on any of the grounds added by section 1, and, where the ground of the petition is cruelty, the petitioner has not in any manner condoned the cruelty, and that the petition is not presented or prosecuted in collusion with the respondent, the court shall pronounce a decree of divorce, but if the court is not satisfied with respect to any of the aforesaid matters, it shall dismiss the petition:

Proviso

Provided that the court shall not be bound to pronounce a decree of divorce and may dismiss the petition if it finds that the petitioner has during the marriage been guilty of adultery, or if, in the opinion of the court, the petitioner has been guilty

- (a) of unreasonable delay in presenting or prosecuting the petition; or
- (b) of cruelty towards the other party to the marriage; or
- (c) where the ground of the petition is cruelty, of having without reasonable excuse deserted, or having without reasonable excuse wilfully separated himself or herself from, the other party before the cruelty complained of; or
- (d) where the ground of the petition is unsoundness of mind or desertion, of such wilful neglect or misconduct as has conduced to the unsoundness of mind or desertion.

Rules of court

4. The court may make such rules of court as it may deem desirable or expedient for the exercise and application of the jurisdiction conferred by this Act.

Coming into force

5. This Act shall come into force on a day or days to be fixed by proclamation of the Governor in Council.

EXPLANATORY NOTES

The purpose of the present bill is to add to the existing grounds on which a Canadian court now possessing jurisdiction to grant divorces *a vinculo matrimonii*, the further grounds upon which the High Court in England, pursuant to the *Matrimonial Causes Act, 1950*, may now grant divorces. No change is made in the jurisdiction of the courts of Quebec or Newfoundland, nor is the jurisdiction of Parliament or the application of the *Dissolution and Annulment of Marriages Act* (chapter 10 of the statutes of 1963) in any way affected. Moreover, the existing jurisdiction of the courts in the provinces and territories other than Quebec and Newfoundland is not affected: additional jurisdiction is however conferred in that new grounds are added to the grounds upon which such courts may now grant divorces.

Clause 2: Adds desertion for three years, cruelty and intractable insanity to the existing grounds for divorce.

Clause 3: Deals with the responsibility of the court in considering petitions for divorce on any of the added grounds.

Clause 4: Authorizes the making of the requisite rules of court.

Clause 5: Provides for the coming into force of the Act on a day or days to be fixed by proclamation.

APPENDIX "74"

BRIEF to the Special Joint Committee of the Senate and House of Commons on Divorce, submitted by the Canadian Association of Social Workers, 185 Somerset Street West, Ottawa 4, Ontario.

Summary of Conclusions and Recommendations

1. Canada's divorce laws require immediate reform to meet the present day needs of individuals and families.
2. Enlightened divorce legislation could do much to promote the dignity of individuals and families, whereas the present divorce laws frequently and unnecessarily humiliate and degrade one or all parties involved.
3. Conflicts within marriage which cannot be resolved should not mean a lifetime of unhappiness, stress, strain and deprivation for the husband, wife or children.
4. Present legislation is costly and complicated and the procedures encourage deception, dishonesty, extramarital relationships, common law marriages and perjury.
5. The children are the real losers when a divorce is granted without proper counselling and appropriate planning for all persons involved; and they may be the losers if a divorce is not granted when the marriage has deteriorated beyond repair.
6. Grounds for divorce should be broadened to include breakdown of marriage and insanity as well as offences such as cruelty and willful desertion.
7. No divorce decree should be granted until the court is completely satisfied that suitable arrangements have been made for the care and upbringing of dependent children.
8. No divorce decree should be granted until there has been careful and skillful counselling to determine whether or not the marriage can be saved, or if it should be saved.
9. The divorce laws should be amended as quickly as possible so that wise changes in legislation will allow dignified legal relief for those who wish to use it to fulfil their needs and those of their children, but at the same time, will not offend those who do not consider divorce an acceptable solution to a dysfunctioning marriage.

Introduction

10. The Canadian Association of Social Workers is a national organization of professional social workers with a membership in excess of 3,000. It has members working in the social welfare field in all provinces and territories of Canada. Members of this Association occupy professional positions in a variety of organizations and agencies, both Government and voluntary.

11. Strengthening personal and family life has always been a primary objective of the Canadian Association of Social Workers. It has always supported those measures which advance physical, social and emotional security for Canadian citizens and which reflect genuine respect for the dignity and worth of each individual.

12. Members of the Canadian Association of Social Workers have a long history of service to families when and where there are marital or parent-child conflicts. The Canadian Association of Social Workers has been in the vanguard in support of social legislation and community services that are designed to bring about a better ordering of our basic social institutions and which offer opportunities for every member of society to contribute to the utmost of his capacity.

Social workers in all sections of Canada are actively promoting programs of family life education and marriage counselling which will help to develop responsible attitudes to marriage, to parenthood and to family relationships.

*The Basis for the Canadian Association of
Social Workers' Views on Divorce*

The Association welcomes the opportunity to present the following views on divorce legislation which are based on many years of work with individuals and families in Canada.

13. Divorce cannot be discussed without considering the most important institution known to our society, the family. It is through the family that the growth of children is fostered and the accumulated culture passed on to new generations. The well-being and health of the family in our society is essential for the continuance of the health of our country in generations to come. It is therefore of the utmost importance that social legislation always be in tune with the current needs of the family.

14. Divorce laws should be changed to immediately wipe out the concept of a guilty party and place the emphasis on planning in the best interests of the family and all of its members.

15. Divorce legislation, in itself, cannot provide the answer to the problem of marriage break-down. It is essential that, along with the legislation, there be an expansion and strengthening of counselling services which will assist couples to work through marital difficulties and prevent the breakup of marriage where this is possible.

16. Marriage counsellors, working in conjunction with the divorce courts, are needed in order to help determine whether or not the marriage can be saved or should be saved. Therefore, they must have the very best qualifications and have already demonstrated their skill in marriage and family counselling.

17. Every effort must be made to protect the children affected by divorce. Planning for proper physical care of the children is not enough. Marriage break-down presents special emotional difficulties for the children involved. Frequently children are torn in their feelings of loyalty and love towards one or both parents when a divorce is granted. Wise legislation, combined with skillful counselling, would help children retain respect for both parents, should divorce be granted, and keep the sense of deprivation to a minimum.

18. Enlightened divorce legislation, bringing it in line with present day needs and values, would serve to strengthen family life, not undermine it. Divorce does not break up a marriage—it merely confirms in law what has, in fact, already happened.

19. Changes in our divorce legislation should provide relief with dignity for innocent persons, including the dependent children who, under our present legislation, are often in distress for reasons of antiquated laws.

March 9, 1967.



First Session—Twenty-seventh Parliament
1966-67

PROCEEDINGS OF
THE SPECIAL JOINT COMMITTEE OF THE SENATE
AND HOUSE OF COMMONS ON

DIVORCE

No. 22

TUESDAY, MARCH 14, 1967

Joint Chairmen

The Honourable A. W. Roebuck, Q.C.

and

A. J. P. Cameron, Q.C., M.P.

WITNESS:

Professor Julien D. Payne, Faculty of Law,
University of Western Ontario.

APPENDICES:

No. 75.—The Very Reverend Dr. Pierre Popesco (*Orthodox Church*).

No. 76.—The Ontario Welfare Council.

ROGER DUHAMEL, F.R.S.C.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1967

MEMBERS OF THE
SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS
ON DIVORCE

FOR THE SENATE

Hon. A. W. Roebuck, Q.C., Joint Chairman

The Honourable Senators

Aseltine	Connolly (<i>Halifax North</i>)	Flynn
Baird	Croll	Gershaw
Belisle	Denis	Haig
Burchill	Fergusson	Roebuck—(12)

FOR THE HOUSE OF COMMONS

A. J. P. Cameron, Q.C., (*High Park*), Joint Chairman

Members of the House of Commons

Aiken	Forest	McQuaid
Baldwin	Goyer	Otto
Brewin	Honey	Peters
Cameron (<i>High Park</i>)	Laflamme	Ryan
Cantin	Langlois (<i>Mégantic</i>)	Stanbury
Choquette	MacEwan	Trudeau
Chrétien	Mandziuk	Wahn
Fairweather	McCleave	Woolliams—(24)

(Quorum 7)

ORDERS OF REFERENCE

Extracts from the Votes and Proceedings of the House of Commons:

March 15, 1966:

"On motion of Mr. McIlraith, seconded by Mr. Hellyer, it was resolved—that a Special Joint Committee of the Senate and the House of Commons be appointed to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either House;

That 24 Members of the House of Commons, to be designated by the House at a later date, be members of the Special Joint Committee, and that Standing Order 67(1) of the House of Commons be suspended in relation thereto;

That the Committee have power to engage services of such technical, clerical and other personnel as may be necessary for the purpose of the inquiry;

That the Committee have the power to send for persons, papers and records, to examine witnesses, to report from time to time, and to print such papers and evidence from day to day as may be ordered by the Committee, and that Standing Order 66 be suspended in relation thereto; and

That a Message be sent to the Senate requesting Their Honours to unite with this House for the above purpose, and to select, if the Senate deems it so advisable, some of its Members to act on the proposed Special Joint Committee."

"By unanimous consent, on motion of Mr. McIlraith, seconded by Mr. Hellyer, it was ordered—That the order of the House of Monday, February 21, 1966 referring to subject-matter of the following bills to the Standing Committee on Justice and Legal Affairs, namely:—

Bill C-16, An Act to provide in Canada for the Dissolution of Marriage (Additional Grounds for Divorce).

Bill C-18, an Act to provide in Canada for the Dissolution and the Annulment of Marriage.

Bill C-41, An Act to amend the British North America Acts, 1867 to 1965, (Provincial Marriage and Divorce Laws).

Bill C-44, An Act to provide in Canada for the Dissolution of Marriage.

Bill C-55, An Act to provide in Canada for the Dissolution of Marriage.

Bill C-58, An Act respecting Marriage and Divorce.

Bill C-79, An Act to amend the Dissolution and Annulment of Marriages Act (Additional Grounds for Divorce).

be discharged, and that the subject-matter of the same bills be referred to the Joint Committee of the Senate and House of Commons on Divorce".

March 16, 1966:

"By unanimous consent, on motion of Mr. Stewart, seconded by Mr. Byrne, it was ordered—That the subject-matter of Bill C-133, An Act to extend the grounds upon which courts now have jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief, be referred to the Special Joint Committee on Divorce".

"By unanimous consent, on motion of Mr. Stewart seconded by Mr. Byrne, it was ordered—That the subject-matter of Notice of Motion No. 11 be referred to the Special Joint Committee on Divorce."

March 22, 1966:

"On motion of Mr. Pilon, seconded by Mr. McNulty, it was ordered—That a Message be sent to the Senate to acquaint Their Honours that this House will unite with

them in the formation of a Joint Committee of both Houses to inquire into and report upon divorce in Canada, and that the Members to serve on the said Committee, on the part of this House, will be as follows: Messrs. Aiken, Baldwin, Brewin, Cameron (*High Park*), Cantin, Choquette, Chrétien, Fairweather, Forest, Goyer, Honey, Laflamme, Langlois (*Mégantic*), MacEwan, Mandziuk, McCleave, McQuaid, Otto, Peters, Ryan, Stanbury, Trudeau, Wahn and Woolliams."

LÉON-J. RAYMOND,

Clerk of the House of Commons.

Extracts from the Minutes of the Proceedings of the Senate:

March 23, 1966:

"Pursuant to the Order of the Day, the Senate proceeded to the consideration of the Message from the House of Commons requesting the appointment of a Special Joint Committee of the Senate and House of Commons on Divorce.

The Honourable Senator Connolly, P.C., moved, seconded by the Honourable Senator Roebuck:

That the Senate do unite with the House of Commons in the appointment of a Special Joint Committee of both Houses of Parliament to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either House;

That twelve Members of the Senate, to be designated at a later date, act on behalf of the Senate as members of the said Special Joint Committee;

That the Committee have power to engage the services of such technical, clerical and other personnel as may be necessary for the purpose of the inquiry;

That the Committee have the power to send for persons, papers and records, to examine witnesses, to report from time to time, and to print such papers and evidence from day to day as may be ordered by the Committee, and to sit during sittings and adjournments of the Senate; and

That a Message be sent to the House of Commons to inform that House accordingly.

After debate, and—

The question being put on the motion, it was—

Resolved in the affirmative."

March 29, 1966:

"With leave of the Senate,

The Honourable Senator Beaubien (*Provencher*) moved, seconded by the Honourable Senator Inman:

That the following Senators be appointed to act on behalf of the Senate on the Special Joint Committee of the Senate and House of Commons to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, namely, the Honourable Senators Aseltine, Baird, Belisle, Bourget, Burchill, Connolly (*Halifax North*), Croll, Fergusson, Flynn, Gershaw, Haig and Roebuck; and

That a Message be sent to the House of Commons to inform that House accordingly.

The question being put on the motion, it was—
Resolved in the affirmative.”

May 10, 1966:

“Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Roebuck, seconded by the Honourable Senator Croll, for the second reading of the Bill S-19 intituled: “An Act to extend the grounds upon which courts now having jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief”.

The question being put on the motion—

In amendment, the Honourable Senator Connolly, P.C., moved, seconded by the Honourable Senator Hugessen, that the Bill be not now read the second time, but that the subject-matter be referred to the Special Joint Committee on Divorce.

After debate, and—

The question being put on the motion, it was—
Resolved in the affirmative.”

J. F. MACNEILL,
Clerk of the Senate.

MINUTES OF PROCEEDINGS

TUESDAY, March 14, 1967.

Pursuant to adjournment and notice, the Special Joint Committee of the Senate and House of Commons on Divorce met this day at 3:30 p.m.

Present: For the Senate: The Honourable Senators Roebuck (*Joint Chairman*), Aseltine, Baird, Belisle, Burchill and Gershaw—6.

For the House of Commons: Messrs. Cameron (*High Park*) (*Joint Chairman*), Aiken, Forest, Honey, MacEwan, McCleave and Peters—7.

In attendance: Peter J. King, Ph. D., Special Assistant.

Professor Julien D. Payne of the Faculty of Law, University of Western Ontario resumed explanation of his brief.

(See Proceedings No. 17 dated February 21, 1967

for Professor Payne's earlier testimony and

Appendix No. 46 of the same issue for his brief)

Briefs submitted by the following are printed as Appendices:

No. 75.—The Very Reverend Dr. Pierre Popesco, (*Orthodox Church*).

No. 76.—The Ontario Welfare Council.

At 5:40 p.m. the Committee adjourned to the call of the Joint Chairmen.

Attest.

Patrick J. Savoie,
Clerk of the Committee.

THE SENATE
SPECIAL JOINT COMMITTEE OF
THE SENATE AND HOUSE OF COMMONS ON DIVORCE
EVIDENCE

OTTAWA, Tuesday, March 14, 1967.

The Special Joint Committee of the Senate and House of Commons on Divorce met this day at 3.30 p.m.

Senator ARTHUR A. ROEBUCK and Mr. A. J. P. CAMERON (*High Park*), Co-Chairmen.

Co-Chairman Mr. CAMERON: Gentlemen, we have a quorum. We have as our witness today Professor Julien D. Payne from the Faculty of Law at the University of Western Ontario. Professor Payne gave us a great deal of valuable information the last time he was before the committee. We are now going to deal, I understand, Professor Payne, more or less with the second part of the brief which you had submitted to the committee. Without further ado I will ask you to carry on.

Professor Julien D. Payne, Faculty of Law, University of Western Ontario: Before continuing on with the brief, I would like to draw the attention of the members of the committee to section 30 of the Matrimonial Causes Act, (Australia) 1959. This section deals with desertion as a ground for divorce.

Incidentally, you will not find what I am saying in my brief, I am afraid. It is an addition I made since I first appeared before the committee. I should like to have it included as an addendum to page 35 of the brief, where I discuss desertion as a ground for divorce.

Now, section 30 of the Matrimonial Causes Act, (Australia), 1959, permits desertion to begin, notwithstanding the existence of a separation agreement between the parties, if one of the parties has made a bona fide request to resume cohabitation which is refused by the other party without reasonable justification, which justification may be based on conduct before or after the execution of the separation agreement.

You may well ask why I refer to this section at this juncture. The position in Canada today is as follows: desertion does not constitute a ground for divorce, and where marriages have broken down it is not uncommon for solicitors to advise their clients to enter into separation agreements. If desertion were introduced as a ground for divorce in Canada, such a separation agreement might well preclude a finding of desertion, even though it was entered into at a time when desertion was not existing as a ground for divorce.

That is to say there might well be parties today who would be denied a remedy, if desertion were introduced as a ground for divorce and no provision were introduced corresponding to section 30 of the Australian Act to which I have referred.

As I indicated last time I appeared before you, if any questions do arise, I think it might be simpler for the questions to be posed during the course of my presentation rather than at the end of the presentation.

I would next refer to page 44 of the brief. The heading is Restrictions on Petitions for Divorce within Three Years of Marriage. In 1937, with the introduction of extended grounds for divorce in England under the Matrimonial Causes Act, (England), 1937, a

provision was introduced under this act, whereby the presentation of a petition for divorce during the first three years of marriage is precluded. Certain qualifications are admitted to this restriction. To avoid injustice resulting from an arbitrary application of the restriction, the court is authorized by the statute to grant leave to a petitioner to present a petition for divorce within three years of marriage where the nature of the case is such as to indicate that exceptional hardship would otherwise be suffered by the petitioner or exceptional depravity exists on the part of the respondent.

This restriction was the subject of criticism in the evidence presented to the Royal Commission on Marriage and Divorce, and it is my submission that the denial of a right to proceed for divorce during the first three years of marriage can be justified only if it affords a real opportunity to the spouses to establish or to re-establish their marriage on a firm foundation.

Withholding matrimonial relief during the first three years of marriage will not itself lead to stability of marriage, and accordingly I would recommend that if such a restriction on petitions during the first three years of marriage is introduced in Canada, then this restriction should be re-enforced by the State's assumption of a more positive role in promoting marriage guidance and matrimonial conciliation. I think it is important that we do not merely introduce a prohibition against matrimonial relief. If a restriction is introduced, it is essential that it be supplemented by positive steps taken by the State to aid parties in the resolution of their marital difficulties.

Co-Chairman Senator ROEBUCK: If you cannot establish the one, then it is not necessary to go into the other.

Professor PAYNE: That would be my inclination.

Senator BURCHILL: Surely three years is a short enough period.

Professor PAYNE: I think it depends on the relationship. It may be excessive in some situations. If you merely have a prohibition and do nothing else to help the parties you may be aggravating their difficulties. Witnesses presented evidence to the Royal Commission on Marriage and Divorce and expressed the opinion that this restriction proved less than effective as a means of promoting stability of marriage in the absence of supporting counselling services.

Co-Chairman Mr. CAMERON: Have you any observations to make as to what may have happened in the United Kingdom during this period of 29 years when this restriction was in force?

Professor PAYNE: The Royal Commission, when they examined this restriction, recommended its retention in future English legislation. This recommendation has been respected by the English Parliament. On the other hand, the case for retention is open to question in the light of testimony submitted by persons experienced in marriage counselling and other disciplines. It is for this reason that I emphasize the need for supporting counselling services.

Co-Chairman Senator ROEBUCK: As the English provision now exists, what would be the situation if a girl married a husband and found he was not of unsound mind but very abnormal in many ways, or supposing he continued to live with another person at the same time so that he was guilty of adultery or guilty of any of the other offences such as cruelty? She could do nothing for three years?

Professor PAYNE: There may be a situation where a particular fact pattern could establish a case of exceptional hardship or exceptional depravity. The difficulty is that not much guidance can be obtained as to the way in which a court will exercise its discretion by ordering the petition to proceed. Here I think is the real difficulty which was adverted to in the testimony submitted to the Royal Commission.

Co-Chairman Senator ROEBUCK: But why exceptional hardship or exceptional depravity? Would not hardship or depravity be enough?

Professor PAYNE: Not under the English statute.

Co-Chairman Senator ROEBUCK: But if we were considering it would it not be enough? I am not impressed by the desirability at the moment, but would not hardship or depravity be sufficient if we were to consider it?

Professor PAYNE: That would make it rather difficult for the court to refuse the right to petition during the first three years of marriage. The court might well, if a case of adultery has been made out, consider that the adultery in itself constitutes depraved conduct, or in a case of cruelty, the offence itself might be regarded as leading to hardship. But the English courts have stated that cruelty or adultery *simpliciter* will not constitute a reason for allowing the petition to proceed. I think it might be necessary to apply the formula that is adopted in the English law if you were in favour of any restriction. Otherwise it would be difficult to differentiate between the cases that should be permitted to proceed and those which should be denied a right to proceed for three years.

Co-Chairman Senator ROEBUCK: I hesitate to close the doors of the court unless a very good case is made out for doing so.

Co-Chairman Mr. CAMERON: It would be a case of justice denied.

Co-Chairman Senator ROEBUCK: Justice deferred is justice denied.

Professor PAYNE: This again is an opinion shared by witnesses appearing before the Royal Commission. I advert to that in my brief at paragraph (109):

“... It was suggested that the restriction ignores the fundamental precept that where there has been a wrong, the law should not withhold a remedy. It was also suggested that the restriction does nothing to encourage spouses to attempt a reconciliation and does not deter them from taking divorce proceedings; where a matrimonial offence is committed by one spouse during the three year period; the other spouse merely waits for the period to elapse before instituting proceedings. The enforced waiting period may also drive both spouses into illicit unions. Moreover, in those cases where leave is given to present a petition within the prescribed period, the cost of obtaining the divorce is greatly increased by the extra proceedings required.”

If I may now direct your attention to heading 3 on page 45—Protection of Children in Matrimonial Proceedings—it is my submission that in pursuit of a decree of divorce or annulment parents may and frequently do subordinate the interests of the children to their personal interests and a judge may not be sufficiently informed of all the material facts to avoid any resulting hardship to the children. I accordingly draw to the attention of this committee the legislation enacted in section 33 of the Matrimonial Causes Act, (England), 1965, which is set out in paragraph 113 of my brief. I think it might well be argued that this legislation should constitute a model for Canadian legislation, and perhaps it would be helpful if I read the particular section.

Section 33 of the Matrimonial Causes Act, (England), 1965 reads as follows:

“(1) Notwithstanding anything in Part I of the Act but subject to the following subsection, the court shall not make absolute a decree of divorce or nullity of marriage in any proceedings begun after 31st December 1958, or make a decree of judicial separation in any such proceedings, unless it is satisfied as respects every relevant child who is under sixteen that—

- (a) arrangements for his care and upbringing have been made and are satisfactory or are the best that can be devised in the circumstances; or
- (b) it is impracticable for the party or parties appearing before the court to make any such arrangements.

If you look at subsection (2) of the same section you will see that a general power is given to the court to proceed without observing the requirements of subsection (1) if the court is of the opinion the circumstances make it desirable that a decree should be made absolute without delay and the court has obtained a satisfactory undertaking from either one or both of the parties to bring the question of the arrangements for the children before the court within a specified time.

Senator ASELTINE: Has the Dominion Parliament jurisdiction?

Professor PAYNE: I think the Dominion Parliament does have jurisdiction to enact legislation of this kind. I think it can be regarded as incidental to the right of Parliament to legislate in the field of marriage and divorce. What we are doing here is introducing legislation which limits the right to divorce.

Co-Chairman Senator ROEBUCK: This only says a divorce shall not be given unless these conditions have been fulfilled. That is within our powers.

Senator ASELTINE: I do not think so. I made a note in the margin when I was reading the brief to bring that point up.

Professor PAYNE: It is my opinion that it would be constitutional.

Senator ASELTINE: I think you are correct in stating that is one of the conditions.

Co-Chairman Senator ROEBUCK: Yes.

Professor PAYNE: I might perhaps have mentioned that in applying this section the English courts have held that if a decree is granted inadvertently because the court has not been made aware of the existence of children, then such decree shall be null and void. I think this sanction is rather important.

Co-Chairman Senator ROEBUCK: But rather dangerous.

Professor PAYNE: I think it is essential to have this sanction if one is to give effect to section 33 and the underlying philosophy of the section.

I would further suggest that consideration be given to the possibility of empowering the court to order a follow-up inquiry—that is to say, an inquiry in respect of the children following issue of the decree absolute, the court having been satisfied at the time of the decree so far as the arrangement for the children are concerned.

In this connection I would draw to the attention of the committee opinions which have been expressed by Dr. Olive M. Stone, Reader in Law at the University of London in England, who in an article to be published in Volume 6, *Western Law Review*, page 53, said this—and she was speaking of section 33 of the English act—

Co-Chairman Senator ROEBUCK: Is that in your brief?

Professor PAYNE: No, it is not in the brief. I was only made aware of the article some three or four days ago, so I am adding to the brief in this particular context.

Commenting on section 33, Dr. Stone said:

Unfortunately, however, these provisions do not seem to have fulfilled the expectations of those who enacted them. In its recent report on Reform of the Grounds of Divorce, The Field of Choice, the Law Commission states that the provisions have been widely criticized as inadequate, both in their scope and in the way that they are working in practice, and that the Commission proposes as soon as possible to institute an investigation into this. Uneasiness appears to exist particularly in regard to two aspects of the provisions. In the first place, there seems to be some evidence that the divorce judges rarely probe deeply into the arrangements proposed by the parties for the children, and if these arrangements seem *prima facie* reasonable they are usually approved. The Law Commission points out that, even in respect of the alleged facts on which the petition is based, "In ten minutes, the average time of a hearing in an undefended case, the Judge obviously cannot carry out a thorough inquisition." This

would seem to apply a fortiori to the arrangements for the children. Secondly, there is no adequate follow-up machinery to ensure that the arrangements approved for the children work satisfactorily, or even that they are adhered to. The Report of a Group appointed by the Archbishop of Canterbury, published in July 1966 recommended that the court should have a duty always to notify the children's department of the appropriate local authority of custody arrangements for children after divorce.

Neither the Archbishop's Group nor the Law Commission is satisfied of the practicability or desirability of attempting to differentiate radically between marriages with children and those without. The Law Commission favours more detailed pleadings and regards the possibility of the intervention of counsel to represent the interests of the public or the children as feasible.

I draw this opinion to the attention of the committee because I think it does point out that if legislation is adopted in Canada on the model set out in section 33, then it might be desirable to include therein specific provision for follow-up inquiries and for a guardian *ad litem* to be appointed to represent the children in the matrimonial proceedings.

Co-Chairman Senator ROEBUCK: Is there not a fundamental difference between the situation in England and the situation here? Here, when we grant a divorce, we do not alter the obligation of the parents towards their children and the care of the children. The jurisdiction over the children under the Children's Act, for instance, for the Province of Ontario is all in Ontario. Long after the divorce has been issued, the jurisdiction over the children is in the province and not in our jurisdiction.

Professor PAYNE: I concede this could be a real problem, and one might consider that a change in the constitution would be required to authorize a follow-up inquiry. Furthermore, the sanction attaching to section 33, namely, the unavailability of a decree, is clearly inappropriate in cases where the parents, subsequent to the decree, fail to live up to their undertakings in respect of the children. I appreciate that this is a problem, and perhaps you cannot take it further.

On the other hand, I think the appointment of a guardian *ad litem* would be constitutionally feasible, although I suspect it would be more likely for such an appointment to be authorized by rules of court rather than by a general divorce statute.

It may be that you cannot travel too much beyond the present terms of section 33. Even if you favour that section it seems that it is not a panacea for all ills, although I do think it is a step in the right direction. The direction we are seeking is a direction which will promote the best interests of the child in a situation where the marriage has broken down, and a divorce should ensue.

Co-Chairman Senator ROEBUCK: We could have an official of the Department of Justice made the guardian *ad litem* whenever the court thought fit.

Professor PAYNE: That might be a solution.

Co-Chairman Senator ROEBUCK: I was thinking of our own parliamentary divorce. I do not know what that would mean in Halifax or Vancouver.

Co-Chairman Mr. CAMERON: When the Hon. Mr. McRuer was before the committee he suggested that jurisdiction in divorce could be given to county court judges with great advantage. I think that one of the advantages that was in his mind was that the county court judge who lives in the county where the children and the family are residing could from that very fact alone have some knowledge of what was going on. He might be appealed to with respect to seeing that any arrangements that had been made were being carried out.

Professor PAYNE: I would doubt whether the county court judge would be aware of the circumstances of a particular family. On the other hand, I think there are good

reasons for introducing jurisdiction over divorce into the county courts if—and this is by way of alternative—it is not feasible to establish specialized family courts. My own preference would be the establishment on a regional basis throughout Canada of special family courts to assume jurisdiction in matrimonial causes. If this cannot be done then certainly I would favour conferring such jurisdiction upon the county courts. I think that that is quite feasible under the Canadian Constitution. Perhaps I can refer to that later in the brief.

Mr. AIKEN: May I ask a supplementary question, Mr. Chairman?

Co-Chairman Mr. CAMERON: Yes.

Mr. AIKEN: Did I understand you to say, Professor Payne, that you would give the family courts direct jurisdiction—

Professor PAYNE: I did not say I would give to the family courts—

Mr. AIKEN: No, but to a type of family court.

Professor PAYNE: Yes, there would be a special type of family court. You could not give the present family courts that jurisdiction.

Mr. AIKEN: Did I understand you to mean that these courts would actually grant the decree?

Professor PAYNE: Yes, that is right. They would have the jurisdiction to decree divorce in appropriate circumstances.

Mr. AIKEN: Have you thought about the possibility of giving jurisdiction to refer ancillary matters to the existing family courts?

Professor PAYNE: I think you will have difficulties if you introduce a reference system, not the least of which would be the problem of delay. However, I think it is certainly a possibility that should be examined. I do not think it is an ideal solution. I doubt, on the other hand, whether an ideal solution is going to be attained having regard to the present division of jurisdiction between the federal Parliament and the provincial legislatures.

Co-Chairman Senator ROEBUCK: You see, our problem here is that we have no family courts except in certain cities. In some provinces there are almost no such arrangements at all. Nor do we have at hand a staff of trained people who can conduct such courts even if they were established. The development of the family courts is a matter of time. I think that they will develop in the course of time, but they are not ready yet to take the place of the county courts, which are to be found in every county of every province.

Professor PAYNE: I think extra judicial appointments will be necessary in any event. It is largely a question of whether you want to locate more judges in the Supreme Court of the County Court or in a specialized family court. I concede that there are problems in establishing special family courts. It may be possible to establish pilot projects for a conciliation type of court, and introduce them into certain major centres. This is something to which I will refer later when I examine the general problems of marriage counselling and conciliation procedures.

I refer next in my brief to the subject of alimony and maintenance, and I point out that the present legal position obliges the husband to support his wife, and there is no reciprocal obligation imposed upon the wife. She is under no obligation to support her husband, regardless of the facts.

I refer to the judgment of Mr. Justice Hofstadter in the case of *Doyle v. Doyle*, and I draw this decision to your attention. It is referred to at pages 48 to 50 of my brief. I think I can leave it to you to read these comments rather than deal with them at the present time.

The point I would make would be that at the present time the courts tend to determine questions of alimony by reference to the issue of fault, and it is my

submission that the courts should never permit fault to be decisive in applications for alimony and maintenance. At the present time fault is decisive since, in order to obtain the right to alimony or maintenance the wife must establish a matrimonial offense. So, for example if a husband, albeit wealthy, succumbs to insanity, no right to alimony or maintenance will vest in the wife in that situation. Other illustrations can no doubt be given.

I think a strong case could be made for the revision of the present legal regime relating to alimony and maintenance, and I think such revision should require fault to be reduced as a factor in applications for alimony or maintenance.

I do not know whether you want me to dwell on this at the present time. I could mention that not only does fault constitute the only basis for an application for alimony or maintenance, but also under certain provincial statutes the fault of the petitioner, and particularly the commission of adultery by the wife, will bar her right to alimony or maintenance regardless of mitigating circumstances, unless her adultery was connived at, condoned or condoned to by the conduct of the husband.

I do not know whether you wish to present any questions to me on this issue.

Co-Chairman Senator ROEBUCK: It is important in this way, that if we decide to exercise our ancillary rights, they would be chiefly with regard to alimony, the custody of children, maintenance, and the division of property, so that that question as to the inadequacy of the original arrangements with regard to alimony is very important to us. I read your brief on this with a great deal of interest, and particularly the thought that alimony should not be based entirely on the fault of the husband, but that the interests of the public should be considered.

Co-Chairman Mr. CAMERON: Probably you could develop it a little bit further, professor.

Professor PAYNE: I was wondering how best to develop it other than by referring to my brief. I think the arguments which favour the view that fault should not constitute the decisive factor appear in my brief at paragraph 119, and in the judgment of Mr. Justice Hofstader in the case of *Doyle v. Doyle* which is reproduced in paragraph 120.

In the first of these two paragraphs I observe—and I think it is a fair observation—that any decision on the issue of fault tends to be somewhat arbitrary since there is usually a substantial conflict in the evidence introduced before the court, and it is difficult, if not impossible, to evaluate the degree of fault attributable to either spouse. Secondly, regardless of the conduct of the spouses, society has an economic interest in alimony and maintenance proceedings since, if the wife, because of her own misconduct, is barred from receiving alimony or maintenance, public assistance may become necessary, and the economic burden is thereby shifted from the husband to the taxpayer.

I would suggest that if revision of the law relating to alimony or maintenance is contemplated, then serious consideration be given to the observations of Mr. Justice Hofstader in *Doyle v. Doyle*.

Incidentally, in the second paragraph of page 48 of my brief, you will observe that the learned judge states that from a procedural standpoint there is a dire need for an integrated court properly staffed and equipped with social aids to handle family matters so that the court dealing with the family will be able to prescribe comprehensive and final relief rather than piecemeal and temporary palliatives.

I am sure that those of you who have practised at the bar will be familiar with problems arising in cases where jurisdiction is seised in two or more courts in a single province concerning the single family. An integrated court would have the advantage of terminating the possibility of a conflict of jurisdiction. It would also have material advantages in providing in one centre or court a staff which is equipped to handle the needs of the parties in terms of counselling, conciliation and advice as to legal remedy.

Mr. Justice Hofstader refers to other procedural requirements, which appear in my brief at page 49, such as the need for sworn financial statements, etc. He further observes that procedural changes are not sufficient in themselves, and suggests that three factors should be taken into consideration in applications for alimony or maintenance: First, the fault factor; second, financial capacity, and third, need.

He observes that alimony should not be a reward for virtue nor a punishment for guilt, and that the element of fault should be de-emphasized. He further states that misconduct of the petitioner should not be a bar to alimony, except in cases of gross culpability, such as infidelity or abandonment.

I am not prepared to concede that the infidelity of the petitioner should necessarily constitute a total bar to alimony or maintenance. It is recognized that where marriage breakdown occurs the fault often rests with both spouses, and it is therefore proper to reduce the significance of the fault factor not only in relation to defences or bars to the remedy but also in relation to the grounds upon proof of which alimony may be ordered.

Mr. Justice Hofstader says that a practical approach in awarding alimony would be to proceed on the basis of what he calls "net need" which would require an examination of the wife's actual financial need less her current assets and earnings potential in relation to her husband's capacity to pay.

It is obvious that on applications for alimony the court must have regard to the totality of the facts in the particular case. Only if this is done, can we avoid the problem of "alimony drones", as certain alimony recipients have been labelled in American jurisdictions. Mr. Justice Hofstader emphasized this. Alimony was devised to protect married women because they had no power of ownership or earning capacity. The position has changed radically. The status and the rights of married women have undergone fundamental changes in the past 70 or 80 years. Mr. Justice Hofstader observes that inflated alimony awards are frequently not only disastrous to the man but psychologically deleterious to the woman. With this I agree.

For these reasons, then, I would suggest that consideration be given to revision of the law of alimony and maintenance.

Co-Chairman Mr. CAMERON: You advocate a more equitable principle?

Professor PAYNE: A more equitable principle and a more realistic principle which would give to those in need and at the same time would not promote a state of indolence on the part of alimony recipients.

I should observe that in paragraph 21, I point out that under the present law there is inequality between the spouses since the husband is under an obligation to support his wife but no reciprocal obligation is imposed on the wife. I recommend that legislation should be introduced imposing upon the wife an obligation to support her husband and the children of their family in cases where the husband is not able to make such provision. Such legislation has already been introduced in England and also in certain jurisdictions of the United States.

Senator BAIRD: I suppose in a case, for instance, where the husband is disabled?

Professor PAYNE: This is the point I am making, yes. Although, I think one could make a case for introducing a total reciprocal obligation leaving it to the court to exercise its discretion in the light of the totality of the facts of the particular case.

Co-Chairman Senator ROEBUCK: You say the present law does not impose on the woman an obligation to support the children?

Professor PAYNE: In practice, subject to—

Co-Chairman Senator ROEBUCK: It is not so in the Criminal Code.

Professor PAYNE: But the code is not really of too much assistance in this context, because the Criminal Code does not empower a court to make a financial award. It may penalize a parent who is neglecting his family, but it does not—

Co-Chairman Senator ROEBUCK: Or her family.

Professor PAYNE: Yes. It does not authorize the court to make a maintenance award.

Co-Chairman Mr. CAMERON: Are there any more questions, before Professor Payne leaves this part of his brief?

Co-Chairman Senator ROEBUCK: This is something which should interest you, Dr. Gershaw, this problem of alimony and support, particularly of the children.

Professor PAYNE: I might add that limited power does vest in the court to vary marriage settlements; and in certain jurisdictions, and indeed under the Imperial Act of 1857, a power vests in the court to order a wife to make payments to the children in certain circumstances. I believe this is referred to in my footnotes.

Co-Chairman Senator ROEBUCK: We could regulate the rights of the parties on the granting of the divorce as ancillary to the divorce and then leave the administration or leave the enforcement of those rights to the courts and the jurisdiction of the provinces.

Professor PAYNE: I think this is true. In respect of children, however, I think it must be recognized that you are going to have difficulty in enforcement unless you repose the responsibility with a special agency or a special guardian appointed by the court.

Co-Chairman Senator ROEBUCK: You cannot do that; that is provincial.

Professor PAYNE: That is uncertain. The constitutional issue arising in this context is difficult to resolve with any certainty.

I turn next to the brief:

5. MARRIAGE GUIDANCE AND MATRIMONIAL CONCILIATION

(122) It is submitted that the State should take positive steps to prevent marriage breakdown by providing for the development and expansion of marriage guidance and matrimonial conciliation services.

EDUCATION AND PREPARATION FOR MARRIAGE

(123) The stability and success of marriage and family life will depend in large measure upon the outlook of persons entering into marriage. Education for marriage and family life is, therefore, of fundamental importance.

(124) The Committee on Procedure in Matrimonial Causes, (Eng.), 1946-1947, has expressed the following opinion:

"We have been much impressed by the evidence of experienced workers in this field that the basic causes of marriage failure are to be found in false ideas and unsound emotional attitudes developed before marriage, in youth and even in childhood. The right time to correct those ideas and attitudes is before marriage. There is a need for a carefully graded system of general education for marriage, parenthood and family living to be available to all young people as they grow up, through the enlightened co-operation of their parents, teachers and pastors, and in addition specific preparation of engaged couples to give them instruction and guidance to ensure the success of their marriage. Valuable work is already being done on these lines and its extension is much to be desired."

It is submitted that difficulties encountered in married life can frequently be forestalled by education and preparation for marriage. Education for marriage and family life should, therefore, be recognized as being no less important than education for a profession or trade. Although specific programs providing education and preparation for marriage are already sponsored by various social agencies and by the churches, there is a great need to co-ordinate and expand these programs so as to make them available to all persons throughout Canada.

It is a rather tall order, but I am convinced that if the State is so disposed, it would be easy to co-ordinate more effective programs in this respect.

Co-Chairman Senator ROEBUCK: Are we not into the celebration of marriage now?

Professor PAYNE: I do not think so. You are into divorce and marriage breakdown avoidance. I think it would be quite proper for the federal Government to assume the responsibility for providing training facilities for social workers and stimulating the development of programs for marriage education by financial subsidy. I do not think that the provinces would be too concerned about the constitutional right of the federal Parliament to invest moneys in marriage counselling and conciliation. It is my opinion that the state should take more positive steps to educate the average Canadian to the responsibility of marriage.

Co-Chairman Mr. CAMERON: How would you work that out in detail?

Professor PAYNE: Are you asking me what sort of program I would envisage?

Co-Chairman Mr. CAMERON: The purpose is laudable, but how would you accomplish it?

Professor PAYNE: I do not feel especially competent to define what the content of the program should be. The expertise is available in Canada to develop such a program and co-ordinated scheme. The social work agencies and other interested organizations and disciplines could be relied upon to make their contribution. Incidentally, I should have included the churches in this context.

Co-Chairman Mr. CAMERON: Most of it would be voluntary?

Professor PAYNE: It would be voluntary but unless it gets some financial subsidy the likelihood is that the work will not be done, or will not be done in the most effective way.

Co-Chairman Mr. CAMERON: Does this mean that if one wants to get married one would have to produce a certificate of having gone through such a course and having understood the responsibilities?

Professor PAYNE: I feel that education for marriage might be developed as an integral part of the school curriculum. This would be one approach, but there are other devices, including the use of mass media. The need for marriage guidance or education is evident. My impression is that many persons enter into marriage, with romantic illusions or romantic delusions and fail to appreciate the responsibilities which are tied to the rights which accrue. For this purpose, education is necessary.

Co-Chairman Senator ROEBUCK: The City of Toronto and the Province of Ontario have published a marriage guidance book. The Toronto book is largely concerned with child culture but both books have some chapters on the responsibilities of marriage. They have recognized that as a provincial responsibility rather than a dominion one.

Professor PAYNE: There is a danger, if you say it is a provincial responsibility, that the provinces will not invest the necessary time and money. If it is a purely constitutional question, I would think that the general power of the federal Parliament to deal with matters of marriage and divorce and to legislate in these fields would entitle the federal Parliament to assume responsibility for developing marriage guidance and educational services.

As I said earlier, perhaps the problem is not very serious when viewed as a constitutional issue. I do not envisage the provinces being averse to receiving financial subsidies for such programs.

Mr. FOREST: There is certainly a need for marriage guidance and marriage education courses but I do not see that the provinces would have no objection to the federal Government promoting these courses. I think it is a purely provincial affair.

Professor PAYNE: It is a nice question and the issue should be put to the test.

My brief continues:

MATRIMONIAL CONCILIATION

(126) It is submitted that the State should seek to promote reconciliation between spouses who encounter disharmony in their marital relationship and that to achieve this result it is essential that the existing facilities for marriage guidance and matrimonial conciliation in Canada be expanded.

It is recommended that on every petition for matrimonial relief, the court should be required to consider the possibility of a reconciliation of the spouses through counselling and, where the court is satisfied that there is a reasonable prospect of reconciliation, it should be statutorily empowered to adjourn the proceedings and designate an agency or suitable person with training and experience in marriage counselling to assist the spouses in reconsidering their position. The court should also be empowered to make interim orders for the maintenance of a spouse and/or for the custody and maintenance of any child of the family where an adjournment is ordered for the purpose of affording the spouses an opportunity to become reconciled.

I recognize that this last recommendation tends to fly in the face of a measure which is designed to promote reconciliation. Nevertheless, I think it would be necessary.

In this context, I might say that legislative provision exists in Australia and New Zealand. Under the Matrimonial Causes Act, (Australia), 1959, and under the Matrimonial Proceedings Act, (New Zealand), 1963, the court is empowered to adjourn proceedings and refer parties for counselling to approved agencies or persons.

This power is not in fact exercised very frequently. I suggest that in many situations, once litigation has gone so far that the parties are appearing in court, the prospects of reconciliation are reduced. It is far more desirable to counsel the parties long before they are contemplating obtaining a decree of divorce. Nevertheless, in the exceptional case, it would be advisable for the court to have statutory power to refer the parties to counsellors with a view to reconciliation.

I might reiterate that in Australia in the last five years this power has been exercised very infrequently. The Law Commission in England observed that the power to adjourn proceedings and refer parties to counselling with a view to reconciliation has only been exercised in Australia fifteen times since 1951.

The Law Commission nevertheless recommends that this power be introduced in the English courts. Perhaps it will save only a few marriages, but on the basis of saving a few rather than no marriages, it is commendable. It is for this reason that I endorse the opinion that a power be given to the Canadian courts to adjourn proceedings and refer the parties to counsellors where the court considers that there is reasonable prospect of reconciliation.

I should perhaps emphasize that the effectiveness of any such legislation will in the final resort turn upon the availability of well qualified and trained personnel to act as counsellors and marriage conciliators. Marriage conciliation cannot be secured on the cheap. I do not think it is enough merely to have a statutory provision empowering the court to refer the parties to counsellors. One must ensure that counselling services are in fact available to effectively implement the purpose of such legislation.

On page 54 of the brief I adopt the reasoning expressed by the Royal Commission on Marriage and Divorce which sat in England from 1951 to 1955, which in turn adopted the reasoning expressed in the Report of the Denning Committee on Procedure in Matrimonial Causes, which sat in England in 1947, where it was emphasized that if counselling and conciliation is to be effective and successful, then it must take place in a frank and uninhibited atmosphere, and each spouse must have complete assurance that nothing he or she says will be disclosed or used to his or her prejudice in any subsequent matrimonial proceeding, except by consent.

These respective committees accordingly were of the opinion that communications made between a spouse and a marriage counsellor or conciliator should be privi-

leged—and I would share this opinion, and recommend that any such legal privilege should attach not only to the spouses but also to the counsellors or conciliators to whom the communications or admissions are made.

Provisions to this effect already exist under the Australian Matrimonial Causes Act and also under the New Zealand act.

I further observe that matrimonial conciliation may well be best secured through the existing voluntary agencies that devote their time and attention to marriage guidance and conciliation. There is reason to believe that these agencies may have restricted their programs because of the limited monetary resources available to them, and I would recommend that the voluntary agencies which presently engage in marriage guidance be encouraged to expand their services and, if such expansion is hampered by the lack of necessary funds, then these approved agencies should receive financial aid from the state.

I further suggest that the law of condonation and collusion should be revised, and I spoke to this on the occasion of our last meeting. I therefore recommend that condonation and collusion should constitute discretionary and not absolute bars to relief in matrimonial proceedings.

The next issue to which I direct my attention is the question of which court should exercise jurisdiction in matrimonial causes. At the present time jurisdiction in matrimonial causes is vested in the superior courts in each province. Obviously one must accept qualifications to this general statement in light of the fact that divorce procedures are not available at present through the judicial process where the parties are domiciled in Quebec or Newfoundland. An extensive and important jurisdiction in matrimonial proceedings is nevertheless exercised throughout Canada by Juvenile and Family Courts or by Magistrate's Courts. A valuable feature of these courts of summary jurisdiction is that they have attached to them trained probation officers and counsellors who often succeed in promoting reconciliation between disputing spouses. My suggestion is that, if jurisdiction in matrimonial causes continues to be vested exclusively in the Superior Courts, then adequate counselling and conciliation services should be available to persons who have recourse to these courts for matrimonial relief.

I am contemplating here not a massive influx of counsellors in these courts, but more in the nature of a skeleton staff which would be responsible for diagnosis with a view to referring the parties to outside counselling and consultation agencies.

I further submit that an examination should be undertaken to consider the feasibility of establishing throughout Canada special family courts to exercise an exclusive jurisdiction over all issues affecting and arising from the marital or familial relationship.

At this point I would state my objections to the superior courts retaining exclusive jurisdiction over matrimonial causes. The principal objections which may be raised against the exclusive exercise of jurisdiction over matrimonial causes by the superior courts are as follows. First, the procedure in the superior courts is involved and expensive. I might add that for domiciliaries of Quebec and Newfoundland, the legislative procedure is no less involved and is more expensive. Secondly, the superior courts are unfamiliar to most people and the procedure and atmosphere of these courts is not conducive to a therapeutic or conciliatory approach to marital or familial problems.

I would now point out what I consider to be the advantages of special family courts exercising exclusive jurisdiction over all issues affecting and arising from the marital or familial relationship.

The establishment of family courts to exercise an exclusive jurisdiction over all matters affecting the marital or familial relationship would have several advantages. In the first place, a single court with an exclusive jurisdiction over matrimonial and familial proceedings could be better equipped at less cost with expert counselling staff

and this would facilitate a therapeutic and conciliatory approach to marital and familial problems and thus place a greater emphasis upon reconciliation as an alternative to a legal decree.

I am fully aware of the fact that at this late stage of the proceedings reconciliation may not be the order of the day. On the other hand, I am not prepared to concede that the opportunity for reconciliation should be disregarded and that the procedure available should militate against the prospect of reconciliation which is quite clearly the case under the existing regime.

The second argument in favour of a family court is that a single court with an exclusive jurisdiction over matrimonial and familial proceedings would eliminate conflicts of jurisdiction where two courts in the same province are seised of the same problem and would also facilitate the more effective preparation of family case histories which would be of substantial value to the court in the disposition of proceedings for matrimonial or familial relief.

I accordingly submit the following recommendations:

It is recommended that all courts which exercise jurisdiction over matrimonial and familial proceedings should be provided with an adequate counselling staff and conciliation machinery. I have already observed that the family courts exercising summary jurisdiction in certain provinces have counselling staff, though not necessarily sufficient staff. My recommendation is that a divorce court—whichever court may be given jurisdiction in this context—should be provided with at least a diagnostic staff so that one could seek out the possibility of effecting reconciliations.

I draw the attention of the committee to the experience of certain jurisdictions in the United States where the conciliation court or family court—and they are not by any means identical—has been used to advantage even at the later stages when the parties have presented petitions for divorce. In Los Angeles County the rate of reconciliation achieved by the Conciliation Court is considerably higher than the national average—offhand I would suggest a figure of 50 per cent knowing full well that this is certainly a conservative estimate of its success in achieving reconciliation. In Toledo, the record of success in achieving reconciliation is less substantial than that in Los Angeles, being in the region of 30 to 35 per cent. Furthermore, the experience in these courts where conciliation and counselling services are utilised is that the end result is to reduce the problems not only in cases where reconciliation between the parties is achieved, but also in the cases where parties go on to obtain a divorce decree. Ancillary matters such as custody of children, visitation rights, and support are often worked out between the parties without the usual rancour which generally goes hand in hand with the more traditional and conventional divorce procedures.

I further recommend that specialised family courts should be considered as a possible means of dealing with the problem of the broken home today, and that such courts might be established on a regional basis to exercise exclusive jurisdiction in matrimonial and familial proceedings.

I recognize that this proposed reform is somewhat radical and its implementation may even be somewhat impracticable at the present time, by reason of the division of legislative powers under the Canadian Constitution. However, if its implementation is not considered desirable and/or practicable at the present time, it is my view that the county courts should exercise exclusive jurisdiction in undefended matrimonial causes, and in defended matrimonial causes with the consent of the parties. That is to say, in a defended cause either spouse should be empowered to insist upon a trial in the Supreme Court. In all cases—whether tried originally in the Supreme Court or the County Court—there should be a direct right of appeal to the court of appeal of the province.

Mr. HONEY: With reference to this may I point out that the former Chief Justice of Ontario, Chief Justice McRuer, who appeared before the committee, suggested that the jurisdiction might be concurrent; that county courts might have jurisdiction even in defended actions. I appreciate that your suggestion is substantially the same, but it may not be quite in line with what the former Chief Justice suggested. Do you have any comment on that?

Professor PAYNE: Well, the effect of my recommendation is that you might have concurrency to some extent. It may be that a case could be made out against my submission that a party should have the right to demand trial in the Supreme Court. I recall the submission of Mr. McRuer but I cannot recall the reasons he gave. To the extent that I differ from him, I would hope I might be given time to examine his submission before being asked to express an opinion as to how I would resolve our conflict, if any.

Co-Chairman Senator ROEBUCK: Mr. Justice McRuer also said that we should not take away the right of the individual to trial in the Supreme Court if he so desires. Do you think he was making a distinction between one and the other?

Professor PAYNE: I think it is arguable that the party who defends should have a right to insist on trial in the Supreme Court. If the party does not defend, I would doubt that such party would be justified in making a plea for trial in the Supreme Court rather than in the county court. The factor of costs is not irrelevant. It may be that Mr. McRuer and I do not really differ in the final analysis.

Co-Chairman Senator ROEBUCK: I imagine that one of his reasons for wanting to bring this within the jurisdiction of the county court is the fact that in some cases the Supreme Court judges visit the localities only twice a year, and to reach the Supreme Court otherwise it is necessary to travel to Toronto, in the case of Ontario, and to other similar centres in the cases of the other provinces.

Professor PAYNE: If I interpret your statement correctly, this might suggest that a right of trial in the Supreme Court should not be available as of right in a defended matrimonial cause. I think the difference between Mr. McRuer and myself may lie in my recommendation that there should be a right vested in a party in a defended cause to have the trial in the Supreme Court. I defer to his view to the extent that the county court should be authorized to exercise jurisdiction so that ancillary matters and interlocutory proceedings can be more effectively handled.

Co-Chairman Senator ROEBUCK: In ordinary litigation if an action is commenced in the county courts which, because of the amount of money involved, could also be within the jurisdiction of the Supreme Court, either of the litigants can move to have it tried in the Supreme Court.

Professor PAYNE: On such financial consideration, I believe so.

Co-Chairman Senator ROEBUCK: If the financial amount involved exceeds a certain amount. Could we not have that same provision apply in the case of a divorce action?

Professor PAYNE: I am not sure how it would apply in a divorce action. We must remember that attendant upon marriage breakdown, there is a distribution of matrimonial property, which not infrequently is of substantial value.

Senator ASELTINE: Is not this entirely a provincial matter? We have no jurisdiction in this.

Professor PAYNE: No, it is a federal matter.

Senator ASELTINE: We have no right to say to the Province of Ontario that under their act they cannot have a divorce action commenced in the county court.

Co-Chairman Senator ROEBUCK: We have done that. In giving jurisdiction to the courts in the Province of Ontario in the act of 1930 we specified that it should be in the Supreme Court. Now if we did that, we certainly have the right to specify that the right shall be in the county court or that the jurisdictions shall be concurrent.

Senator ASELTINE: They gained their jurisdiction by that act. Saskatchewan, Alberta and Manitoba—they are outside. They could make whatever regulations they wanted without coming to Parliament.

Professor PAYNE: British Columbia has already done so.

Senator ASELTINE: How about Nova Scotia?

Mr. MACEWAN: There is concurrent jurisdiction with the Supreme Court.

Co-Chairman Mr. CAMERON: I don't think there is any question about the right to put such a clause in any bill granting extended jurisdiction—that they could be tried by the supreme or the county court, and the Supreme Court or the County Court judges having concurrent jurisdiction. All we are debating now is whether they should be tried only by a Supreme Court judge when they are defended, and any difference of opinion between the Honourable Mr. McRuer and the witness is really minimal.

Professor PAYNE: Yes, I think so.

Senator BURCHILL: From the standpoint of the petitioner, how would the costs compare?

Co-Chairman Mr. CAMERON: They would probably be much less in the County Court.

Professor PAYNE: The next issue to which I directed my attention—

Senator ASELTINE: Is domicile the next?

Professor PAYNE: Yes.

Co-Chairman Mr. CAMERON: That is the big question.

Co-Chairman Senator ROEBUCK: We are pretty well agreed on it.

Professor PAYNE: I confine my submissions and inquiry to the question of jurisdiction in divorce. I do want to emphasize that my submissions are restricted to domicile as the basis for jurisdiction in divorce—and not other—proceedings. I do think it is important to recognize that distinctions presently exist between the jurisdictional bases for divorce, nullity and judicial separation. I did not refer to nullity and judicial separation in my brief, but if the committee so desires I could speak to this in due course.

In the brief, I first considered domicile as the basis of jurisdiction in divorce proceedings, and observed that the general rule in Canada today is that a court may exercise jurisdiction over divorce proceedings only if the parties are domiciled in the province wherein the proceedings are instituted. A married woman automatically acquires the domicile of her husband on marriage and retains his domicile so long as the marriage subsists. Since the cumulative effect of these rules would result in substantial hardship to a wife whose husband has deserted her and established a domicile in a foreign jurisdiction, section 2 of the Divorce Jurisdiction Act, R.S.C. 1952 Ch. 84 provides that a married woman who has been deserted by her husband for a period of two years and upwards may institute divorce proceedings in the courts of the province wherein the husband was domiciled immediately prior to the desertion.

The concept of the unity of domicile between spouses derives from the former common law doctrine whereby the husband and wife were regarded as one person—and, as is well known, the husband was the one. This doctrine has been eroded by the legal, social and economic emancipation of the married woman, and is no longer in accordance with modern trends. I accordingly recommend that the unity of domicile rule should be abolished. It might be considered that the hardship resulting from this rule to the married woman was effectively mitigated by the Divorce Jurisdiction Act to which I have already referred. However, it is submitted that more effective protection would be afforded to married women if legislation were adopted in Canada empowering the married woman to establish an independent domicile for the purpose and for this purpose only—of instituting matrimonial proceedings, including proceedings for the dissolution of marriage. I am not suggesting here recognition of the married woman's right to establish an independent domicile for all purposes, but only her right to do so for the purpose of bringing proceedings in a matrimonial cause before the provincial courts.

Co-Chairman Senator ROEBUCK: Would you mind reading paragraph 139 on page 58?

Professor PAYNE: I further submit that the provincial concept of domicile might well be replaced by a national concept, and that either spouse who is domiciled in Canada should be entitled to institute matrimonial proceedings in any province, provided that such spouse has resided in the province wherein relief is sought for not less than one year immediately preceding commencement of the proceedings.

There are two recommendations, then: the first, empowering the wife to establish an independent domicile; and the second, which is independent thereof, the establishment of a national concept of domicile to replace the existing provincial concept.

If I may bring your attention to the first one, the right of the wife to establish an independent domicile, I have observed that you might well contend that she is already effectively protected by the Divorce Jurisdiction Act, but I think it is questionable whether this Act would be as effective in according protection to the married woman as a statute empowering her to establish an independent domicile for the purpose of instituting matrimonial proceedings.

By way of example, I visualize a case where a woman leaves her parents' home in Ontario and marries a man who is domiciled in the Province of Nova Scotia. She goes to live with him in the Province of Nova Scotia. Thereafter he deserts her, leaves that province and acquires a domicile in the Province of Saskatchewan. In this situation, providing the wife remains in Nova Scotia, she will have adequate protection under the Divorce Jurisdiction Act because her husband was domiciled there at the time he deserted her. But consider the possibility of her returning to live with her parents.

Senator ASELTINE: She might have deserted her husband.

Professor PAYNE: Yes, but I am assuming the situation where the husband deserts the wife.

Senator ASELTINE: What position is the poor husband in then? He has to follow her to the new jurisdiction and pay all the costs of the action in that jurisdiction.

Professor PAYNE: The husband has no problem because he takes the domicile with him. The wife has a problem because not only does the husband take his domicile to where he goes, but he takes the wife's with him too.

Senator ASELTINE: I do not think it is as easy as all that.

Professor PAYNE: I am not sure it is all that difficult to prove a change of domicile, particularly in undefended actions which represent more than 90 per cent of all divorce petitions. I have sat through a number of applications both in English and Canadian courts, and very rarely is the issue of domicile mooted at length before the courts. It may be that this would indicate the problem is not as substantial in fact as it might appear to be in theory. To return to my hypothetical case, however, it would be quite possible to visualize the wife returning to her own parents in Ontario who might help out caring for the children while the wife goes to work. She could thus return to the Province of Ontario, and her right to sue for divorce would only be exercisable in the Province of Nova Scotia under the Divorce Jurisdiction Act, and in the Province of Saskatchewan where the husband is presently domiciled. In a situation like this, empowering the woman to establish an independent domicile would be more effective in protecting her rights.

On the issue of national domicile, I think strong arguments can be made to favour the recommendation which I have set out in paragraph 139.

Mr. HONEY: Is there any substantial difference between the two recommendations, because when you speak of national domicile you qualify it by saying the spouse must reside in a province for at least a year.

Professor PAYNE: Residence should not be equated with domicile.

Mr. HONEY: But to acquire domicile, under your second suggestion, the spouse must reside for a year in the province.

Professor PAYNE: To acquire domicile, no. My recommendation favours a national concept of domicile. Let us assume that a divorce petition is brought before the Ontario courts; the court would ask: "Is the petitioner or the respondent domiciled in Canada?"

Co-Chairman Senator ROEBUCK: That is, has she the intention of remaining permanently in Canada?

Professor PAYNE: Yes.

Co-Chairman Mr. CAMERON: Domicile is always based upon intention.

Professor PAYNE: I do not think anyone should identify the concept of residence with that of domicile. What I suggest is that, if you have a national concept of domicile, it would be desirable to qualify the right to proceed for divorce by imposing a further provincial residential requirement. One would therefore need to be domiciled in Canada and would also have to prove one year's residence in the province wherein the proceedings are instituted.

Senator ASELTINE: It seems to me to be a matrimonial—

A MEMBER: —muddle?

Senator ASELTINE: It naturally follows that when a person gets married he has to take that chance.

Professor PAYNE: I am sorry, but I do not follow your point.

Senator ASELTINE: Well, his wife might leave him and bring an action against him in the Yukon while he is living in Nova Scotia. He would have to follow her there in order to defend himself. He has to take the chance that that might happen when he gets married?

Co-Chairman Mr. CAMERON: You have to take that chance now.

Mr. PETERS: Mr. Chairman, I fail to understand what purpose, if any, that residence clause has. I am in complete agreement with a Canadian domicile, but if you have a Canadian domicile you have to establish that you are domiciled anywhere in Canada. By establishing Canadian domicile you are really, as I see it, providing the benefits of any provincial court to any person who may wish to bring an action. The residence clause is a restriction that is not necessary in our present domicile structure. You do not have a residence clause. You have to establish your domicile, but you do not establish residence necessarily with domicile.

Professor PAYNE: The additional requirement of residence is to prevent forum shopping.

Mr. PETERS: What?

Professor PAYNE: Forum shopping. In other words, if you have a national concept that applies then any person domiciled in Canada could obtain a remedy in any Canadian divorce court. Thus a prospective petitioner, when contemplating divorce, may not concern himself with the grounds—we will assume them to be uniform throughout the country—but may well say: "It is better from a financial standpoint that I proceed in the Province of Saskatchewan rather than the Provinces of Alberta, Ontario or Quebec." The object of the one-year residence clause is to restrict as far as possible forum shopping by a prospective litigant.

Mr. PETERS: You are assuming, firstly, that the provinces are going to have different divorce legislation and, secondly, that this person is a sort of a rich tourist who can visit around for this purpose. I would think that you are attaching this residence clause to some specific proposal, and it is not likely to be one of—perhaps I should ask you: Is it your intention that the residence clause should stand by itself no matter what happens in relation to any of the other divorce changes that may take place?

Professor PAYNE: If you mean: Should residence stand alone—

Mr. PETERS: Not residence, but domicile—the Canadian domicile recommendation.

Professor PAYNE: I think the Canadian domicile recommendation could be approved even if one disapproved of the previous recommendation concerning the married woman's right to acquire an independent domicile. On the other hand, I think you could accept both. You could accept both or either of them.

My comment on paragraph 139 is in part premised on the possibility of different divorce grounds in the Canadian provinces. Perhaps there might be different grounds in the province of Quebec. But, I think the important consideration is that forum shopping might exist not only for the purpose of establishing your grounds for divorce, but also for the purpose of securing superior property rights or support rights. On these ancillary matters, unless the federal Parliament sets out a general code, differences will exist in the various provinces, and I am prepared to concede in some circumstances that the parties will have or will find sufficient funds to enable them to select the best jurisdiction.

Co-Chairman Senator ROEBUCK: May I say a word here because I thoroughly agree with the speaker? The purpose of domicile as a condition of applying to the courts of Canada is to see that we do not become another Reno for people who live to the south, because domicile involves the intention of remaining—not so much the necessity of staying for a period, but the intention of becoming Canadian citizens or Canadian residents, and staying here permanently. That would keep the people who are shopping around for a divorce from leaving the United States and coming up here in the same way that people who live in Canada go to Mexico and other places.

Now, the idea of residence as a condition for access to the courts is this: Supposing a couple are living in Halifax, and the husband decides to get a divorce, and he commences his action in British Columbia or, perhaps, the Yukon, as might be the case if he is entirely free to enter any court he likes. If you restrict the plaintiff to the place of residence then at least you have some *bona fides* in the choice of the court. So, you exclude the possibility of Canada being a divorce shop, and if you adopt the proposal that he must reside in the province in which his action is taken you stop either of them taking an unfair advantage of the other by starting the action in some distant province.

Mr. PETERS: Mr. Chairman, is it true that a man now by his domicile would be able to do just what you have suggested? He would be able to take his domicile by certain established principles, and without the residence clause. He would be able to establish himself in a new domicile. The only advantage we have in having a Canadian domicile is not for the husband, because he carries his domicile with him, within limits, but we are providing the wife with a Canadian domicile for this specific purpose and thus allowing her to separate her domicile from that of her husband. This is not likely to work in the reverse. I think you would have to meet quite a number of conditions. In other words, it is the wife's protection that we are providing by this Canadian domicile rather than the husband's.

Co-Chairman Mr. CAMERON: What we have been discussing is all based on the protection of the wife, so far as I can understand it, because, as you say, the husband has his domicile and it goes with him when he moves from one province to another with the intention of residing permanently in the province to which he moves. This is not the case with respect to the wife.

Mr. PETERS: So really the domicile arrangements that we would make under the Matrimonial Causes Act would be—

Professor PAYNE: My recommendation would also benefit the husband to some extent. There are a number of cases wherein it has been impossible for the court to identify a husband petitioner with a particular province, although not at all difficult to

identify him with a country. My recommendation could well prove advantageous to the husband in such circumstances. So, it is not a one-way street, although I agree that most of the advantages would accrue to the married woman having regard to the nature of the present regime and the recommended change.

The next item in my brief is under the heading of, "Void and voidable marriages." In paragraph 140 I summarize the conditions which render a marriage void for want of capacity. In paragraph 141 I point to the fact that in New Zealand and Australia, statutory provision has been enacted whereby a marriage shall be void *ab initio* on proof of certain facts.

In Canada, legal capacity to marry is still set out in the common law. For example, the law relating to the effect of duress or mistake or insanity upon the marriage contract is regulated by the general common law of Canada and has not been reduced to statutory form. I question whether the Canadian Parliament should not favour the adoption of legislation corresponding to that set out in section 7 of the New Zealand Matrimonial Proceedings Act of 1963, which is reproduced on pages 58 and 59 of my brief.

You might note that that under section 7, subparagraph (b) there is a provision relating to the formalities of marriage. In Canada, such a provision would fall exclusively within provincial competence.

The other items under section 7 of the New Zealand act relate to the legal capacity to enter into a valid marriage, and the provision reads or declares that a marriage shall be void where at the time of the ceremony of marriage either party to the marriage was already married. Secondly, a marriage is void where, by reason of duress, mistake, insanity or otherwise, there was at the time of the marriage an absence of consent by either party to marriage to the other party. And, thirdly, a marriage is void where the parties to the marriage are within the prohibited degrees of relationship set out in the Marriage Act (New Zealand), 1955.

You might question whether there is any need to introduce similar legislation in Canada. Why not be satisfied with the common law of Canada? Well, problems can arise. At present, for example, it is questionable in Canada whether duress renders a marriage void or voidable, and this may have important consequences. This question is clearly resolved in New Zealand, since the Matrimonial Proceedings Act expressly declares that the marriage shall be void if by reason of duress there is absence of consent to the marriage.

On the question of marriage between persons within the prohibited degrees, section 7 (a) (iii) of the New Zealand Act expressly declares such marriages void. In Canada, today, however, such marriages are governed by provincial statutes which are by no means uniform. It is submitted that such marriages should be governed by legislative statute enacted by the Parliament of Canada and that such statute might be modelled on the provisions of the New Zealand act.

I now refer specifically to the age of marriage, and make the observation that there appears to be a relatively high incidence of marriage breakdown in cases where a spouse is married at a very early age. It is accordingly recommended that legislation should be enacted by the federal Parliament of Canada, raising the minimum legal age for marriage to 18 years. I further recommend that such legislation should provide that where a marriage has been celebrated between parties, one of whom has not attained the age of 18, it should be voidable at the instance of the person who was under age at the time of marriage.

I recognize that such legislation will not necessarily in itself be sufficient to reduce the incidence of marriage breakdown amongst persons marrying at an early age, and that it would be necessary to supplement it by more adequate provision for marriage education and guidance.

I am aware that bills have been introduced in the Parliament of Canada stipulating a minimum legal age to marry. I believe the age adopted in such legislation is generally 16.

Co-Chairman Senator ROEBUCK: I do not think it is within our jurisdiction as a committee to go into that. We are charged with the study of divorce, and certainly the age of marriage does not come within that definition.

Professor PAYNE: The reason I included it in my brief was because I looked at it from the standpoint that divorce represents a legal means of resolving a marriage breakdown situation. If the age of marriage is relevant to the incidence of marriage breakdown, then I feel it is a matter that could be brought before this committee. I do not really know whether your committee has authority under its terms of reference to consider this. My own feeling is that this committee might perhaps express an opinion on this point to Parliament, because what we are dealing with is the issue of marriage breakdown and the age of the parties at the time of the celebration of marriage is relevant to that issue. I think it is a matter on which this committee might express an opinion.

Co-Chairman Mr. CAMERON: We might comment on it, but we would not have jurisdiction or the right to make recommendations. I think we can comment on anything that would be an improvement in the situation regarding marriage and divorce in this country.

Professor PAYNE: I might turn to another matter which may be regarded as outside the terms of reference—I am not sure—namely, the question of capacity to marry a divorced wife's sister or divorced a husband's brother. Under sections 2 and 3 of the Marriage and Divorce Act, R.S.C., 1952 Ch. 176, a man may marry his deceased wife's sister and a woman may marry her deceased husband's brother. Perhaps I should point out that these sections also extend to other relationships.

In the light of conflicting decisions in *Re Schepull and Bekeschus and Provincial Secretary* [1954] O.R. 67 and in *Crickmay v. Crickmay* (1966) 57 D.L.R. (2d) 159 (B.C.), it is uncertain whether the relationship of affinity is terminated by divorce so as to entitle a man to marry his divorced wife's sister and a woman to marry her divorced husband's brother. It is recommended that legislation should be enacted to resolve this uncertainty and that such legislation should take the following form:

“When a decree for divorce has been made absolute, it shall be lawful for the respective parties to marry again as if the prior marriage had been dissolved by death.”

Perhaps I might advise you that this provision, or something corresponding to it, appears in the New Zealand Matrimonial Proceedings Act. Offhand, I do not know if it appears in the Australian statute.

Mr. PETERS: May I ask why this was in the act in the first place? You said it is a bar to marriage. In what way, and why?

Professor PAYNE: Are you asking me where this originates? This goes back presumably to the old English law.

Senator BURCHILL: Is that the Canadian law?

Professor PAYNE: As far as consanguinity and affinity is concerned, in Canada, you will find it under the provincial statutes—the Marriage Acts—although one might question whether it is proper for the provincial legislatures to enact such legislation since it deals with capacity to marry.

Co-Chairman Senator ROEBUCK: Is that not covered by the act of 1930?

Professor PAYNE: The act of 1930 only specifies deceased wife's sister, and not divorced wife's sister. My submission is that a man should be statutorily empowered to marry not only his deceased wife's sister but also his divorced wife's sister. Such legislation would resolve the judicial conflict which appears in the Schepull case and the Crickmay case which I have already cited.

Co-Chairman Mr. CAMERON: Is there a legitimate reason why this is under ecclesiastical law? I know it is a biblical restriction.

Professor PAYNE: I am reluctant to suggest any historical explanation. One must realise that at the time when the degrees of affinity and consanguinity were established, the ecclesiastical law did not recognize the dissolubility of marriage. A conflict exists, however, in the judicial decisions of Ontario and British Columbia. I think it should be resolved one way or another. I would resolve it by empowering a man to marry his divorced wife's sister as well as his deceased wife's sister.

Mr. PETERS: Was it a problem at one time?

Professor PAYNE: The distinction was not made in the old tables of degrees, because they derive from the ecclesiastical law, which did not admit of the possibility of dissolution of marriage and therefore, in a sense, it is a problem which has only arisen since divorce was made available through the judicial process.

The problem does exist, but it is not very significant. I am thinking in terms of numbers. I think an opportunity might be taken, however, to clarify the uncertainty existing by reason of conflicting Canadian decisions.

Co-Chairman Mr. CAMERON: You have not dealt with voidable marriages.

Professor PAYNE: On voidable marriages, I make no recommendations, and merely draw attention to section 9 of the English Matrimonial Causes Act, 1965, which supplements the common law ground of impotence, which renders a marriage voidable. It provides that a marriage shall be voidable in England on the ground of wilful refusal to consummate, on the ground of insanity, and on the ground of—

Senator ASELTINE: I wonder if the witness could tell us what is the common law now in so far as Canada is concerned with regard to these matters.

Professor PAYNE: With respect to voidable marriages, impotence renders a marriage voidable in Canada—beyond that point, we are in a realm of uncertainty.

Senator ASELTINE: Refusal to consummate the marriage?

Professor PAYNE: Wilful refusal to consummate the marriage does not render a marriage voidable in Canada: it does in England.

Senator ASELTINE: I have a case on that point right now.

Professor PAYNE: In Canada, the position is that wilful refusal may be regarded as being of evidential value in a case of alleged impotence. Certainly, where wilful refusal has continued for a period of time, the courts will be inclined to infer impotence from the fact of such refusal.

It has been suggested by the Canadian Bar Association—on the basis of a resolution which I drafted—that wilful refusal to consummate the marriage should be a ground for divorce. The Canadian Bar Association met in Winnipeg. Little time was spent in discussing this recommendation. It would be my contention that wilful refusal to consummate the marriage should not be introduced in any circumstances as a ground for divorce.

I think that to introduce wilful refusal as a ground for divorce, while retaining impotence as a ground for annulment, can only lead to difficulty.

I do not think that serious problems are presently encountered in cases of wilful refusal. In petitions for annulment today, wilful refusal to consummate the marriage may be regarded as evidence of incapacity to consummate, or impotence.

Co-Chairman Senator ROEBUCK: May I ask if marriage breakdown is made a part of our recommendations, would it be possible to give a divorce on the ground that marriage breakdown was occasioned or caused by a wilful refusal to consummate?

Professor PAYNE: My own inclination would be to say that, if one wishes to recognize marriage breakdown as a criterion for divorce, then there are two alternatives.

The first is to stipulate marriage breakdown as a ground for divorce, without qualification. I think that would present problems, especially if it provided the exclusive criterion for divorce, since it requires the court to undertake a thorough inquiry, sometimes called an inquisition, in all cases, both defended and undefended. It further requires that expertise be available either in the court, or to the court. At present, in Canada, I do not think we have this required expertise.

In the alternative, I have suggested that this committee consider the possibility of recognizing separation for three years as a ground for divorce, subject to certain provisos which are included in my brief and of which I spoke the last time I was here.

I would oppose any statutory formula which specifically stipulated that divorce should be granted "on proof of marriage breakdown due to drunkenness, insanity, wilful refusal to consummate, imprisonment, commuted death sentence, etc." It is impossible to stipulate a comprehensive list of the causes of marriage breakdown and any list which is not comprehensive will result in denial of relief in certain cases where the remedy of divorce should be available. It is for this reason I recommend separation for three years as a ground for divorce, recognizing that separation for such a period of time reflects the fact of marriage breakdown.

Co-Chairman Mr. CAMERON: You include some remarks on sociological research.

Professor PAYNE: They might fall outside the terms of reference of the committee. It is my thought that more research should be undertaken to determine the character of the family in Canada and to ascertain certain matters which are at present merely a subject for conjecture.

Mr. PETERS: In this regard, would you recommend to the committee the establishment of a permanent family sociological study that would report to Parliament periodically, every ten years, on the changing environment as viewed in divorce. It would show how divorce has changed from 30 years ago, to some degree. I gather from your study that to make it effective it would have to be brought to the attention of Parliament on occasions, for a decision. Would you be prepared to recommend that this be done on a formal basis to the Senate every ten years?

Professor PAYNE: I have reservations about recommending any detailed program. There exists now the Vanier Institute of the Family, which is collecting data on the family. I would not seek to impose an obligation on this Institute to report to Parliament. If its research leads to the formulation of recommendations for change in the legal or social structure, I would hope that interested parties would bridge the communication gap between the Institute and the Parliament of Canada. I am by no means assured that this will happen.

Mr. PETERS: Are you not, in studying this matter—and you have studied it in very great detail—struck with the fact that this sociological change in the atmosphere of our social structure has been much faster than our legislation has been able to keep up to it? Are you not struck by the fact that there will be no change in this aspect so long as there is not some machinery whereby we will be able to face the problem in a limited period, or within certain limitations?

Professor PAYNE: I would hope that there will be established some means of communication between the Vanier Institute on the one hand and Parliament on the other.

I would emphasize that it is extremely difficult to carry out sociological research on the family in Canada. There are indeed very few sociologists in Canada who specialize in the Canadian family. I would hope, however, that the Government might take steps to provide more comprehensive statistics relating to the family in Canada. At the present time, statistics are not readily available and are limited in their scope. Without adequate statistics, it is extremely difficult to undertake effective sociological inquiry.

Mr. PETERS: I am still of the opinion—and I think maybe other people have the same opinion—that unless a recommendation is made for a periodic review and becomes part of our legislation, we will have to wait until a crisis develops before we again face this problem.

I am thinking of something that happened recently where we had a commitment from the Government that the Senate divorce situation would be reviewed in five years. We did not insist on this being part of the law, and though we had a firm understanding that this would be done, I am doubtful if it will be. Provided this committee does not eliminate the need for it, I am doubtful if that review will take place, and this is why I am wondering why you are reluctant to recommend that there be a periodic review.

As an example, the Bank Act says that there will be a review of it every ten years, whether it is needed or not. If nothing new is available at the time, then you just reindorse it; if something is new, you look at it. But there is a necessity outside of Government initiation of having that review take place.

Professor PAYNE: Well, I favour review. I am reluctant to specify a particular program or period for review, probably because I recognize that sociological research in this particular context is going to be slow to evolve. It is not going to be appearing overnight. There is a backlog of work to be done.

Mr. PETERS: Let us provide a hypothetical case. Let us say we pass the marriage breakdown theory with no terms at all. Is it not your opinion that the Bar Association within a matter of a year will be able to make recommendations as to whether or not further change should take place? I am thinking of Australia where that happened, and New Zealand where that happened and England where they had a review within a matter of three years. They made major changes, really.

Professor PAYNE: If you are contemplating a radical departure from the present procedures, and I am not suggesting you should not, then you must distinguish the situations in England, Australia and New Zealand. In England the laws have evolved gradually. The big breakthrough occurred in 1937 when they added more faults grounds, namely desertion and cruelty, and the non-fault ground of insanity. The next major breakthrough in England, if it proves acceptable to Parliament will likely be the recognition of the breakdown principle through a separation clause which the Law Commission advocated in its recent report.

In Australia, legislation is modelled on the experience which existed in all the states. Indeed, I think you will find that the grounds for divorce are modelled on former state laws with minor variations being introduced, but no totally new grounds being introduced. The major change effected by the Australian Matrimonial Causes Act was that it introduced a national policy in respect of the laws of divorce and other matrimonial causes. But it built upon earlier foundations, namely, the laws on which the states had proceeded for many years.

If one were to introduce the marriage breakdown concept in Canada without qualification as to exclusive criterion for divorce, although I have much faith in the various organizations in this field, I have no reason to believe that they would be in a position to rectify the problem if that criterion proved fundamentally ineffectual, or impracticable. I think you would be back where you are today.

It may be that I am being conservative here, but in preparing my brief and my submissions to this committee concerning divorce grounds and other matters, I applied criteria similar to those applied by President Kennedy in respect of legislation. First, will they work? I suggest that my recommendations have been put to the test. You may not accept them in toto; you may reject them in toto. Nevertheless, it can be seen from the experience in Australia, New Zealand, England and the United States, that they work. The next question is will they help? I think it is quite clear that they will help. Will they pass? This is a matter for this committee and the Parliament of Canada.

Will the marriage breakdown theory work as the sole criterion for divorce? I have reservations when I face this first question. I have no reservations on the second question. I am convinced it will help, if it will work. The third question is one on which I have more reservations, though.

Co-Chairman Senator ROEBUCK: Would it be acceptable?

Professor PAYNE: I think this would go to the third question.

Mr. HONEY: Did the witness say he had more reservations on the third question?

Professor PAYNE: I have more reservations. That is to say, speaking personally, I have serious doubts as to whether the marriage breakdown theory would be acceptable to the federal Parliament, notwithstanding that several organizations have submitted recommendations to this effect. The primary question, however, is simply how does it work, if at all. My submission is that the cost of implementing the breakdown theory as the exclusive criterion for divorce would be excessive, because this theory by its nature implies an inquest into every matrimonial cause—not just into the defended cases which today represent only 7 per cent of all divorce cases. And it requires expertise which at the moment we do not have in Canada.

Mr. PETERS: I am still of the opinion that, when you make this suggestion for the fact that we should—and I have no argument with it because I think it is a much better system than using a legislative process of crises producing legislation, which is what always happens with legislation—if you use the idea of either the Vanier Family Society or social reform of institute, or whatever it may be, I would see a great advantage, if you were just to agree to carry your proposal to the extent of attaching this to the legislation so that there would be an opportunity on a regular basis of reviewing the social conditions of our nation in the light of what our experience has been, rather than our closing the legislation until—I mean I cannot see your recommending that we engage in the social study, no matter who does it, unless you are willing to tie that to the legislative process that, in my opinion, should flow from that study, either negatively or backwards or forwards.

We are plagued with the problem now of social change moving so rapidly that legislators just do not keep up to it. You can look at all this social legislation and it will fit into this category. It seems to me that recommendations to the committee might be worth while.

Professor PAYNE: I am in favour of Parliament doing everything possible to encourage and promote studies of sociological changes in the family. I do not consider that divorce legislation enacted in 1967 or 1968 will represent a final decision to be handed down from generation to generation. It will necessarily require consideration and reconsideration. I hesitate to lay down a specific program or a particular period within which I would call upon an institute or parties to report. I might perhaps draw to you attention that in New York they have a standing committee of the legislature which deals with matrimonial and family laws and it issues an annual report to the state legislature.

Co-Chairman Mr. CAMERON: Would this be a good point to terminate our discussion? Have you any further question, Mr. Peters?

Mr. PETERS: No, I was just thinking that the Canadian Bar Association had reported that 500,000 people in Canada were living common law, before any changes take place. It seems to me that the Bar association might be well advised to make a recommendation that would be more formal than just the recommendation to the agencies, which I have not heard mentioned before. But it should be able to make a recommendation which would be tied to the legislative process without the Government having to take the responsibility of making the review.

Co-Chairman Senator ROEBUCK: I think the figure was 200,000 and not 500,000, and in my view that is four or five times the actual number.

Professor Payne, it is my responsibility to express on the part of this committee our indebtedness to you and our gratitude for what you have done for us. As you know already, because I have said it two or three times to you, I consider your brief to be a monumental piece of work; it is comprehensive, it is clear; it is practical and it will be of the greatest service to us when we are preparing our report. If we had had to hire somebody to produce a document of this kind it would have been worth many hundreds of dollars. It is really a very valuable piece of work based, as it is, upon very long experience and, I would add, experience of the right type. You have been engaged for years in lecturing on this subject and you have been thinking and discussing the philosophy that is behind the subject that we are investigating, as well as the practical application of the law. Your knowledge of the subject in England, in New Zealand, Australia and the United States and Canada is simply immense.

I express, rather poorly I know, on behalf of every one of the members of this committee our admiration for the brief and for the contribution you have made. I hope we will be able to accomplish something as a result of it.

The committee adjourned.

APPENDIX "75"

Submission to the Special Joint Committee of
the Senate and House of Commons on Divorce
DIVORCE IN THE ORTHODOX CHURCH

by

The Very Reverend Dr. Pierre Popesco,
3490, Iberville Street, Montreal, Que.

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The Orthodox Church is that company of faithful Christians who are subject to the patriarchs of Constantinople, Antioch, Alexandria, Jerusalem, Moscow, Belgrade, Bucharest, to the Church of Greece, Georgia, Cyprus, Albania, Poland, Czechoslovakia, Finland and the Church of the Dispersion and Missions.

The present structure of the Orthodox Church is one of decentralization, founded both on the secular traditions of ancient Eastern patriarchs and on certain realities of the modern world.

Mutual relations between the autocephalic churches are governed by a historic hierarchy, in which the ecumenical patriarch of Constantinople is regarded as the undisputed head of the Orthodox Church.

The present occupation of the ecumenical See is His Holiness Patriarch Athenagoras I.

The Orthodox Church has more than 180 million members, follows the same liturgy translated into the language of each people and accepts the teaching of the first eight centuries of Christianity as the exclusive rule of faith.

The Orthodox Church in Canada has 320,000 members, Christians.

Sources of Orthodox Church Canon Law are, besides the Holy Scriptures and Tradition, the canons contained in the Nomocanon composed in the year 833 which, over a long period of time, was ascribed to Photius.

These canons are:

1. The Apostolic Canons.
2. The canons of the Nicaean Ecumenical Synod—323
3. The canons of the Synod of Constantinople—381
4. The canons of the Synod of Ephesus—431
5. The canons of the Synod of Chalcedon—451
6. The canons of the Trullan Synod 691-692
7. The canons of the Synod of Nicaea—787

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3. The canons of provincial synods, namely: that of Ancyra 314; of Neocaesarea 314-325; of Gangra 340; of Antioch 341; of Laodicea 343; of Constantinople held under Nectarius 394; of Carthage 419; of Constantinople 861 and 879.

4. The canons of the Holy Fathers, namely: (a) of Denys of Alexandria 265; of Gregory of Neocaesarea 270; of Peter of Alexandria 311; of Timothy of Alexandria 385; of Gregory the Theologian 389; of Amphilochius of Iconium 395; of Gregory of Nyssa 395; of Theophilus of Alexandria 412; of Cyril of Alexandria 444; of Genadius of Constantinople 471; of Tarasios of Constantinople 809.

In the "Athenian Syntagma", to these canons were added, under the title of Διαφορά several canonical prescriptions taken from the works of Saint Basil the Great, John Chrysostom and St. Athanasius, in addition to the synodal responses of the Patriarch Nicolas of Constantinople 1086-1111, the canons of the martyr, Nicephorus 818, and the Κανονικὸν of John the Hermit.

The "Athenian Syntagma", published in Athens by Raly and Potlis 1852-59, forms a universal and official ecclesiastical collection, and is so recognized by the highest authorities of the different national churches.

It should be observed that in the Orthodox Church the legislative authority is exercised "sinodally". After the ecumenical synods, the legislative authority is held by the ecumenical synods, the legislative authority is held by the synods formed by the bishops of the different autocephalic churches. The most important legislative activity was that of the patriarchal synod of Constantinople, in which bishops and patriarchs belonging to areas under Turkish domination frequently participated. The decisions of the Constantinople Church are followed by the entire Orthodox Church.

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Lastly, it must not be forgotten that the Orthodox Church still accepts the principle found in chapter 28 of the first title of the Nomocanon in XIV titles, in which it is stated: "In matters for which the canons provide no solution, we must abide by the civil laws."¹

The Orthodox Church could the more readily admit this principle inasmuch as the Greco-Roman emperors acknowledged the Church's laws to be as compulsory as those of the State by decreeing that any law contrary to the canons would no longer have any force. Where a conflict existed between the civil laws and the canons, the Orthodox Church, following Belsanon's opinion, recognized that "the canons have more authority than the laws of the State because, having been established and confirmed by the Holy

¹ Syntagma 1.68.

Fathers and by the emperors, they hold the same rank as the Holy Scriptures, while the laws of the State, being solely the work of the emperors, cannot have the same force as the Holy Scriptures and the canons.¹

One of the most disputed of questions, in the year 1054, was the separation of the churches. Because of the seriousness of that act and the unfortunate consequences respecting the unity and splendour of the Christian Church, each individual church throws the blame on the other.

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THE TEACHING OF THE ORTHODOX CHURCH ON DIVORCE

The purpose of this work is not to make a comparative study of religious legislation, nor to exhibit the arguments for or against divorce. On this latter subject, as Mr. Glasson remarks, all shades of opinion have been collected and every solution tried.²

We ourselves share the opinion of Edmond Willequet who contends that the institution of divorce does not proceed from a feeling of scorn for the marriage tie, but quite the contrary; it rather bears testimony to the care taken by lawmakers to maintain the institution of marriage in the highest possible esteem. "Divorce, he says, cures the ills born of ill-assorted marriages, restores not only their inner purpose to the sexes, but prevents public opinion from attributing to marriage itself disorders the distressful spectacle of which is apparently in full view. Far from being hostile to marriage, divorce is its complement."³

It is our intention simply to expound the teaching of the Orthodox Church in respect of cases in which divorce is allowed, it being clearly understood that *that Church maintains, in principle, the unity and indissolubility of marriage.*

In accordance with that teaching, acceptance of divorce on certain grounds does not mean that man is putting asunder that which God has joined together, for, as the Church, in God's name, unites a couple, so also, in God's name, may she separate them, when the union contracted no longer corresponds to the Creator's intention. The Church was founded to make use of the "power of the keys"⁴; the more so in that in this question of divorce a divine dispensation is contained in the words reported in Saint Matthew.⁵

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The progression of the New Testament in respect of the Old, in the matter with which we are concerned, resides in the fact that the Lord did away with the death penalty inflicted on the adulterous woman under the laws of Moses, by making adultery, henceforth the only ground for divorce, to result in the dissolution of the marriage bond and by allowing divorced persons the right to contract a second marriage. It is clear that in interpreting the wording of the Gospel we must make a comparison, not with our modern institutions, but rather with the social environment of the Jews at the time of Christ and with the Mosaic institutions which allowed divorce and remarriage of divorced persons. According to Orthodox Church teaching the exception "except it be for adultery" is applicable both to the principle of the indissolubility of marriage and to the principle of prohibition of a second marriage.

¹ Syntagma 1.38.

² Glasson: Civil Marriage and Divorce, 2nd edition, p. 492.

³ Willequet, Edmond: Divorce, p. 8.

⁴ Matth. XII, 31-20.

⁵ Op. cit. XIX, 9. v. 32.

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INDISSOLUBILITY OF MARRIAGE

In conformity with the words of Christ, the Orthodox Church has vigorously affirmed the principle of the unity and indissolubility of marriage.¹ Marriage, for the Orthodox Church, consists in the complete and indissoluble union of husband and wife who, in that relationship, not only have the same rights and obligations the one towards the other, but become one flesh and one blood.

The Orthodox Church sees, in marriage, both a civil contract and a sacrament; it is from this latter characteristic that indissolubility of marriage is derived.

A number of important passages in the Holy Scriptures express the principle of indissolubility. There we read: "But I say unto you, That whosoever shall put away his wife, saving for the cause of fornication, maketh her to commit adultery: and he that shall marry her that is put away, committeth adultery."² "What therefore God hath joined together, let no man put asunder."³

"For the woman which hath an husband is bound by the law to her husband so long as he liveth; but if the husband be dead, she is loosed from the law of her husband."⁴ "And unto the married I command, yet not I, but the Lord, Let not the wife depart from her husband; but and if she depart, let her remain unmarried, or be reconciled to her husband: and let not the husband put away his wife."⁵

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With the teaching of the Lord and his apostles being so clear, it is fully understandable that all the doctors of the Church, without exception, taught the same truth. For example: Saint Justin the Martyr, Clement of Alexandria, Saint Basil, Saint John Chrysostom, Saint Cyril of Alexandria, as well as others.⁶

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THE EXCEPTION, ADULTERY

The Lord has indicated only one ground for dissolving marriage, namely unfaithfulness, which is the violation of the conjugal tie by either husband or wife. "And I say unto you, that whosoever shall put away his wife, except it be for fornication, and shall marry another, committeth adultery; and he that shall marry her that is put away, committeth adultery."⁷ "But I say to you, that whosoever shall put away his wife, excepting for the cause of fornication, maketh her to commit adultery: and he that shall marry her that is put away, committeth adultery."⁸

For that reason, the canons of the holy synods and the rules of the Holy Fathers give only that ground for the dissolution of marriage; however, they observe that even in this case the bond may be maintained by the reconciliation of husband and wife.⁹ The passages from Saint Matthew referred to above have given rise to much controversy. The adversaries of divorce, unable to deny the authenticity of the texts in question, have issued a number of hypotheses so as to brush aside the dissolubility of marriage, even in the case of adultery.

¹ Matth. XIX, 6; Milas Nicodem. Dreptul Biseriosc Oriental, Bucuresti 1915, p. 517.

² Matth. V, 32; XIX, 9—Mark X, 11, 12; Luke XVI, 12; Paul I Cor. VII, 10, 11.

³ Matth. XIX, 6; Mark X, 9.

⁴ Romans VII, 2.

⁵ I Corinth. VII, 10.

⁶ Justin, Apolog. I No. 6; Clem. Alex. Strom. II, 23; III, 11; Saint Basil: Exameron, Vol. VII, No. 5; Chrysost. Epist. ad. Syriac CXXV; Epiph. Expos. Fidei Cathol. No. XXI; Haer LIX, No. 46; Cyril Alex. to Malach. No. 28; Theodoret & I Corinth. VII, 11; Lactantius, Instit. div. VI, 23.

⁷ Matth. XIX, 9.

⁸ Matth. V, 32.

⁹ Neocaesarean Council, c; Council of Carth. c. 115; Saint Basil, Rules: 9, 21, 39, 48. The VI Ecum. Council. c. 17.

As our purpose is not to give an exegesis, we shall simply summarize them.

Certain writers contend that the word *πορνεία* means fornication prior to marriage. Such an opinion cannot be accepted because:

- (a) the context shows it is speaking of a marriage regularly contracted;
 - (b) the Lord does not use the word on any other occasion to speak of fornication prior to marriage, and lastly,
 - (c) means adultery in the Old and New Testaments.
- Because of these difficulties, other explanations have been proposed.

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For some, the expression *παρεκτός λόγου πορνείας* could be an exclamation and might have the following meaning: Whoever puts away his wife—may the very idea of adulterous relations be removed far from me, I will not speak of such a thing—causes her to commit adultery. Such a so-called explanation contradicts the wording.

And others suggest that the relative pronoun in the second part of the text be repeated. The meaning would then be: Not only the one who puts away his wife for any cause other than adultery without marrying another commits adultery, but also the one who puts her away because of adultery and marries another. To the Orthodox Church, as we have already stated, the expression *παρεκτός λόγου πορνείας* refers to the first part of the sentence as much as it does to the second.

Catholic writers themselves recognize this.¹

If Mark, Luke and Paul do not mention adultery as grounds for divorce, it is because they did not deem it necessary to write on a matter of which everyone was aware at that period.

In Mark, Luke and Paul, the expression, excepting for the cause of adultery, is taken for granted, it is implicitly understood.

In addition to arguments based on texts, the Orthodox Church invokes humanitarian reasons in support of its teaching. Indeed, an injustice is committed if, when one of the spouses has not respected the sanctity of the marriage bond, violating one's pledged troth by adultery, the innocent spouse is deprived of the natural right to marry, for the lifetime of the guilty spouse. Such an assertion is contrary to reason, as Origen remarked in the third century. Such violation of human nature is nowhere recommended in the Holy Scriptures.² While allowing divorce on the grounds of adultery, the Orthodox Church considers it to be an exception which has not the same moral value as the rule, rather as an undesirable possibility, provoked by outside and inside causes.

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The grounds for divorce are, in relation to the principle of the indivisible oneness of the relationship of spouses, not inconsistencies in ecclesiastical and civil laws, but merely temporary accommodations to human frailty.

They are exceptions which do not abolish the rule; even as such they are not to be rejected, for their purpose is to avoid a greater evil that a harshness which takes nothing into account might cause.³

But even more important, it is out of respect for the supreme dignity of marriage that the Orthodox Church has deemed it necessary to enact laws regarding its dissolution, where conflicting circumstances have destroyed the intimate relationship between a husband and his wife.

The notion of adultery was early expanded to include not only physical union against the law, but also the notion of spiritual adultery. It is in this latter sense that it

¹ die Unauflöslichkeit der christlichen Ehe p. 202, Paderborn.

² I Cart. VII, 9.

³ Zhishman, das Eherecht der morgenlandischen Kirche, Wien 1964 p. 119.

is taken in Saint John VIII, 41, as also in *Hermas*, since, as stated by the latter, adultery does not only mean befouling one's body, but whoever performs the works of the heathen commits adultery.¹

Origen (254) also favours extension of the notion of adultery. In his comments on *Matth. XIX*, having spoken of the laws of the Old and New Testaments, he asks himself the question whether, by the expression *πορνεία* other faults of the wife might not also be included, such as, for instance, the crime of poisoning, infanticide, ransacking of the house, and whether dissolution of marriage should not be allowed on grounds as serious as are those.² Origen made the following remark: in this matter, reason and the Holy Scriptures do not appear to be in agreement, since Jesus, on the one hand, did not admit of any other legitimate ground for dissolution than *πορνεία*, while reason seems to indicate that other faults just as serious are sufficient grounds for dissolution.

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The writer takes the affirmative position, for Christ did not prohibit marriage in a general kind of way, he simply said: Whosoever shall put away his wife who is not an adulteress, maketh her to commit adultery.³

St. Ambrose likewise favours extension of the notion of adultery: All those are adulterers, he says, who pervert the truth of the faith and of wisdom,⁴ an opinion also shared by Saint Jerome (420), c.7c. XXXII, 7.

In "*De Sermone Domini in Monte*", ch. 12, No. 36, the blessed Augustine draws out the meaning of the word fornication, expressing himself as follows: "Since the Holy Scriptures constantly call idolatry fornication, and the apostle Paul calls greediness for riches idolatry, who can doubt that any guilty desire is rightly called fornication?"⁵

In ch. 16 (No. 43) the Father of the Church again brings up the question of the scriptural notion of fornication, by which putting away of the wife is allowed: he wonders if the word fornication is to be understood of a person who is guilty of unchastity, as understood by everybody, or if it is likewise to be taken in the sense given it in the Holy Scriptures, which, generally speaking, use the word fornication to express any degradation such as idolatry, avariciousness and any offence against the law in order to satisfy desires that are unpermitted.

Using I Cor. VIII, 12 as his authority, he relies in the affirmative, saying that the word fornication is to include, in addition to carnal adultery, unbelief also, which is spiritual adultery.⁶

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He gives the same teaching a little farther on in the same chapter (No. 46): "If unbelief is fornication and idolatry is unbelief and if covetousness is idolatry, it is certain that covetousness is fornication also. Who can then exclude from the notion of fornication any guilty desires?" In like manner canon 4 of Gregory of Nyssa assimilates vices against nature to adultery, while Saint Basil, can. 7, and Theodore of Studium⁸ assimilate murder, poisoning and idolatry thereto.

The term "adultery" is frequently applied to usurpation of the episcopal office⁹ and to a marriage arbitrarily concluded before the first had been dissolved in the legal forms prescribed for particular grounds for divorce.¹⁰

¹ Migne, P.G. II 919.

² Migne, XIII, 1245.

³ *Matth. V*, 32.

⁴ Migne: P.L. XV, 1768.

⁵ Migne: P.L. XXXIV; 1247.

⁶ Migne: 1. c. 1252.

⁷ Migne: 1 c., 1253.

⁸ Migne: 1 c. XCIX. 974. 1010.

⁹ *Evagr. Hist. eccl. II. 8 Nicet. Paphalog. vit. Ignat. Patr. Const. Collecti X. 736.*

¹⁰ *Can. 48. Apost. can. 9 and 771 Saint Basil, 87 at Trullo; Clem. Alex. Strom. 2. 23. Bloptares, Synt. Atl. VI. 177.*

Expansion of the idea of fornication is also admitted by the Roman Catholic Church¹, applying it, of course, in the case of separation of body, which may be pronounced on the grounds given above, on "multiple grounds", as expressed in the new Codex juris canonici.

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THE TEACHING OF THE CHURCH FATHERS AND CHURCH COUNCILS OF THE FIRST EIGHT CENTURIES OF THE CHRISTIAN ERA

The Church Fathers allow dissolution of marriage in the case of adultery: All, commencing with Theophilus, bishop of Antioch (185), quote the text from Saint Matthew which states that marriage is indissoluble except on the grounds of adultery.

The first to allude to it was Hermas, in the second century of the Christian era.

In lib. II, mand. IV, cap. Ist of his work on "The Shepherd" (written about the year 145), Hermas, among other things, asks the shepherd who appeared to him in the form of an angel, whether a man, who had caught his wife in adultery, could, without committing sin, continue to live with her. In his reply, the angel makes a distinction, based on whether or not the man was aware of his wife's fault. In the latter case, by continuing the marriage relationship, he is guilty of no sin, but if he was aware of his wife's sin and she does not do penance, but on the contrary, persists in her adultery, he is equally guilty with her and participates in the adultery. To the question as to whether, if the wife wishes to return to her husband after she has done penance, she should or should not be taken back, he obtains the following instructions from the angel: "If the husband is unwilling to take her back, he commits a sin and renders himself very guilty; for on the contrary the one who has committed the sin and has done penance is to be taken back, but only once, since, in respect of God's servants, penance is allowed but once. It is because of this possibility of penance that the husband is not to marry another woman. This disposition, he adds, is valid both for the man and the woman."²

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He repeats the same principle a little farther on in relation to the subject of idolatry which he assimilates to adultery. It is because of this precept (of penance), he says, that you, men and women, are to remain unmarried, for in this way penance may perhaps take place.

It follows from this text that Hermas makes second marriage of the innocent party depend upon the penance of the guilty party and not on the idea of the absolute indissolubility of marriage; it follows further that, if the adulterous party falls into sin a second time, there is no longer any hindrance to the innocent party's marrying a second time.

The passage from Hermas has nevertheless given rise to a dispute which is far from finished; it should be observed that Hermas quotes no text: he simply reflects the morals of his time.

St. Justin, philosopher and martyr, about 167, takes a stand on divorce in both of his Apologies. In the first, ch. 15, the author quotes various texts to show the sublimity of the teaching of Christ concerning chastity; among these he also quotes Matthew V. 32, "he that shall marry her that is put away, committeth adultery", without, however, going into any further explanation. And then he continues: "As those who, in conformity with human laws, contract two marriages, are sinners in the eyes of our Master, so also are those who shall look on a woman to lust after her."³

¹ C. XI. C. XXXII 911, 4; c. VII. C. XXXI 911, 7 and the Vth Glory Sedomita; C.V.VI.C. XXVIII. 911. I.

² Migne P. G. II. 919.

³ Migne P. G. VI 349.

This passage presents some difficulties as regards interpretation of the expression duplex matrimonium. Are we to understand simultaneous bigamy, a further marriage following the death of one of the spouses or a second marriage of the divorced persons, allowed by the law of the 12 tables?

The context indicates that St. Justin was not blaming second marriages in general, but only a second marriage contracted before the first was dissolved.

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Justin speaks more clearly in his second apology.¹ In it he speaks of a heathen woman who had long lived a dissolute life and who later was converted to Christianity. She also tried to convert her husband, but he persisted in his licentious life, with the result that his wife wanted to separate from him, thinking herself guilty for continuing to co-habit with a husband who, against the laws of nature and against every right, had no other interest than to follow, in every possible way, a licentious life; nevertheless, made steadfast by her own prayers and quieted the hope of an improvement, she did violence to her own feelings and remained. But when she learned that her husband, who had gone to Alexandria, was leading a life that was worse than ever, she sent him what you (Romans) call repudium and separated herself from him, so that she might not be an accomplice in his sins by continuing to co-habit with him and sharing bed and board with him.

Later the husband withdrew the complaint formulated against her; nevertheless he remained divorced from her.

By these words we see that divorce is allowable. The ideas of Origen (254) on marriage and divorce are found in the comments on Matth. CXIV. Having spoken of Old and New Testament laws wherein are contained many provisions providing satisfaction for the weakness of human nature, and referring to I Cor. VII. 39: "The wife is bound as long as her husband liveth."

Origen mentions a custom then existing in a number of churches of his day to the effect that some ecclesiastical officers had allowed the wife to contract another marriage while her husband was still living. To justify the custom Origen adds that they had not so acted without a reason, for, because of human weakness and to avoid a worse evil it seems preferable to allow such a union.²

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Farther on Origen refutes the objection that the Jews might raise to the effect that Jesus Christ was allowing the putting away of a wife under the same conditions as Moses (Paul 24.1), that consequently the expression *πορνεία* in Matthew would mean the same as *ἄσχημον πρῶγμα* in Deut., by the consideration that in the Old Testament grounds for divorce cannot mean adultery because, according to the law, the latter was punishable by death, but must rather mean any other fault of which a wife is guilty; Christ did not allow dissolution of marriage on any other ground than that of adultery.

In a letter addressed to Amphilochius, bishop of Iconium and Metropolitan of Lycassonia, Saint Basil (379), among other things, wrote: "The decision of the Lord by which separation is not permitted except in the case of adultery, applies, in consequence of its meaning, both to husbands and to wives"³. But the custom does not stop there: it is more severe with regard to women. Custom ordains that wives are not to separate from their husbands, even when their husbands are living in adultery or fornication. I do not therefore know whether a woman who is living with a husband forsaken by his wife can be called an adulteress; the wife who has left her husband is surely the guilty party, whatever the ground on which the marriage was dissolved However, if the separation occurred because of the husband's misconduct, the taking of such action

¹ Migne: P. G. VI. 444.

² Migne: P. G. XIII. 1245.

³ Migne: P. G. XXX. 677.

finds no justification in ecclesiastical custom, for the wife is not even to separate from an unfaithful husband, but is rather under obligation to carry on right to the end, because of the uncertainty of the result, "for, how knowest thou, O wife, whether thou shalt save thy husband?"¹

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Therefore the wife who has forsaken her husband is an adulteress if she has taken another husband; but forbearance ought to be exercised towards the forsaken husband, and the woman who lives with such a husband must not be condemned.²

In the 31st oration³, after stating that a first marriage is legitimate, a second allowed and a third contrary to the law, St. Gregory Nazianzen (390) speaks of divorce in the following terms: "The (Mosaic) law allows divorce on any grounds, but Christ does not so allow it, but only on the grounds of fornication." Since Saint Gregory Nazianzen draws a comparison between Mosaic divorce and Christian divorce, it is clear that he allows it, in the case of fornication, with all the characteristics belonging to divorce in the old law, so bringing with the right to divorce, the right to remarry.

In his work *Πανέριον* (The Bread Basket), Saint Epiphanius of Salamis in Cyprus (413), expresses himself thus: "But when anyone is not satisfied with having had only one wife, either because of her recent death, or because for some other reason, whether fornication or adultery, or indeed some dishonourable reason, dissolution of the marriage has taken place, the Holy Scriptures do not blame such a man if he has contracted a new marriage with a second wife, or a woman with a second husband, nor are they excluded from the Church, nor from eternal life, but leniency is shown them because of their weakness; or so that he might have two wives at the same time, since one of them is still living, but in order that, being divorced from the first, he might contract a new union with a second wife, if it seem good to him. The Holy Scriptures and the Holy Church of God have compassion on such a man, especially if he be a man of piety and conducts himself according to God's laws.

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When he completes the Apostle's words of I Cor. VII, 10, "let not the wife depart from her husband" by the words of the Lord: "excepting for the cause of adultery", the Doctor of the Church indicates that the Lord's words and those of the Apostle are to be understood as legitimately permitting the putting away of the adulterous wife; that to him such dissolution of marriage is absolute, that is, giving right to remarriage, supporting his exegesis by verse 11. The Doctor of the Church indeed further explains this verse as follows: "But since dissolutions had taken place on grounds of abstinence and on other ostensible grounds, even as on grounds of small importance, the Apostle states that it would have been better if they had not occurred; but if the dissolution has taken place, the wife is to remain bound to her husband, and, though there is no question of physical union, she nevertheless will remain bound in this sense that she will not marry another husband."

Chrysostom therefore maintains the indissolubility of marriage only where a wife has separated from her husband on grounds of austerity, on other of ostensible grounds, or for reasons of small importance, but not in the case of a wife who separates from her husband on grounds of adultery. As he conceives it, adultery is a genuine ground for divorce, according to the law of Christ; indeed, it is clear he would also doubtless have mentioned adultery, in the contrary situation, in the reference indicated above, among the grounds that bring about only the outward dissolution of bed and board.

In support of this opinion, that the Doctor of the Church contends that a wife's

¹ I Cor. VII. 16.

² Comp. Can. 77; *ibid* 804.

³ Migne; XXVI, 289.

adultery dissolves the marriage bond, may also be added his exegesis of I Cor. VII, 12-15. "If anyone, whether husband or wife, has an unfaithful spouse, let her not put him away." Chrysostom asks: "What do you think? If he is unfaithful, he is to continue the conjugal life with his wife, but if he is an adulterer, he is no longer to do so? And yet adultery is a lesser sin than unbelief!". Why is the life in common allowed in this case while, in the case of a wife's adultery, the husband is not blamed for putting her away?

He solves this apparent contradiction thus: "Because in one case there remains the hope that the unfaithful party may be saved by means of the marriage, while in the other case the marriage has already been dissolved; and furthermore, in the former case (the case of spiritual adultery, that is, unbeliever) there remains the hope that the husband may be saved by the wife, his close friend and confidant; in the second case (carnal adultery) that cannot happen: for how could a wife, who for some time has left her husband and given herself to another in violation of the laws of marriage, win again the offended husband who, besides, has become almost a stranger to her? Still further, after adultery, the husband, in that case, is no longer her husband, while in the other case, even though she be an idolater, the wife does not lose her rights over her husband."¹

As regards a wife, he offers an identical solution in the homily on I Cor. VII, 39, 40:

"The divorced adulterous wife is no longer the wife of her first husband; so as not to dishonour himself by continuing conjugal relations with the unfaithful wife and so as not to encourage adultery, the husband is obliged to put her away."

Any doubts that might still be preferred against the opinion that Chrysostom regarded adultery as grounds for divorce in the sense of dissolving the bond are dissipated by his exegesis of verse 15.

"If the unbeliever wishes to depart, he may do so; this has come to be known as the 'privilegium paulinum', in which he understands it in the sense that the marriage is completely dissolved, and in which it is said that spiritual adultery, that is, unbelief, brings about the same consequences as carnal adultery. Indeed, in explaining verse 15 he continues thus: "If unbelief commands you to sacrifice to idols and, as his wife, to choose between participating in heathen practices or leaving the house, it is better in such case that the marriage be dissolved." In such case it is the unbeliever who provides the ground for dissolution, just as in the case of adultery it is the adulterous person who provides it.² By these words Chrysostom has clearly expressed the opinion that dissolution on the grounds of adultery is to be understood in the same sense as dissolution in the case of "privilegium paulinum", that is, in the sense of dissolution of the marriage bond.³

In his exegetical work dealing with worship in spirit and in truth, Lib. 8, Cyril of Alexandria 444, in a reference to Deut. 24:1, 4, makes the following remark: a wife divorced from her husband on legitimate grounds, and who has been dishonoured by the fact that another has taken her as his legitimate wife, is not dangerous but rather inconsiderate, as shown in Prov. XVIII, 22: "He that keepeth an adulteress, is foolish and wicked."⁴

In his comments on Matth. V, 5, 32, he adds that "it is not bills of divorce that dissolve marriage in the sight of God, but bad conduct."⁵

¹ Migne: P. G. LXI, 154ff.

² Migne: P. G. LXI, 155.

³ Denner, die Ehescheidung im neuen Testamente p. 79 Paderborn 1910.

⁴ Migne: P. G. LXVIII, 584.

⁵ Ibid LXXII, 380.

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Therefore, according to Cyril, there are "legitimate grounds" for divorce which are based on reason. Moreover, in the case of adultery, Cyril allows that a husband may marry a second time even during the lifetime of his adulterous wife.¹

The synods of the first centuries of Christianity largely reflect the teaching of the Fathers of the Church: marriage is indissoluble except in the case of adultery.

In the 9th canon of the Synod of Elvira (about 305 or 306) it treats of wives who "for no reason" forsake their husbands and marry others, and in the 10th canon, of those who forsake their husbands for reasons of adultery and contract new marriages.

In the former case communion is to be refused to such wives to the end of their days, in the latter it will be administered to them if the forsaken husband has died or if it appears necessary in case of mortal illness.

From the expression "without antecedent causes" the conclusion has been drawn that wives incur no penalty if they contract a new marriage after forsaking their husbands on just grounds. The remark has also been made that the canons only speak of the wives, which gives the impression that husbands might contract new marriages after putting away their adulterous wives.

Canon 10 of the Synod of Arles (314) recommends that the young husband who has caught his wife in adultery remain unmarried as long as possible, during the lifetime of his wife, even though she was an adulteress, but it is simply advice given without any sanctions.

The Synods of Neocaesarea (314-325) and *Laodicea* (314-381) are of interest because, in canons 3 and 7 of Neocaesarea and in the first of Laodicea, they deal with second marriage and other marriages that may still take place, and it is stated there that the matter does not relate to "successive bigamy", but to marriage during the lifetime of the first wife, a marriage which both synods acknowledge to be valid, to which only an ecclesiastical penalty is attached.

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In addition, canon 8 of the Synod of Neocaesarea forbids a married priest whose wife has committed adultery to continue the marriage, on pain of losing his priestly functions.

In Ireland St. Patrick held two synods with his suffragans, the first between 450-456, the date of the second, unknown.

Canon 27 of the second synod grants the right of remarriage to a husband who has put away his adulterous wife, assimilating adultery to natural death, and canon 28 considers the marriage to be dissolved in the case of adultery.

The same ideas are expressed by the Council of Vannes (465) in canon 2, which, like the Irish synods, is based on St. Matthew.

The Council of Aige (506) is still more tolerant. It only excommunicates persons who divorce their spouses and who remarry if they have not previously informed the bishops of the province of the ground for their divorce. (c.25).

The second Council of Orleans (533) forbids divorce on grounds of a disability subsequent to marriage; those who disobey will be excommunicated (can. 11).

The Council of Nantes (658) allows the husband to put away his adulterous wife, but forbids him to marry while she is living. The husband may be reconciled to his wife, but, in such case, both the husband and the wife will do penance for seven years (can. 12).

The Council of Hereford (673) expresses itself in the manner of the Fathers of the Church: none has the right to put away his legitimate wife except it be for fornication, and it adds that those who have put away their wives are to abstain from taking another if they wish to act as good Christians (Can. 10).

¹ Denner, o. cit. p. 70.

Canon 87 of the Trullan Synod calls the wife who marries another husband an adulteress, if she has forsaken her husband without cause, but the latter has the right to contract a second marriage, and neither he nor his second wife shall be regarded as adulterers.

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The Synod of Soissons, 744, forbids divorce, but certainly allows an exception in the case of adultery on the part of the wife (can. 9). The synods of Compiègne (757) and Verberie (758 art. 68) both allow divorce on various grounds.¹

Most of the penitential books allow divorce on a certain number of specified grounds: adultery, abandonment, captivity, impotence of husband, the servile condition of a wife ignored by her husband, conversion to Christianity of one of the spouses, and even by mutual consent.

With regard to the Orthodox Church, nothing much can be added to what has just been said. Indeed, Orthodox canon law can be considered to be definitely established by the 9th century, following the publication of the Nomocanon, long attributed to Photius. We have already emphasized how important is that canonical collection since, as we have said, it is the acceptance or rejection of a ground for divorce by it that forms the criterion in the matter with which we are dealing.

After the 9th century Orthodox theologians restricted themselves to comments on previous canonical provisions. Theophylactus 1107, archbishop of Ochrida; Eutlymius Zigabenus 1118, Zonaras, Alexis Aristenus, Theodore Balsamon.

We must add that Orthodox canonists see a confirmation of their teaching in the following facts:

(a) the attitude of the clergy, both Eastern and Western, which never protested against the legislation of the first Christian emperors, notably against that of Justinian, would tend to prove that such legislation was in accord with Christian principles, which princes of that period would never have dared disobey. Civil legislation enjoyed the

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same consideration in the East as in the West: the popes referred to it respectfully and used it, not only in ecclesiastical and civil administration, but also in the internal organizing of their courts.²

(b) from talks which, at Florence (1432) brought about the short-lived union of the two Churches, it may be concluded that the teaching of the Orthodox Church concerning the dissolubility of marriage was not regarded as contrary to Christian tradition, or, at the very least, it was not considered to be a dogma, but simply a matter for disciplinary action, for union would otherwise have been impossible.

The same may be said concerning partial unions which later took place: among the four conditions for the union of a part of the orthodox Roman Catholics of Transylvania 1699, to cite only one case, the question of divorce was not mentioned.²

At any rate, that argument is not new: it was invoked at the Council of Trent by Ostunensis: "The fact is," he states, "the practice of the Greeks did not begin at the time of the schism, nor in the period of the heresies for which they were condemned, but rather in the period in which the Greeks were united to the Apostolic See."

It is for that reason that, at the Council of Florence, Eugenius IV did not condemn them, even though they had refused to renounce their teaching.³

¹ Compiègne: can. 9, 11, 15, 16, 19, 21; Verberie: can. 2, 5, 9, 10, 11, 12, 17, 18.

² J. B. Vitra: *Juris Gaecorum historia et monumenta* II praefat XXXIV note 6. The four conditions are: the primary of the pope, consecration of the Host, purgatory and the Filioque of the Holy Spirit.

³ Theiner Acta II, 320-360.

(c) Likewise the Council of Trent did not condemn the practice of the Eastern Churches. It places its anathema on those who say that the Church was mistaken when it taught and teaches, in accordance with the teaching of the Gospel and of the Apostles, that marriage is not terminated by the adultery of one of the parties and that the innocent party may not marry another. (Sessio XXIV c.7).

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The history of that canon is well known: its final editing was the consequence not only of the intervention of the representatives of the Republic of Venice (August 11, 1563), drawing the attention of the Council to the unrest that could have occurred in the Venetian possessions in the East if the original wording had been maintained, but also of that of a great many Priests who asked that the teaching of the early Church Doctors be not condemned. In addition a number of them contended that an obstructing impediment against remarriage of divorced persons might be found in Scripture texts, but not a diximant impediment, the latter having only been introduced by the Constitution of the Church.¹

It was as a result of these discussions that the canon received the wording indicated above and that it now appears to be directed solely against Protestants.

Whether or not Canon 7, "*De Sacramento matrimonii*", contains a statement of dogma or is only confirmation of a point of discipline is a disputed matter²; however, we still believe that in our own day the question of dissolution of marriage does not form an impediment to the union of the Churches that is so desired.

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HISTORICAL SURVEY DIVORCE BY MUTUAL CONSENT

Roman law allowed divorce. At a time when "*conformatio*" marriage took place, dissolution was obtained under the opposite and difficult "*difformatio*" method.

Divorces became more easily obtainable when marriages were performed by means of the uses of the *coemptio*. To obtain a divorce it was necessary to invoke grounds provided in the law: adultery, drunkenness, sorcery.

Religious decadence and the new form of marriage, marriage by consent, which replaced the old forms, still further encouraged the relaxation of morals and, as a consequence, easier divorces.

Divorce by consent now corresponded to marriage by consent: marriage could be dissolved "*nudo consensu*" of the spouses.

In order to obtain a divorce by mutual consent the spouses required no justification; furthermore, such divorce did not harm them materially, as their respective rights were settled by mutual agreement. In respect of unilateral divorce (the *repudium*), Roman law distinguished between *divortium* "*bona gratia*" and *repudium* "*injustum*": the former was obtainable on grounds recognized by the law, but for which the spouse put away was not responsible, while the latter was deliberately brought about by one of the spouses who was unable to invoke legal grounds for the divorce. Lower Empire law recognizes these various aspects of divorce, but, on this occasion the *repudium* is the object of a subdivision different from the former: a distinction is made between divorce that results in a penalty against the guilty party (*cum damno*) and divorce providing no penalty (*bona gratia*), which is not to be confounded with divorce by mutual consent.³

¹ Esmein *op. cit.* II, p. 299.

² Perome: *De Matrimonio christiano*, Leodii, 1861, III, p. 4.

³ Nov. 117, Cap. 8-13.

In the previous chapter we showed the teaching of the Orthodox Church on the dissolution of marriage for a specified cause; it now remains to show its struggle in the fight against divorce in general, and especially against divorce by mutual consent, which managed to keep alive until the tenth century.

In the struggle against "*divortium ex consensu*" the difficulty arose from humanitarian notions from which its legal strength had been derived and which could not willingly be repudiated. Because of the profound penetration of the institution into all circumstances of life, it would frequently be a painful business to bring the special reasons for divorce into court or before public opinion, for example, in the case of adultery, to accuse powerful and wealthy accomplices, to render public ignominious treatment sustained, to destroy whole families by the exposure of things most delicate in nature and altogether private in character, and to provoke bitter enmities. And as little could implacable hatred and invincible antipathy, which are based on temperaments and often on inexplicable causes, be reduced to special grounds for divorce.¹

In spite of these difficulties, the Roman emperors clearly perceived that, in order to prevent the decline of morality, and, as a consequence, of the State, resulting from the facility of divorce "*ex consensu*", it was their duty to take restrictive measures.

In the year 18 Augustus tried to reduce the number of divorces by the "*Julia de coercendis adulteris*" law.

As in the past, divorce was to be effected without the intervention of the public authorities; however, observation of certain formalities were now required: the consent had to be confirmed by the statement of seven adult Roman citizens (S. XXIV, 2.9.).

A limitation of the right to divorce was also brought by the laws of "*Julia*" and "*Papia Poppaea*" about the year 9 of our era, under which marriage contracted between a freedwoman and her employer could no longer be dissolved. The Church, on its part, stood strongly against divorce. The canons have their basis in the New Testament, but in them the essential matter is not the prohibition of divorce, but the precept of the Lord and the prescriptions of Saint Paul according to which a divorced spouse has no right to remarry (can. 46 Apost. 102 Carth. 48 and 77 Saint Basil, 87 in Trullo), while the Fathers speak strongly against voluntary divorce, as, among others, did Saint Gregory of Nazianzen who asked Olympias to use every means to prevent the divorce of the daughter of Veranius by mutual consent (Ep. 176).

The Church's influence began to make itself felt in the political legislation. In the year 331 Constantine limited the "*repudium injustum*" by making it impossible for the husband to separate from his wife unless the latter had been guilty of adultery, pandering or poisoning. But the grounds on which a wife could put away her husband were reduced to murder, poisoning and despoiling of a grave (C. Theod. III, 16. 1).

The "*divortium bona gratia*" was also subjected to changes: for example, where a husband had gone to war, a wife could only remarry four years after his disappearance. Illegal separation resulted in pecuniary penalties being imposed on the spouses, and, in addition, a wife was deprived of the right to remarry. Divorce, "*ex mutuo consensu*", was not altered by Constantine (Cod. V. 17.7). His legislation, abolished by Julian in the year 363, was re-established and partly changed by Theodosius II and Valentinicus III in the year 449. In principle they were devoted to Constantine's law by which divorce was not to be permitted for every trifling reason; nevertheless, they considerably extended the right to obtain a divorce by the addition of a whole series of new grounds for divorce to those already in existence.

¹ Zhishman, op. art. p. 99.

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In order to get a divorce both spouses could invoke the following grounds: adultery of the other spouse, poisoning, theft, forgery, receiving and concealing stolen goods, piracy, debauchery, attempts on one's life. In addition, the wife could unilaterally divorce her husband for high treason, theft of animals and cruelty on the part of her husband. The husband could put away his wife when the latter became dissolute without authorization, or when, still without her husband's authorization, she attended the theatres and banquets. If the divorce took place where none of the grounds mentioned existed, severe penalties were laid upon those found guilty. A wife lost her dowry and the donation, "ante inuptias"; moreover, under pain of infamy she should not remarry before five years had elapsed. In the case of a divorce without justification, the husband was only subjected to pecuniary penalties (loss of dowry and the donation ante nuptias). Where there were grounds for divorce, the husband could after a one-year period, remarry the wife who had been put away; the dowry and the donation "ante nuptias" were awarded to the innocent party.

In the year 497 the emperor Anastasius declared that, where a marriage is dissolved by mutual consent when none of the reasons indicated by the emperors Theodosius II and Valentinicus III, in the year 449, exists, a wife may, after a year, marry again (Cod. V. 17.9).

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The right created by Theodosius lasted about a century, and it was only the important reign of Justinian I that brought new reforms to divorce legislation. In respect of this question, Justinian laid down as his primary principle that anything contracted between human beings may be dissolved. The stipulations "ne liceat divestere" were absolutely null and void. (Nov. XXII. C3.).

However, in the year 542, the same emperor, in the Novella 117, ch. 10, abolished divorce "ex consensu" except on grounds of piety. According to the Novella 117 there are two kinds of unilateral divorce (Repudium): divorce "cum damno" and divorce "bona gratia". The former is justified by the crime of high treason, attempts on one's life, adultery legally proved, and circumstances usually accompanying adultery or following thereupon.

These are considered to be: (a) on the husband's side: a wife's keeping company with other men, participation in banquets and the baths, the unauthorized absence of a wife from the conjugal home, frequenting of theatres and circuses without her husband's authorization; (b) on the wife's side: attempts made by a husband upon his wife's moral rectitude, falsely accusing her of adultery, keeping a concubine, continued adulterous relations in spite of repeated exhortations.

Divorce "bona gratia" was also made the subject of legislation by Justinian. Divorce on the grounds of disappearance, allowed by Constantine, was restricted by the Novella 22, ch. 14, the waiting period being fixed at ten years instead of four.

The Novella 117 no longer recognized those grounds for divorce. But divorce could be granted on the grounds of impotence after a test period of two years (L.10.C.5.17), and, according to the Novella 22, ch. 6, after three years. In addition the following grounds for divorce were recognized: captivity or slavery (Nov. 22, ch. 7; Novella 117, ch. 12), monastic vows, elevation to the episcopacy (Nov. 22, ch. 5, Nov. 117, ch. 12).

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Where illegal divorce occurred, a wife lost her dowry and was exiled for life to a convent, while a husband guilty in the same fashion lost the donation "propter nuptias" and, in addition, was subject to a penalty equal to one-third of the donation (Nov. 117, ch. 13).

The Novella 117 was later confirmed by the Novella 134, ch. 11. But, as noted in the Breviary of Theodore Hermopolitanus (Nov. 134 and 26), separation where no grounds existed remained valid: it is bad, said he, but it is valid.

Divorce by mutual consent, abolished by Justinian, was re-established in the year 566 by Justin II, his successor (The Novella 140). Justin II begins by declaring that there is nothing so worthy of esteem as is marriage which, ensuring an uninterrupted succession of families, forms the very basis of the State.

It is for that reason that he is anxious that marriage bring happiness to husband and wife, and that they, avoiding the suggestions of the Evil Spirit, do not separate without just cause.

But as such a state of perfection cannot be reached by all men, because of the difference in temperaments, which very often engenders a dangerous enmity between the spouses, he decided to remedy this situation, even more so because, in his opinion, when his father abolished divorce by consent, he had not obeyed the injunctions of his just and sure thinking, and had not done what was necessary in respect of the weakness of the human will.

There are many who, painfully enduring a marriage that had been entered into, have asked him, he says, to allow their marriage to be dissolved by mutual consent. He put off its solution for awhile, endeavouring to reconcile those who were dominated by disorderly sentiments and hatred. Sometimes some of them even reciprocally set traps for each other, using poison and other means which end in death, to such an extent that the very children of their marriage have been unable to reconcile them.

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For these reasons, Justin II decreed a return to the ancient right by which, with no damage, a marriage could be dissolved, "for if the marriage is established by the reciprocal will of the spouses, it is ordinary justice that it be dissolved *"ex consensu"* in the opposite situation, for which bills of divorce are the evident manifestation.

Lastly, Justin again confirms the previous decisions relating to marriage, the children by such marriage and the grounds for dissolution. Very important with regard to the development of the teaching concerning divorce, not only in the Orthodox Church, but also in civil legislation, is canon 87 of the Trullan Synod (692). That canon excludes divorce where no grounds exist, as well as divorce by mutual consent. The result was that the *Ecloga*, published (740) by the emperor Leon II and his son, Constantine, abolished divorce by mutual consent. Both emperors issued the following decree: "the wisdom of God, the Creator, has made us to understand the indissoluble union of those who, being legitimately married, live in Our Lord; for, having created man out of nothing, he did not create woman in the same manner, even though he could have done so, but he formed her out of the man, so as to establish the law that, since those two persons are one flesh, marriage is not dissoluble. For that reason when the woman, at the instigation of the serpent, approached her husband, offering him the bitter fruit, he did not separate her from her husband; in the same manner, when both disobeyed the commandment that had been given, God did not separate the man from his wife; he punished the fault that had been committed without dissolving the marriage. This important law was also confirmed by the words of the Creator: when the Pharisees asked him whether a man could separate himself from his wife for every cause, he replied that what God had joined together, man is not to put asunder, unless

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it be for fornication. That is the law we wish to follow also, and we do not intend to take other measures in relation thereto. But, since bad habits have enveloped most men, and a great many married couples are dissolving their marriages on trifling grounds, we have deemed it necessary to indicate one by one in this law the grounds on which marriages may be dissolved. (*Ecloga tit. XIII*).

After that introduction the following reasons for divorce are given:

1. Fornication of the wife.
2. Impotency of the husband.
3. Undertakings endangering the life of the other spouse.
4. Leprosy. All other causes for divorce, notably mental illness, are suppressed.

Forty years later, about the year 790, emperors Leon IV and Constantine found they had to take severe measures against those who brought about, together, a spiritual relationship to a degree that was prohibited (can. 53 in Trullo), so that they might thereupon obtain a divorce.¹

The same Novella condemned divorce by mutual consent, recalling that it is only permitted, in accordance with the Justinian law, for a pious purpose, which does not seem to be altogether in agreement with apostolic canon 8.

In spite of those prohibitions, there are good reasons for believing that divorce by mutual consent continued even after the Novella quoted above.

It is thus an explanation is given of the reasons why canons 115 and 123 of the Patriarch Nicephorus (806-815) do not declare divorce by consent to be null and void, and only impose a canonical penalty; on the other hand, it is seen from the *Ecloga privata aucta*, ch. 7, title II, that divorce by mutual consent was still being practised at the time that that collection was published, about 867.

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The collection bearing the name of Photius (Tit. XIII, ch. 4) does not go beyond a reminder that divorce by mutual consent was abolished by Justinian (Nov. 117), and then re-established by Justin II. From that single reference it would appear that divorce by mutual consent was still in effect about 883, because that collection makes only one final reference to the Novella 140 of Justin II. But, in his comments, Balsamon is more explicit: he shows that the Basilicas do not reproduce the Const. 9, tit. 17, lib. II of the Code that allows dissolution of marriage by consent. The fact that neither do the Basilicas reproduce chapter 10 of the Novella 117, abolishing divorce by consent, is of no importance, he says, since they have reproduced (lib. XXVIII, tit. 7, ch. 4) chapter 13 of the Novella 134 which confirms the Novella 117. Moreover, he observes that the Novella 140 of Justin II was not accepted in the Basilicas (Migne P.T. CIX 1192).

Victory against divorce by mutual consent was only fully won at the end of the 9th century. The Byzantine collections of that period all contain the prohibition of divorce by mutual consent.

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SECOND PART

CHAPTER I

CAUSES FOR THE DISSOLUTION OF MARRIAGE—CLASSIFICATION— DISSOLUTION OF BETROTHAL

A. The causes for divorce have fallen under various classifications. John Hadsdits, one of the first authors to deal with divorce in the Orthodox Church, divided them into two main groups, each having two subdivisions:

- (a) *Death*, (1) natural death, certain or presumed, (2) civil death.
- (b) *Fornication* or adultery, (1) certain, (2) presumed.⁴

¹ Zadoria. J. G. R. III. 49.

² Zhishman, op. cit. p. 1. 106.

³ The Prodiron XI, 4, Epanagoga, tit. XXI, Basilicas XXVIII, 7, 6. Peira XXV, 37, 62 LXVIII. 6.

⁴ John Hadsdits: Rissertatio de causis matrimonium dissociantibus Budae 1826.

In the first half of the 19th century, Theodore Mandies considered the following as causes for divorce: death, fornication and apostasy which, according to him, are the only canonical reasons for the dissolution of marriage.¹

The most widespread division and that which is generally adopted by canon lawyers and authors who have dealt with this matter, is that referred to in Novel 117 of Justinian, chapter 8, which divides the reasons for divorce as follows: (a) causes which entail penalties against the guilty and (b) causes which dissolve the marriage "bona gratia", i.e. without penalties against the spouses.

In spite of its antiquity and its practical importance, our preference goes to the division of causes for divorce into three groups according to their origin and their (occupation) acceptance or rejection by the canonical collections.

This division seems to us more legal and more in accordance with the development of ecclesiastical doctrine regarding divorce, because the Orthodox Church has not indiscriminately accepted all the causes for the dissolution of marriage established by the civil laws, but only those which are recognized as such by the Nomocanon which for a long time was attributed to Photius. The Nomocanon was made compulsory for

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the entire Orthodox Church by the synod held in Constantinople in the year 920. The cause for divorce established by the State, but which is not accepted in this collection, has no legal force from the viewpoint of ecclesiastical law and no divorce may be pronounced for such a cause. But, for acceptance in the above-mentioned collection, the cause for divorce acquires a canonical character and may serve as a cause for a canonically valid divorce. In our outline, we shall thus divide the causes for divorce as follows: (a) causes established by the Church in accordance with canonical sources, (b) causes established by civil legislation and accepted by the Church, (c) causes established by civil legislation and not accepted by the Church.²

B. *The betrothal* is the promise of marriage. In the Mosaic law, it had the value of marriage, and whoever had sexual relations with someone else's betrothed was punished as an adulterer. (Comp. Seut. XXII. 24).

After the exchange of symbols of betrothal, the betrothed woman received the name of spouse. It is in this sense that the Holy Virgin is called Joseph's spouse (Matth. I. 20).

In Roman law betrothal was considered as a contract which was accompanied in most cases by a "stipulatio poenae" which was valid in that case. It was also accompanied by certain formalities: an exchange of gifts, giving of earnest money or the kiss which the betrothed exchanged before witnesses. Whoever had sexual relations with a young woman who was betrothed in this manner, committed adultery, but betrothal which was entered into solely by means of verbal engagements, did not produce this effect (Cod. V.1.3. De sponsalibus). In the case of dissolution of betrothal, the betrothed woman had the right to act as husband, both against the fornicating betrothed and against the person which had committed adultery with her. (Basilian rule IX. 7.c. 17. and 2; LX, 58, c.8 heading 7, chap. 12 and 3 of the same book).

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Novel 109 by Leo the Philosopher and a Novel by Alexis Comnenus in the year 1083, imposed the religious blessing upon betrothal and made it one with marriage; since that time, it can only be dissolved in the same manner as perfect marriages. In

¹ Th. Mandies: *Dissertatio de causis connubium discindactibus*, Leipzig, 1849.

² Nicodem Milash: *Oreptul Biscericese Oriental*, p. 521, Bucuresti 1915.

principle, religious betrothal is indissoluble like marriage itself; it can only be dissolved for the following reasons:

(1) If the betrothal could not be made valid because the children were under the age of puberty.

(2) When the betrothed woman has been made pregnant by a person other than her betrothed. Leo the Philosopher who added this new cause for dissolution to the former ones set by the Cod. V.1, justifies it by the consideration that such relations, before marriage, prove the absence of loyalty and sincerity on the part of the betrothed woman towards her future husband and furthermore, they would not be a cause for perpetual disputes in the future family.¹

(3) Because of diversity of religion and dogmas.

(4) Because of moral depravity or

(5) Because of a change of social conditions.

(6) When marriage has been deferred since more than four years for a plausible reason, because of chronic illness, because of the death of parents, because of crimes entailing capital punishment or because of a lengthy trip undertaken out of necessity.

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(7) When the betrothal took place as a result of violence exercised by the Governor of the Province, against the will of the parents.

(8) When one of the parties takes up monastic life. In such cases, wedding gifts are returned, but no damages are due (Photius, *Nomoc. tit. 11.c.1.*).

(9) When the betrothed man became a decurion.

(10) When his fortune was confiscated or he was obliged to perform some service towards the State.²

The betrothal was also dissolved when the marriage could no longer take place because of some hindrance. The betrothal without religious blessing was not nullified: it had the force of a civil contract, and even constituted an impediment to marriage, in accordance with the ancient civil law, but the betrothed man, from the civil viewpoint, only was not considered bigamous in a case where he married after the death of his first betrothed. Byzantine civil laws and canon lawyers deal at great length with the dissolution of betrothal, but from the practical point of view, those prescriptions are without interest, because the Orthodox church, in order to avoid the latest consequences resulting from the complete union of betrothal and marriage—consequences which were sometimes unfortunate, namely for future clerics—has made provision to celebrate the religious betrothal and the wedding on the same day, at the same time, without discontinuity, so that in fact the question of the dissolution of religious betrothal no longer arises.

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I. THE CANONICAL CAUSES OF DIVORCE

ADULTERY³

A. *The notion of adultery:* As we have already shown in the doctrine of the Orthodox Church, adultery completely dissolves the conjugal bond. Greco-Roman civil legislation agrees on this point with the teaching of the Orthodox Church: Novel 117, c.8 and 2 cite adultery as a cause for divorce, immediately after the crime of high treason.

¹ Novel 93.

² Blastores, Migne, I.9. CXLIV 1190.

³ The causes for divorce are enumerated in the *Nomocanon XII*, 4 (*Synt. Ath. I* 294-301) and in Blastores I, 13 (*Synt. Ath. VI*, 175 and 179), and also in Latin in *Beveregii Synodicon II*, p. 73-75; Migne, *Biblogia graeco-latina* (IV) (*Nomocanon et CXLIV* (Matth. Blastares)).

By adultery we mean the violation of conjugal fidelity. However, the notion of adultery has not always been understood in the same manner: it has covered more or less ground according to the different definitions dealing with it.

According to the first definition, adultery is any sexual relation contrary to the laws, whether it be with a free person or with a married person. According to this conception, which has often been applied in the Church, the notion of adultery coincides with that of fornication.¹

The argument of those who confuse adultery and fornication is that there can only exist one single legitimate union of the husband and the wife and of the wife with the husband, and consequently, that which is not legitimate is unjust and contrary to law and whoever is not properly bound is in possession of a foreign bond, even though the latter does not have a master.²

The definition given by the Fathers of the Church is of a more restrained nature and holds as a principle that "*copula carnalis*" of a married person with a person other than the spouse constitutes adultery.³

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Although this definition was in keeping with the aspirations of the Church which was aiming at establishing legal equality between spouses, it was not accepted by the canonical law of the Orthodox Church, which in the end followed the opinion of St. Basil, which in fact amounts to the ancient Roman law modified by Byzantine law. In L. 6 and I Dig. XLVIII. 5. we read that every fornication committed with a virgin or a free woman is considered as adultery. But immediately thereafter, in the same law, we encounter the restriction, according to which adultery proper consists in relations with a married woman, and the term fornication (*stuprum*), is reserved to relations with a virgin, a free woman or with children.⁴

Byzantine legal experts have adopted this distinction between adultery and fornication: according to Harmenopoulos (*Manuale Legam. lib. VI. tit. I*) the definition of the *Julia de adulteris* law is abusive, because true adultery is that which is committed by the married woman.

The demarcation between fornication and adultery is also clearly drawn by the Fathers of the Church and by the canonical lawyers. The basis for the distinction is the consideration that, in the first case, it is the sexual instinct and its amorous passions which are gratified without infringing on the rights of another person, whereas adultery implies the violation of another person's rights which often goes hand in hand with attempts against the latter's life. In the case of fornication, the man has sexual relations with a free woman, whereas in the latter case, he has illicit relations with someone else's wife.⁵

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Fornication does not differ much from adultery⁶; but since the Fathers recommend indulgence, St. Gregory of Nyssa also accepts the above-mentioned distinction. Since adultery is thus a more serious sin than fornication, because of the prejudice it imposes on a third party, the penalties for adultery are equally more severe: the Fathers of the Church agree that the penalties for adultery should be doubled as compared to the penitence imposed on fornicators.

¹ Sig. XLVIII, 5, 6; Basil LX 37.8.

² St. Gregory of Nyssa, c. 4.

³ Tertoll de Monog. C. 9. Lactance div. Inst. VI. C-23; Chrysost. Homil. V in Thesal c. 4; De lib. rep. in I. Cor. VII 39; Augustin, de bono conjug. c. 4.

⁴ Cf. L. 34 and I D. XLVIII 5.

⁵ St. Gregory of Nyssa, c. 4.

⁶ I. Thesal. IV. 4.; Eccles. IX. 12.

St. Basil (Can. 21) makes the same distinction between adultery and fornication. A husband who has a legal wife and who has relations with a free woman is a fornicator and not an adulterer, for want of a canon condemning him as such. But he should be punished more severely than the unmarried man, who is guilty of fornication.

In fact, the latter has an excuse which the former, who only acted because of his intemperance and immoderate feelings, cannot invoke.

A wife must take back a husband guilty of fornication who has given up his misconduct, but a husband is obliged to turn an adulterous wife out of his house. St. Basil adds that justification for this measure is not easy to find, but custom will have it that way; he cites: Proverb XVIII. 22 and Jerem. III. I. The commentators state that the latter passage, "The woman shall no longer return to her husband" should be understood in terms of the husband who does not want to take her back; but if the husband forgives her, she must be taken back within a period of two years, in accordance with the Novels of Justinian and of Leo the Philosopher. And finally, it should be noted that the woman, who has made a vow of chastity and has then given way to the desires of the flesh, is adulterous, along with the man with whom she has sinned (Can. 60 St. Basil).

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The same applies to he who marries the betrothed of another man, during the latter's life (Can. 98 St. Basil and 98 of synod in Trullo). The Fathers of the Church very often quote the words of the Lord reported in St. Matth. XIX 9. and V. 32. Canonical lawyers interpret them in the sense that it is only he who turns out his non-divorced wife in terms of the law, who is guilty of adultery. By means of an *argumentum contrarium*, it is inferred that whoever turns out his wife for a just cause and marries another, whether free or divorced according to the legal conditions of Novel 117 of Justinian, is not guilty of adultery.¹

With regard to a divorced woman, the Fathers and canonical lawyers agree that she should remain unmarried (Can. St. Basil 48) because of the general terms in which the Lord expressed himself, without distinguishing whether she has been turned out for a just cause or not. She only becomes adulterous though, if she contracts a new union, in view of the fact that simply abandoning her husband does not make her adulterous.²

Although a wife was not the cause for the divorce, but the husband, she will be condemned as adulterous, if, failing to become reconciled with him, she contracts a new union.

The following question has been asked: what penalty was imposed upon the husband of the wife who was unjustly turned out, the husband who was the cause and the author of the adultery if the woman contracted a new marriage? Some have considered him adulterous, but this is not the opinion of Balsamon, since the wife is free not to remarry according to her will and thus not to become adulterous.³

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He should thus not be considered adulterous, but he will be dealt with according to civil laws, which forbids divorce without just cause and here Balsamon refers us to Novel 134 cap. 11, reproduced by the Basilian rule: book XXVIII tit. VII. c.6. Christianity has upheld the principle of the equality of rights of the spouses. This principle is affirmed for instance by St. Basil in his canon 9 and we also find it in the Roman legislation of the Lower Empire, which applied without distinction the penalties for reckless divorce to husband and wife.

¹ Migne: P, G. CXXXVIII, 134.

² Migne: CXXXVIII. 621.

³ Ibid. 729

However, in that same canon 9, St. Basil affirms that the custom is more severe towards women, who according to it should make it an absolute duty never to abandon their husband, because even though they left him because of ill-treatment, it would have been better to suffer the blows than to separate; the squandering of the dowery does not constitute a just cause, and neither does the husband's fornication.

This practice would be all the more justified, since the Apostle himself does not order the wife to separate herself from her unfaithful husband, but on the contrary, he enjoins her to remain with him because of the uncertain result, because the wife may perhaps save her husband.¹

For these reasons, St. Basil affirms that the wife who abandons her husband, no matter for what reason, and who marries another man, is adulterous, but the abandoned man is not guilty, since the responsibility falls entirely upon the woman who has abandoned him. In this case, the second woman who cohabits with the abandoned husband, is not adulterous.

The canonical lawyers add, that the husband only becomes adulterous when he separates himself, without just cause, from his wife and marries another woman because he imposes adultery upon his former wife, and likewise, the woman who lives with a husband who has turned his legal wife out without reason, is adulterous, because she takes the husband of another woman.

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It goes without saying that adultery must have been committed intentionally. The purpose must be sought for in any crime, and St. Basil does this at great length when examining the circumstances in which adultery has not been committed intentionally. (Can. 8 St. Basil). Consequently, there is no adultery when relations took place by error or when the woman was raped. St. Basil states it formally in the case of fornication (Can. 49) and St. Gregory the Thaumaturge does so for the captive women who are raped by barbarians, unless they had already entered upon guilty relations prior to their captivity (Can. II. This is only the confirmation of the ancient principle: "*Vim passa mulier lege non tenetur*").²

B. THE PENALTIES FOR ADULTERY

I. The ecclesiastical penalties: Adultery is such a serious sin, that St. Basil likens the adulterous person to homicides, sodomites, makers of poison, idolaters, to whom he inflict a penance of 15 years (c. 7 and 58). St. Gregory of Nyssa punishes adultery with 18 years of penance, which is double the penalty for fornication. (can.4).

The synods of Ancyra (can.20) and the 6th oecumenical gathering in Trullo, show more indulgence towards people guilty of adultery, to whom they inflict a penalty of seven years. (can.87). This penance consisted of five degrees: the first year, the penitent had to remain at the gates of the Church and, falling at the feet of those who entered it, ask them with tears in his eyes to pray for him; during the second period, he was allowed to remain in the entrance of the Church to hear the reading of the Holy Scriptures; during the third stage, the penitent took part in the prayers of the catechumens, and then in those said by the faithful, and it was only after seven years of penance—the three last periods lasted two years each—that he was considered worthy to receive communion.

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The foregoing degrees did not apply to the adulterous woman. She was simply excluded from communion during 15 or 17 years for the reason that if she were put amongst those who wailed at the doors of the Church or else placed amongst the

¹ I. Cor. VII. 16.

² L. 39. O. XLVIII. 5.

catechumens, everyone and especially the husband would think that she was guilty of adultery and perhaps even of other crimes, and because of this, her life would be in danger.¹

Adultery is such a serious crime that laymen, whose wife has committed adultery, are not allowed to become members of the clergy and this applies all the more so if they have committed it themselves. If the wife has committed adultery after the ordination of her husband, the latter must turn her out; in the opposite case, he will be unfrocked.²

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II CIRCUMSTANCES ACCOMPANYING ADULTERY

The circumstances which, in general, accompany adultery or suggest it, are considered by Novel 117 as distinct causes for divorce. This is why we shall expose them in a special paragraph, although they seem to be rather an extension or at the very least a means of proof of adultery.

Likewise, all attempts by one of the spouses against the life of the other, constitute, according to the same Novel, a distinct cause for divorce. However, we have joined them under the heading of circumstances which accompany adultery, since, ordinarily, it is the relations of one of the spouses with a stranger which leads to attempts against the other's life.

These circumstances are as follows:

A. Faults which are ascribable to the wife.³

(a) If the wife has been guilty of attempts against her husband's life or if she has had knowledge of plots prepared by other persons and has not denounced them to him. The nature or motive of these undertakings is not important, whether they were successful or not; all they have to do is put the life of the other spouse in danger.⁴

(b) If the wife takes part in feasts with strange men or goes bathing with them against the husband's wishes.

(c) If she lives outside of the conjugal home against the husband's wishes, except in cases where she was staying with her parents or when she had been turned out without the husband being able to ascribe one of the causes provided by the law. In this

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case, the marriage will not be dissolved, because this is an act of God for the wife, which was provoked by the husband.⁵

If the wife was present at equestrian games, at plays or took part in hunting unknown to her husband or against his wishes.

In all cases, the husband obtains the right to make use of the guilty wife's dowery, while its ownership is reserved for the children resulting from the marriage; if there are no children, the husband will have full ownership over it.

(e) The fact of a wife reaching an understanding with a third person, while her husband is still alive, in order to conclude a new marriage, was considered by Novel 22, c.6., as a cause for divorce. Through Constitution 30, Leo the Philosopher refers to the first decision of Justinian by decreeing that arrangements of the wife with a third person, in view of concluding a new marriage, constitutes a cause for divorce and the justification for it is that by her action the wife has offended the Creator who had united them, and by coveting another husband, the wife was the first to separate herself from her husband, towards whom she has shown hostile feelings.

¹ St. Basil, can. 34.

² Can. 61 apost. and 8 of the synod of New-Caesarea.

³ Nov. 117, cap. 8.

⁴ Comp. can. 8 St. Basil.

⁵ St. Basil, can. 35.

B. Faults ascribable to the husband.¹

(a) If the husband has made attempts against the life of his wife, or if having knowledge of plots by others he did not denounce them to her, and did not try to defend her according to the laws.

(b) If the husband acts to the detriment of his wife's pureness, by giving her to other men.

In both these cases, the wife obtains, besides her dowery, the proper nuptias donation, the ownership of which is reserved to the children, if any.

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(c) If the husband has accused his wife of adultery without being able to prove it. In this case, the husband not only loses the donation, "propter nuptias", but also one third of this donation, which is deducted from other personal property.

These penalties are applicable when there are no children; if there are any, all the husband's property is awarded to them, and the rights concerning the ante-nuptial donation and resulting from other laws, remain valid.²

Furthermore, the husband will have to undergo the penalties which the wife would have received had she been condemned.

(b) If the husband, scorning his wife, cohabits with another woman in the common house or in another house in the same locality, and if, in spite of repeated exhortations by his wife, by the parents of the latter, or by other reliable persons, he does not give up his conduct.

As in the foregoing case, the wife receives over and above her dowery and the ante-nuptial, one third of the latter deducted from the husband's other property. If there are any children, the wife will only have the usufruct of the ante-nuptial donation and of the one third received by her as a penalty inflicted upon the husband, while its ownership is reserved to the common children; if there are no children, the wife will have its entire ownership.³

C. According to the Basilian rule XXVIII, tit. 8 reproducing L. 39.D.XXIV 3, if the spouses have both given causes for divorce, with reciprocal wrongs, dissolution will take place without any damage for them, because as the offences are equal, dissolution takes place by means of reciprocal compensation.

But in this case, canonical lawyers admit a compensation for wrongs which makes the dissolution of marriage impossible.

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The husband, who has known and tolerated his wife's misconduct, will no longer be able to divorce her for adultery; the same applies to a husband who has become reconciled with his wife after having found her guilty of adultery.

If the wife accused of adultery proves that her husband was guilty of the same crime, the judge will not separate them.

In order to avoid the dissolution of the marriage, the wife accused of adultery may accuse the husband not only of adultery, but also of the vices against nature of which the latter is guilty and any heresy into which he has fallen, because both of them, it is said, must do penance and the faults of one of the spouses are neutralized by those of the other.⁴

D. A wife who is whipped or beaten with sticks by her husband for a reason which does not give any right of divorce may not be separated from him. In this case,

¹ Novel 117, cap. 9.

² L. Harmen XV (XII) 14; Prochiron XI. 17.

³ 4 Harmen XV (XII) 15; Prochiron XI. 18.

⁴ The rule of Matth. Bassarab ch. 179. 180 and Bujoreanu.

the marriage remains indissoluble, but the husband who has been convicted for assault and battery against his wife, in a circumstance other than those constituting causes for divorce, will have a pecuniary penalty imposed upon him. As damages for cruelty towards her, the wife will receive, even during her marriage, besides her dowry, one third of the "propter nuptias" donation which is deducted from the husband's property.¹

E. The civil-ecclesiastical legislation of the Rumanian principalities, which were decreed in the middle of the 17th century and remained in force until the introduction of the Civil Code in 1865, permitted the wife to ask a divorce when the husband beat her excessively, causing her injury and tears, or else if he terrified her by his menaces; it gave the husband the same right, when the

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wife beat him or when she had an abortion. A husband was obliged to provide for the upkeep of his wife who had left the conjugal domicile because of ill-treatment inflicted by him.²

The maltreatment had to be proven by reliable witnesses, with the exclusion of the wife's parents. The latter's lamentations and cries which could be heard outside, were not sufficient to prove the ill-treatment dealt by the husband. Finally, the legislator recommends to put more faith in witnesses who affirm than in those who deny.

The same laws, which are merely a translation of dispositions taken in Constantinople under Emperor Alexis Comnenus, in the 12th century, give a husband the right to chastise his wife.

A husband has a right to beat his wife for a just cause and with reason; furthermore, the chastisement should be applied with measure, with compassion and without hate. At the same time, the legislator took care to decide when chastisement is applied with measure and when not.

Blows are considered as applied beyond measure, with spite and as inappropriate, when the wife is beaten with a stick and especially when the piece of wood with which the husband was beating her is broken in the process, or when he draws blood and finally, when he give her blows in the face or on the head.

If someone has beaten his wife only once or if he beats her by means of punches or slaps, this is not considered as resulting from spite, no matter how hard and how

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often he beats her. At the request of a wife who fears ill-treatment by her husband who has a violent nature and easily blows his top, the judge may order the latter to provide a security to his wife to guarantee her from all excesses and maltreatments.

In spite of the security, the husband keeps his right to chastise his wife when she is guilty of a serious fault, but he should always exercise it with measure and without spite.

We hasten to add that this legislation, which is foreign to Rumania, has never been literally applied, because the customs of the country have always been more lenient than the above-mentioned dispositions would lead one to believe.

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III—ABORTION

Tertullian (Apol. c.9) took an energetic stand against this crime, along with Lactance (I. VI. C.20) and Minutius Felix in Octavo.

¹ Basil. XXVIII. 77. comp. c. 9 St. Basil.

² The rule of Matth. Bassarab. p. 121-122.

The synod of Ancyra (can. 21) subjects women, who give and who accept medicines which are conducive to abortion, to a 10-year penance.

According to St. Basil (can. 2), women who deliberately did away with foetuses, are liable to charges of murder, without distinguishing—and in this he differed from the Mosaic Law¹ whether the foetuses were formed or not.

The 6th Ecumenical Council in Trullo also considers as murderers persons who both give and accept medicines conducive to abortion (c. 91).

Finally, women who abandon their children, who do not nourish them or who expose them to public pity, which they themselves have not received,² are considered as belonging to the same category as women who do away with foetuses. According to Novel 22 c. 16, which reproduces the provisions of the Code (I. 11 and 2.C.V. 17), abortion was considered as a cause for divorce, because by her ignominy, the wife has caused great pain to her husband, whom she has deprived of all hope of offspring. But in Novel 117, cap. 8, Justinian no longer counts abortion amongst causes for dissolution of marriage.

Emperor Leo the Philosopher, who favoured divorce, put the first law of Justinian in force again because it seemed more useful to him. According to Leo the Philosopher, a woman who has an abortion should be considered as an enemy of her husband; such a woman is even more guilty than the one who, against the will of her husband, has lived outside of the conjugal house or who, still without the consent of the husband, has taken part in feasts with strange men. And yet, the latter actions which are less guilty than abortion, constitute causes for divorce; Leo the Philosopher concludes that the husband has all the more reason for repudiating his wife who is guilty of abortion, which is a crime against the husband, by depriving him of offspring, and also against nature (Novel 31). This provision was accepted in the fundamental collection of canons of the Orthodox Church.³

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4. *Difference in Religion*

The Church very early pronounced against marriage of the Orthodox with heretics and pagans except where the heretic party showed its intention to convert to the christian faith: cf. in this connection the Councils of Cartage, C. 21, Laodicea, C. 10 and 31, Chalcedon, c. 14.

The sixth ecumenical synod, c. 72, reviving the same interdiction, added that such a marriage, if need be, should be dissolved and the guilty, excommunicated for it said, do not combine that which cannot be combined, do not unite the lamb with the wolf nor the sinner with the elect of Christ.

Finally the canon arrives at the situation considered by Saint Paul (I Cor. VII 12, 17.) Two partners have contracted a legitimate marriage, both being unbelievers. In the following, one of them converts to the Christian faith, the other continues in his erroneous ways. In this case, the Apostle—"Speak I, not the Lord"—commands the christian party not to dissolve the marriage if the unbelieving spouse consents to live with him, for the unbelieving husband is sanctified by the wife and the unbelieving wife is sanctified by the husband: else were your children unclean, but now are they holy (verse 14).

But if the unbelieving depart, let him depart. A brother or a sister is not under bondage in such cases.

Different from this case is the one where the unbaptized spouse agrees to live with the converted spouse but in this cohabitation wants to compel him to commit actions

¹ Exod. XXI, 22, 23.

² St. Basil can. 52.

³ Nomoc. III. 10.

contrary to the Christian religion or to the essential marital duties. This discipline is attested from the very beginnings, cf. the commentary of Ambrosiaster I Cor. VII and the 19th Homily of Saint John Chrysostom.

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Divorce takes place also where one of a Christian couple married in church apostatizes or falls into heresy if the latter refuses cohabitation or endeavors to betray the other one into his errors. The spouse that has been released from the bonds of matrimony may contract a second marriage without being subject to a pecuniary penalty.

To justify the dissolution of a marriage contracted by a Christian with a heretic or a pagan, the canonists also refer to the definition of marriage given by the Roman Law: (*Nuptiae Sunt conjunctio maris et feminae, consortium omnis vitae, divini et humani juris communicatio.*)¹

This definition shows that those who would contract marriage must belong to the same religion, for a difference of opinion in this important matter which concerns the salvation of the souls would be a source of continual dissension in the future family. Often the dissolution of the marriage of a trumpeter of the Emperor of Byzance is quoted as an example. This dissolution was due to a decision of the patriarch Theodote on the grounds that the wife refused to follow her husband who had embraced the Christian faith.²

However, civil law recognizes the possibility of mixed marriages between the Orthodox and heretics and requires in such a case that the children be brought up in the Orthodox religion³, a principle accepted and applied by the Orthodox Church. Roman Law (*Cod. lib. V, 1 Const. 5*) also provided for the breaking-off of an engagement on grounds of difference of religion: if the betrothed was aware of the difference in religion between herself and her fiancé before the engagement, her parents were considered responsible; if she was not aware of this circumstance or if she learned about it only after the payment of the earnest, the parents were only obliged to return the earnest.

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So far we have assumed that only one spouse had embraced the Christian faith and that the other one continued in his erroneous ways. But what solution should we apply to the case where the other spouse converted to the Christian faith as well and wished to take back his former spouse now in the bonds of a second marriage? The canonists differentiate according to whether the first marriage was dissolved by the Church or not⁴. In the first case nothing more can be done since the second marriage contracted with a Christian spouse remains valid and thus indissoluble. However, if the Christian spouse has contracted a second marriage without having had the first one dissolved, it is this marriage that remains valid and the second one will be dissolved by the judge who will advise the former spouse to resume the connubial life.

The same criterion applies where the first converted spouse has taken up the monastic life. If he has taken it up after having had the first marriage dissolved by the Church, connubial life will not be resumed. But if he entered orders without having the first union dissolved, the judge may allow the spouse who became a monk to leave the order and to take up connubial life with his former partner. The judge's decision is

¹ (Sig. 1. lib. XXIII tit. 3.

² Migne P. G. CXIX, 767.

³1 Cod. tit. 5 Const. 12 and Const. 18 of the saame title.

⁴ The rule of Matthew Basarab, ch. 182 p. 120.

optional. The spouse that entered the order cannot be obliged to leave it. His consent is necessary for the resumption of the connubial life. However, if the spouse that entered the order has been ordained a deacon or priest, he cannot leave it, even if he wanted to do so. Only monks that have not progressed beyond the first degree of monastic life, i.e. the ones that have only received the benediction of the religious habits, may leave the order to take up married life with the former partner.

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V—THE SPOUSE THAT HAS LIFTED HIS OWN CHILD
OUT OF THE FONT

Canon 53 of the Trullan Council considers the spiritual relationship resulting from baptism as superior to natural relationship.

On the basis of this provision, the canonists of the Orthodox Church decided that relationship resulting from baptism is an obstacle to marriage up to the seventh degree. The same as natural relationship. The same conclusion was arrived at by the synod held under Nicolas, patriarch of Constantinople.¹

This principle has also been admitted in Civil Law: Basilica XXVIII, tit. 5. c. 10 Decree 6.

Noting that a great number of those that received children from fonts later married their co-sponsors, the Sixth Ecumenical Synod condemned such action and decided that marriages contracted in defiance of the provisions made would be dissolved and the guilty, subjected to the penalties provided for fornication.

The Sixth Council, held in the Trullus, having learned that many bishops, in Africa and elsewhere, lived together with their wives, even after consecration, absolutely forbade this practice in the future (Can. 12). The council declared that it would not revoke earlier decisions in the matter but that it saw itself compelled to take this measure in the interests of the Church in order that the clergy might not incur the reproaches of the faithful, and based itself upon I Cor. X. 31, 33 and I Cor. IV, 16. Lastly, it decided that bishops that did not abide by these decisions would be removed. This decision is quite in keeping with the laws of Justinian which prohibit a bishop

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from having a wife or to live with her on pain of removal from the episcopacy because he had shown himself unworthy of his ministry².

Canonists explain that there is no contradiction between c. 5 Apostolic which prohibits bishops, priests and deacons from repudiating their wives on religious grounds and c. 12 of the Trullan Council which orders bishops to separate from their wives. Apostolic Canon 5 is explained, they say, by the need of the young church to deal tactfully with the customs of the pagans she wanted to convert and upon whom she could not, from the very beginning, impose all the decrees of Christian perfection, for the priests of the Jews were married and the Greek sacrificers as well. Eventually, however, when the Christian faith had spread farther about the world, the bishops could be subjected to the more rigorous rules of continence without danger.

Canon 12 of the Trullan Council thus appears as an advance in the moral order and a measure taken in the higher interests of the Church, who always considered celibacy superior to marriage.

¹ Migne P. G. CXXVIII 993; Balsamon Rep. to Marc Alex. interrog. 43.

² Nov. 123. cop. 29; Basil. lib. III, tit. I c. 45.

Canon 48 of the Trullan Council stipulates the conditions of this divorce.

- (a) It is a divorce by mutual consent for the sake of piety, the only kind of divorce by consent permitted by the Justinian's civil legislation.
- (b) It is a divorce "bona gratia" that does not involve the former spouse in any pecuniary penalty.
- (c) The divorce can only take place with the consent of the wife: her consent is essential.
- (d) It is the sacrament of the bishop that dissolves the marriage.
- (e) Following consecration, the wife is given the tonsure and will live in a convent removed from the residence of her former spouse.
- (f) The latter may maintain her if she has no personal means of livelihood.

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The consent of the wife is required in the case of elevation to the episcopate because after the consecration of her spouse she is obliged to take up the monastic life.

This is not the case where the spouse takes up monastic life. The partner remaining in the secular world is entitled to contract a second marriage.

Finally the following question was asked: A married priest, deacon or reader enters a monastic order and is given the tonsure but his wife remains in the secular world which she may do as has been shown. Can the tonsured one eventually be elevated to the episcopate although his wife refuses to take up the monastic life?

This question was answered by John, Bishop of Citros, who said that the divorce for the purpose of entering a monastic order is a legitimate action undeserving of censure. The tonsured one may therefore be promoted to the highest ecclesiastic dignity if his merits recommend him for it.

John of Citros bases his reply on Can. 8 of the Council of Neo-Caesarea which prescribes that the priest whose wife has been convicted of adultery shall retain the priesthood provided he expels her. If such a priest retains the priesthood after having expelled the guilty wife, there is all the more reason, he says, for a husband divorced from his wife for a good cause to be worthy of obtaining the sacerdotal and pontifical functions.¹

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VI—ENTERING THE MONASTIC ORDERS

The basic writings in this matter are Novel 22. cop. 5, Novel 117, cop. 10 and Novel 123 De episcopis, clericis et monachis.

From these writings and the commentaries concerning them, the following principles are derived:

1. Divorce is permissible for the sake of piety when one member of a married couple chooses the better way of chastity by taking the vows.

2. Although Novel 117, cop. 10 calls this kind of dissolution of the marriage a divorce "ex consensu", the great majority of the canonists teach that a tonsure may be given even without the consent of the other member.²

However, the divorce is called "bona gratia" i.e. without pecuniary penalty for the married couple in view of the sublime purpose they have in mind.

3. The spouse remaining in the secular world may contract a second marriage and it is precisely for this reason that the canonists emit the opinion that divorce may take place even without the consent of the spouse.

4. The marriage is dissolved without repudiation, i.e. without judicial sentence. However, the dissolution is effective only at the end of a three year period

¹ Migne, P. G. CXIX. 963.

² Blastares, in Migne, P. G. CXLIV 1182.

(the period of probation provided for in Novel 123, cap. 35 and Canon 5 of the Second Council of Constantinople) at the end of which the spouse actually dons the monastic habit.

5. If the husband alone has chosen the monastic life he must return to the wife not only the dower and all he has received besides, but also whatever he promised her in the case of death.

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If the wife enters the convent the husband shall keep the marriage portion and receive as well whatever the wife promised him in the case of predecease. All other property will be returned to the wife.

If both members of a married couple enter the monastic life at the same time, the dotal instruments are voided and each member receives the property that was his before the marriage unless they wish to make mutual donations and concessions to each other.

6. The two spouses may reconsider their decision and resume connubial life without being subject to any penalty provided that they do so before they enter the cloister.

7. The marriage of the partner who abandons the monastic life must be dissolved, he being considered an adulterer. Those that gave their consent or had knowledge of the fact shall be punished.¹

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CAUSES FOR DIVORCE ESTABLISHED BY CIVIL LEGISLATION AND ACCEPTED BY THE CHURCH

I. HIGH TREASON

Lex majestatis similis est legi de sacrilegio". Thus the Roman Law.²

The commentators find that the comparison is justified because, they say, either violates the divine order and piety and because things public may be compared to things divine.

The seriousness was such that the crime could not be expiated even by the death of the accused.³ Action could be taken even after death. Whoever was guilty of the crime of high treason could no longer validly sell, transfer or receive.

II. EXTENDED ABSENCE

According to Can. 31 of St. Basil, the wife whose husband has gone on a journey and who marries somebody else without awaiting the return of the former and without having obtained reliable information as to the death of her husband commits adultery. The justification of this provision lies in the consideration that such a wife lacks adequate reason for contracting a second marriage.

In Canon 36, the same Father decided that the wives of soldiers, on a military expedition, who remarried without awaiting the return of their husbands, are guilty of the same crime as the wives whose husbands have gone on a

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journey and who remarry without awaiting their return. However, in the case of the husbands on a military expedition, the wives deserve greater indulgence since the

¹ Peira, 25, 38.

² L. I. D. XLVIII. 4.

³ L. II. XLVIII. 4.

probability of their husbands being dead is greater owing to the variety of dangers they are exposed to.

Finally, Canon 46 of St. Basil considers the case of a woman who has married a husband whose wife has temporarily left him. However, the latter returns and the husband separates from the former. According to St. Basil, the wife who separated in this manner has committed adultery albeit through imprudence owing to her ignorance. Such a woman cannot lose the right to contract a second marriage although it would be better that she remain unmarried, for it is not proper that she live with another husband when she was known a short while ago as the wife of another. In marriage, Blastares adds, following therein the civil laws, we should consider not only that which is allowed but also that which is honest.¹

Novel 117 cop. 11, reproduced by all Byzantine collections, provides that the wife of a soldier must wait indefinitely even though she receive no news whatever from her husband. And although she may be told that her husband is dead, she may not marry a second time without having first questioned personally or through other trustworthy people the chiefs and archivists of the unit in which he served. The military chiefs will issue her with a certificate of death for her husband, the truth of which must be confirmed by an oath on the gospel. Having obtained this certificate, the wife must wait another year and only at the end of this period may she legally contract a second

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marriage. Finally, the Novel provides penalties for those who have borne false witness and stipulates that the soldier may on his return, if he so desires, take back his former spouse, a provision the Orthodox church has extended to the husband who is not a soldier.

III. Impotence

Novel 22 cap 6 and, following it, all the Byzantine civil law collections consider impotence as a necessary and reasonable cause for divorce.

The law gave the wife and her parents the right to repudiate her husband if he had shown himself incapable of fulfilling the conjugal duty during two years after the conclusion of the marriage.²

Novel 22 cop. 6 reproduces the provision of the Codex with a minor change concerning the time the husband is on trial which is now three years. This measure is justified by the fact, established since, that husbands who were impotent for a longer period than two years, eventually showed that they were capable of fulfilling the conjugal duty and procreating.

Novel 117 cop. 12 merely quotes impotence among the causes that dissolve marriage "*bona gratia*", without penalty, and refers otherwise to the earlier provisions. These provisions are resumed in the following points:

1. A continuous period of three years must have elapsed since the conclusion of marriage.
2. Impotence must be due to a natural weakness preceding marriage. This excludes accidental impotence or impotence acquired after marriage.

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3. Impotence must be proven. This must be done before the Court, and dissolution will be by sentence of the Court.

4. Action rests with the wife and her parents who may bring it even against the will of the husband.

¹ Migne P. G. CXLIV. 1198.

² L. 10. c. V. 17.

5. As regards property, the wife takes back her dower but the donation "ante nuptias" or "propter nuptias" remains the property of the husband who does not lose any of his. The foregoing provisions have been accepted by the Church and are reproduced in all canonical and civil collections of the Orthodox East.

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3. CAUSES FOR DIVORCE ESTABLISHED BY CIVIL LEGISLATION BUT NOT ACCEPTED BY THE CHURCH

I. INSANITY

According to the old legal experts, insanity was an impediment to betrothal but if it occurred later it did not dissolve it.¹

It was the same with marriage: insanity made its conclusion impossible since consent was necessary to render a marriage valid but insanity did not dissolve a validly contracted marriage.²

Finally Digest XIII. 3.1.22 and 7 and 8 distinguishes between sufferable insanity and insufferable insanity.

If insanity is sufferable, the husband or wife that sends the bill of divorce must know that he or she will be considered guilty of the dissolution of the marriage. However, if the insane partner is incurable or raving, so as to frighten the other partner, the latter may repudiate the insane spouse. In this case, the dissolution is "bona gratia", without pecuniary loss to the married couple.

The above legislation finally considers the case of a husband who does not wish to divorce his insane wife who he neglects in her misfortune, keeping her dower. In this case the committee of the wife and her parents are entitled to apply to a judge who will take the necessary coercitive measures against the husband. If the latter continues to mismanage the dower of his wife without providing the care she requires, the property of the wife will be committed to the custodian who will administer it.

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Neither of Justinian's Novels 22 and 117 list insanity among the causes for the dissolution of marriage.

Leo the Philosopher considers this provision too severe. To oblige the husband to live with an insane wife is contrary to reason. For the husband, this is contrary to reason. For the husband, this is tantamount to being condemned to live all his life with a wild animal. Such a marriage, says he, is not within the intentions of the Maker. Only the marriage that does not afford the couple all the satisfaction and all the joys to which they are entitled according to the laws of nature, is indissoluble.

Photius (Nomoc. XIII. 30) maintains that Leo the Philosopher's novels 111 and 112 have never been applied and that Justinian's novels 22, cop. 15, and 117, cop. 8.9. were always followed which do not list insanity among the causes for divorce. It should be noted that Timotheus of Alexandria (Can. 16) considers that the husband who sends away his insane wife and marries another one commits adultery. (Nomoc. XIII. 30) but adds that he has nothing else to say. Similarly, the Ecloga of the Emperors Leo and Constantine decided that the insanity of one of the partners, if occurring after marriage was contracted, does not dissolve the latter.³

To insanity may be compared the decision taken by the Church of Constantinople in the case of epilepsy of one of the partners.⁴ This decision establishes the principle

¹ L. 8. D. XXIII 1.

² L. 8 pr. D. I. 6; L. 16; 2. XXIII 2. L. 4 D. XXIII 2.

³ Leunclavius: Jus graeco-romanum t. II p. 107.

⁴ The rule of Matthew Basarab. p. 145.

that the marriage is dissolved if epilepsy is prior to celebration of the marriage but that it remains indissoluble if the sickness occurs after its celebration.

We consider this decision to be a local prescription.

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II—SENTENCE OF HARD LABOUR

This cause for divorce was established by modern civil legislation which entitles the innocent spouse to seek the dissolution of the marriage (Section 213 of the Roman Civil Code).

III—INSUPERABLE REPULSION

This is not accepted as a cause for divorce. It is cited as such in Section 214 of the Rumanian Civil Code, 1864. However, this cause for divorce is not accepted either by the Canon Law of the Orthodox Church nor by the other codes containing divorce causes for the members of this Church. It is true that a decision of the Council of Constantinople dated December 1315 (Act. Patr. Const. I.28.29) considers insuperable repulsion a cause for the dissolution of marriage. However, in the opinion of the canonists, this decision is not founded in law.

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CHAPTER III

DIVORCE PROCEDURE AND THE SECOND MARRIAGE

The majority of procedural rules as well as rules concerning the material aspect of the dissolution of marriage have been taken, as many causes for divorce, from Roman Law in accordance with the principle that in questions not resolved by the canons Civil Law must be followed.

The rules to be exposed in connection with the action, the "procedure at court" and the consequences for the partners and the children apply only in the case of adultery which is the main cause for divorce. The details of the other causes for divorce are set out in the preceding chapter where each one of them has been treated.

1. First of all there must be good cause for divorce. The earlier laws and old custom let people divorce without penalty. The husband could say to his wife "Uxor, tuas ipsa res tibi agito" and the latter could say "Tuas, marite, res tibi agito."

All this has been rescinded by Christian law. The Orthodox Church adopted the restrictive list of divorce cases established by Justinian's legislation and, in accordance with Novel 117 cap. 12¹, decided that marriage might not be dissolved except for these causes.

2. There must be a judicial sentence. The canonists insist on the principle that the partners may not separate at will without process or sentence. On no account, says Balsamon, whether it be for a rational cause or not, may the wife separate from the

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husband without the permission of the judge, as laid down in Canon 9 of St. Basil and the various novels of Justinian reproduced in Basilica, lib. XXVIII tit. 7. Any abandonment of the husband by the wife without a judge's permission is unjust and illegal.²

However, in the legal regulations of Basil the Wolf³ as well as in the rule of Matthew Basarab, which is but the translation of Aristaene's commentary, we find cases

¹ L. 2. I. D. XXIV. 2.

² Basilica XXVIII 7.5.

³ Migne, P. G. CXXXVIII. 809.

⁴ Basil the Wolf, Legal Regulations, Iassy 1664.

where one of the partners may separate from the other "at will and without the knowledge of a judge"¹

By virtue of his own authority and without the permission of the judge, the husband may chase from his home the wife caught in the act of adultery. The wife may separate alone on her own initiative and without the instrumentality of a judge where the husband has beaten her to the point where she had to run away lest she be killed or where he has beaten her so severely that she was unable to voice her complaints against her husband before the judge.

The wife may also separate without a judicial sentence if the husband illtreats her too often and without reason.

Finally, she may separate of her own volition if the husband lapses into heresy or attempts his wife's life.

None of these cases concern divorces without judicial sentence. The context leaves no room for doubt. The cases only concern spouses who may send away their partner without the instrumentality of a judge. Normally a judge gives a decision on the de facto separation of the partners, assigning to each of them a different residence, but the

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cases mentioned were considered so serious, that the spouse was given permission to send the other one away without asking for judicial action. Dissolution of marriage can only become an accomplished fact after the judgment has been pronounced by an ecclesiastical court.

Marriage is a divine institution says Matthew Basarab in Chapter 213 of his rule, which, in addition, orders that dissolution cannot take place without cause nor be obtained by bribing the judges. He who, without good cause, would dissolve the marriage is called an antichrist and a violator of the laws.

"Neither may the wife separate from her husband without judgment, nor the husband from his wife" says the same legislator a little farther on. This is why a person who marries a woman who is married but not legally divorced, is called an adulterer, although the wife gave cause for divorce or the husband had good cause for sending her away, for a married couple cannot separate without judgment and without a divorce decree.

3. The fact must be proven. Having mentioned the causes for divorce by name, Novel 117, c.8. 1 and 2 continues as follows: If the husband believes he can convict his wife of the crime of adultery, he must first draw up the accusation and if the crime of adultery has not been clearly proven, the penalties provided for in the laws will be applied to the offenders after the bill of divorce has been sent. The same principle is taken up in Novel 134, cap. 12.

Balsamon, referring to the laws that require the statement of five witnesses to condemn a woman, adds that according to the teachings of the Fathers the woman would only be condemned if she were convicted of adultery but would not be if she were only suspected of meeting, or becoming intimate with, a third person.²

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4. *Action for divorce* on the grounds of adultery becomes void after five years. Not everybody is entitled to bring such an action in order that not just anybody may hurt the marriage. The action is the exclusive privilege of the closest parents, grandfather, brother, paternal uncle, maternal uncle and above all the husband. The law also recommends that they act only in the case of great necessity.³ However, parents can

¹ The Rule of Matthew Basarab. Targoviste 1652, ch. 193-187 pp. 121-124.

² Migne: P. G. CXXXVIII. 1215.

³ Basilica, LX 37.68. Harmenop. VII I, 34.

only dissolve the marriage of their unemancipated daughter and not that of their emancipated daughter.¹

5. *Legal procedure.* Jurisdiction in marriage matters belongs to the bishop who exercises his jurisdictional powers with the help of the church council (diocesan synod).

Proceedings are instituted by the innocent spouse (the guilty partner is not entitled to bring an action) either directly before the church council or through the parish priest. The respondent must reply to the accusations brought against him by the plaintiff. He must also reply to any new objections the latter may make. The hearing continues until the Court considers that the defence has been given a full hearing. The counts, the pleadings and the plea of the defendant are carefully examined by the Court who for this purpose subpoenas witnesses and people acquainted with the circumstances of the case. After being sworn in, the witnesses are questioned by the competent ecclesiastical tribunal.

The injured partner is given a certain time by the Court, during which an appeal with the higher court (Consistory of Appeal) may be lodged. Once the time has expired the right of appeal is lost and the decree becomes definite.

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2—THE SECOND MARRIAGE

The doctrine resulting from the canons and their interpretation by the great canonists, whose opinion is tantamount to law in the Orthodox Church, concerning the persons who commit adultery may be reduced to the following points:

1) The husband who sends his wife away and marries another is an adulterer: such a husband may not contract a second marriage.² The canonists interpret these writings to the effect that they apply only to a husband who sends his wife away without good cause. Such a husband may not contract a second marriage and will be excommunicated if he does, whereas he who sends away his wife for good cause and marries another is not an adulterer.

2) The same applies to the husband who does not marry a free woman but a wife that has been sent away. He is an adulterer and any marriage contracted is not a legal one.

Here, however, the canonists, by “sending away”, mean the wife that has not been legally separated from her husband. A man may therefore validly marry a legally divorced woman. i.e. under the conditions set out in Justinian’s Novel 117.³

3) The husband who has been abandoned with or without good cause (can. 9 and 35 St. Basil) deserves indulgence. He may contract a valid second marriage and his second wife will not be considered an adulteress.

4) Balsamon finally asks whether an adulterer may marry an adulteress, his correspondent. The answer is yes. He develops this idea in the commentary to Canon 39 of St. Basil after having maintained in the commentary to Canon 37 of St. Basil

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that, contrary to Roman Law, the adulterer may contract a valid second marriage after having paid the penalties for adultery in Canon 58 of St. Basil.

B. Concerning the second marriage of an innocent spouse the Orthodox Church has not experienced any difficulties since none of the Fathers of the first four centuries of the Christian Era has condemned it. However, this second marriage, as any second marriage in general, involves some loss. He who marries for the second time, says St. Nicephorus, patriarch of Constantinople, shall not be crowned. In addition he is

¹ L.S.C. V. 17.

² Can. 48 Apost. 9, 77 St. Basil, 87 in the Trullus.

³ Migne, P. C. CXXXVIII, 134.

punished by being excluded from communion with the holy sacraments during two years, and he who marries for the third time, during five years. In addition, the priest may not take part in the marriage festivities and those who have contracted a second marriage may not be ordained priests.¹

The question of the second marriage does not offer any difficulties concerning the renewal of the marriage between former spouses. The Orthodox Church recommends, at the very height of the procedure, the reconciliation of the married couple in each case, even that of adultery. He differs herein from the former harshness of the Roman laws. Even after dissolution of the marriage on the grounds of adultery, she favoured the reconciliation of the married couple.

C. Some canonists, in particular Aristaene, admit in certain cases a temporary separation lasting until the guilty spouse has improved.²

This separation may take place where one of the partners is guilty of sodomy, where the husband oppresses his fellow-man by usury and above all in cases of insuperable repulsion involving the danger of death for the partners. Similarly, Section

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11 of the Green Synodal Statute provides for a temporary dissolution of the external community of the married couple which was also permissible in the Patriarchate of Constantinople under Sections 512 and 517 of the Judicial Instructions of 1899.

The objection that this was a western custom unknown to the Orthodox Church is answered by Theotoca as follows: "The informal divorce practiced by us is a temporary measure, a preventive rule quite different from the divorce as it exists in the Eastern Church. This rule involves the following: where the ecclesiastic court has vainly tried, by all possible means, to reconcile the partners it sets in the meanwhile at time limit of 15 days for a new attempt at reconciliation. If this time limit is also passed without any result, the court orders a temporary divorce for three, six or nine months, as the case may be, assigns a residence to the couple and obliges the husband to pay annually a certain amount for the maintenance of the wife and the children.³

The Orthodox Church, in certain cases, does admit the complete dissolution of the marriage ties. From the present study it appears that this doctrine is based on the two writings of St. Matthew V. 32, XIX-9 prohibiting divorce "except in the case of adultery", which writings have led to the serious controversy mentioned above. In addition, the Orthodox Church relies upon the opinions of a great many Fathers and councils of the first eight centuries of the Christian Era.

On the other hand, it was found that under the principle that in questions not resolved by the canon ecclesiastic law must follow civil law the Orthodox Church has accepted a certain number of causes for divorce established by the Emperors of the first Christian centuries. Justinian's Novel 117 thus still is the basic text in the matter of divorce.

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It has finally been shown that the criterion for the allowableness of causes for divorce established by civil legislation is based on their allowance or rejection by the collection of canons written at the end of the 9th century and long attributed to Photius.

¹ Synt. Ath. 10. 427; V. 441.

² Nomocan. XIII. 2.

³ Milas, op. cit. p. 525.

The various governments of the Orthodox East accepted the principles of ecclesiastical legislation. Elsewhere, as in Romania, this jurisdiction is left to the civil authorities. In the present Orthodox countries beyond the Iron Curtain great differences of opinion have arisen.

Marriage and divorce are thus considered a purely civil agreement. The church has no jurisdiction in the matter of divorce. The wreckage of broken homes is everywhere. The word "home" has lost his true meaning. The sacred ties of marriage are made in heaven, but to judge by present developments they merely are, as in Noah's time, a simple formality, a temporary trial union, an agreement to be broken as the whim takes the contracting parties and for any reason whatever.

The vows of fidelity then would appear to be no more than scraps of paper.

APPENDIX "76"

ONTARIO WELFARE COUNCIL

22 Davisville Avenue, Toronto 7

487-3291

March 6, 1967

Mr. J. P. Savoie,
Secretary,
Special Joint Committee on Divorce,
The Senate,
Ottawa, Ontario.

Dear Mr. Savoie:

Would you be kind enough to bring to the attention of the Special Joint Committee of the Senate and House of Commons on Divorce, the enclosed document.

It is a brief presented by the Ontario Welfare Council to the Ontario Law Reform Commission. At the request of that commission, a committee of our Council, in conjunction with the Association of Directors of Family Agencies in Ontario, undertook to comment on a number of matters related to family life.

Since changes in the divorce laws relating to Ontario and in the methods of handling divorce actions in Ontario courts are included in the recommendations, the Board of Directors of the Ontario Welfare Council has asked that a copy of the Brief be forwarded to the Joint Committee.

If further copies are desired please let us know.

Yours truly,
Trevor Pierce,
Executive Director

BRIEF

to the

ONTARIO LAW REFORM COMMISSION
FAMILY LAW PROJECT

Submitted by the Ontario Welfare Council

March 1967

RECOMMENDATIONS FOR LEGISLATIVE CHANGES

1. Amendment to The Juvenile and Family Courts Act and The Divorce Act (Ontario) (Canada) to give legislative sanction for a marriage counselling service attached to the courts, and to provide for government funds for this service in courts and in qualified family service agencies.

2. Amendment to The Deserted Wives and Children's Maintenance Act to allow for granting public assistance during a waiting period before the required laying of a charge for non-support; and to place responsibility for action in cases where there is delinquency in maintenance payments, with the court or the municipal welfare department.

3. Amendment to The Matrimonial Causes Act to provide for maintenance and education of children up to the age of 18 and beyond, while a child is still at school (Section 6 (2)). This would be consistent with The Child Welfare Act in which Crown guardianship is continued up to the age of 18 and may be extended up to 21 years of

age (Section 34), and with The Youth Allowances Act. Also, maintenance orders should be granted on the basis of need and should not depend on judgment of guilt or fault.

The following recommendations which are outside the scope of the department instituting this enquiry are included because we feel they are an integral part of the total situation in Ontario.

1. Amendment to The Divorce Act (Ontario) (Canada): Under the present legislation, divorces are costly. This often leads to desertion, common-law unions and illegitimacy. When all reasonable hope for reconciliation has come to an end, divorce should be equally available to all segments of the community regardless of ability to pay. New legislation should introduce the concept of "marriage breakdown" to replace the concept of "matrimonial offence" as the basis for granting of divorce. Domicile of either husband or wife in Ontario should entitle that party to institute proceedings in Ontario.

2. Amendment to Section 150 of The Criminal Code: Instruction in family planning is an integral part of marriage preparation and counselling and should be readily and legally available to married couples and couples about to be married. The Act should be amended to permit the legal dissemination of information and the legal sale of contraceptive devices.

ONTARIO WELFARE COUNCIL BRIEF TO THE ONTARIO LAW REFORM COMMISSION FAMILY LAW PROJECT

The Ontario Welfare Council was asked to submit this brief on Marriage Guidance and Conciliation Procedures for the consideration of the Family Law Project, which has been authorized by the Ontario Law Reform Commission. Specifically, the Ontario Welfare Council was asked to present a review of the present situation and the extent to which it can be improved by governmental action.

PROCEDURES

The Committee (list attached) assigned this responsibility was aware that marriage guidance is offered under a variety of auspices by people of different professional training. As a first step, it was decided to obtain information about the kinds of programs and services offered, major problems and how improvements might be effected. Accordingly, a questionnaire (intended for purposes of *sampling only*, copy attached) was designed to obtain information about preventive programs, pre-marital counselling and family life education as well as counselling on marital problems. Family planning, an important aspect of marriage preparation and marriage counselling, was included. Questionnaires were sent to the 24 family agencies in Ontario, five juvenile and family courts and to a number of different organizations and individuals who offer marriage counselling and/or become involved in helping people with marital problems. In all, 65 questionnaires were sent out and 46 were returned. The high proportion of returns, we believe, indicates the degree of concern about family life, and the Family Law Project.

In addition, letters (copy attached) were sent to the major national church organizations, ten in all, requesting information on whether formal programs in pre-marital counselling, marriage counselling and family life education have been developed; whether the churches offer clergy and training for counselling, either informal educational programs or formal post-graduate training. Nine replies were received and questionnaires and the considered opinion of the Committee members.

All responses have been carefully considered and taken into account by the Committee. This brief is thus a consolidation of the information and views given in the questionnaires were completed on seven programs.

The Ontario Welfare Council wishes to acknowledge the help received from those who provided information. Particular mention should be made of the Ontario Association of Family Agency Directors who collaborated with us in the preparation of this brief.

The Ontario Welfare Council also wishes to express its appreciation to the Ontario Law Reform Commission for undertaking this important work, and particularly to Professor Julien Payne for providing this opportunity to the Ontario Welfare Council to submit this statement.

A REVIEW OF THE PRESENT SITUATION

1. *Counselling on Marital Problems*

People seek help with marital problems from doctors, lawyers, clergymen, juvenile and family courts, family service agencies and other voluntary community agencies and from professional people in private practice—psychologists, psychiatrists and social workers. Many of these also offer pre-marital counselling.

Doctors and lawyers become involved tangentially in the course of professional practice.

A study¹ of the *doctor's* role in marriage counselling points out that the majority of the 30 doctors interviewed recognized a responsibility to help their patients with marital problems. However, "because of time limitations or because their training did not equip them to help in this area, they could offer only a very limited time and help. These doctors allowed and encouraged the patients to talk over their problems, but were frustrated with the limited help they were able to give. For the most part, the treatment given by the doctors was advice-giving or offering the patients a sympathetic audience which provided a cathartic release of tension. . . . Most of the doctors did not follow up on the problem that were discussed with them, so that they had no way of knowing the extent to which they had or had not been helpful, or the extent to which the problem had eased or become aggravated." Most of the doctors knew about the services of family agencies but were under the impression agencies serve 'welfare' cases only.

A study² of 30 *lawyers* led to similar conclusions. Most lawyers accepted responsibility for the social aspects of legal problems, but in varying degrees. Two-thirds of the lawyers involved with domestic relations work "expressed dissatisfaction on the grounds that they could try their best but really would not be able to help anyway, or that they felt incompetent in the social area." Although it was not possible to make any judgment about how adequately lawyers recognize, accept and discharge these responsibilities, there is generally an absence of special attention in any of the major law schools to the teaching of human relations.

Clergymen generally regard marriage counselling as an inevitable aspect of their work, and feel that it is within their competency. Although some denominations provide institutes for pastoral counselling, few clergymen have formal training in this field.

Generally speaking, doctors, lawyers and clergymen refer more serious problems requiring long-term marriage guidance to family agencies where available, or to private practitioners—psychologists, psychiatrists, or social workers.

Most *juvenile and family courts*³ provide some counselling on marital problems. By the time cases get to the court, however, situations are acute and frequently the

¹ Marriage Counselling—by Lillian Messinger, B.A., B.S.W. Research report submitted in partial fulfilment of the requirements for the Degree of Master of Social Work, University of Toronto—School of Social Work, University of Toronto, April 1959.

² Lawyers' Help with Social Aspects of Socio-Legal Problems—by Marian B. Guild. Submitted in partial fulfilment of the requirements for the Degree of Master of Social Work, University of Toronto, 1961.

³ For the material in this section, the Committee relied heavily on the Report of the Department of Justice—Juvenile Delinquency in Canada, 1963.

husband or wife has already deserted. In the opinion of one judge, the service offered by the court "usually draws the bitterness out of the situation" but in only about 20 to 30 per cent of cases are reconciliations effected.

Some courts employ marriage counsellors but generally counselling on marital problems is provided by probation staff. The training and experience of personnel engaged varies considerably. Frequently, too, the work of the probation staff is too diversified, involving the handling of adult probation, parole, domestic counselling, and juvenile problems. Although there was a difference of opinion among our respondents as to whether counselling should be compulsory, there was general agreement that a good professional counselling service should be available in juvenile and family as well as supreme courts.

Although statutory responsibility of these courts is limited to wives and families who have been deserted, in practice some courts accept referrals where there is a possibility of desertion developing, or where help with a marital problem is requested by one partner. Several respondents felt that counselling by the juvenile and family courts should have legislative sanction. Other respondents said that courts should have better qualified judges and magistrates. As an example, one said that, "Much suffering has been caused in families because of the lack of qualified personnel in positions of magistrates and judges."

Judges of juvenile and family courts are selected by provincial authorities. No professional qualifications are, by law, required of persons appointed. We believe that legal knowledge is necessary to enable a judge to perform his functions properly, but that a background of social and behavioral sciences and knowledge of resources available to the court is equally important. Recognizing that it would be difficult, if not impossible, to combine these in one individual, the report of the Department of Justice on Juvenile Delinquency in Canada has recommended that a specialized program of training be made available to judges.

The method of financing these courts also has a bearing on their efficacy. Although The Juvenile and Family Courts Amendment Act 1966 has added a section whereby Ontario may administer a juvenile and family court and pay operating costs and salaries, financial responsibility usually is left with the municipality. This makes the successful operation of the court dependent upon the cooperation of local authorities, who sometimes are more concerned about the tax rate than they are about ensuring the proper solution of the community's social problems.

The result is that the level of performance of the juvenile and family court varies considerably from municipality to municipality. Salaries, generally, are low and unlikely to attract the calibre of persons required. The Juvenile and Family Court Act (Section 21) provides for the Lieutenant Governor in Council to make regulations prescribing the duties of the officers and members of the staffs of juvenile and family courts, but regulations have not been written.

The Juvenile Delinquents Act¹ requires that a juvenile court committee be established in connection with a juvenile court. In Ontario, a committee of a children's aid society is required to act in this capacity, but we question to what extent any such committees are functioning in the Province and, in view of the heavy responsibilities carried by the societies, whether they should be expected to do so. In any case, although the duties of the juvenile court committee set out in the federal act relate specifically to juvenile delinquents, in view of the extent to which juvenile and family courts are involved with marital problems and desertions, the function of the juvenile court committee should be reassessed.

The Report of the Department of Justice² states that one of this committee's major functions would be "that of continuous public education in the community to interpret the purposes and philosophy of the juvenile (and family) court and to

¹ Section 27, subsection (7).

² On Juvenile Delinquency.

stimulate the support necessary to enable the court to carry out its objectives. Another should be that of general 'watchdog' supervision of the court and the services upon which the court relies Judges should continue to be appointed by the appropriate provincial authorities but should be selected only from names recommended by an advisory group, consisting of representatives of such fields as education, law, medicine, psychology, religion and social work."

Family service agencies are the major organized voluntary resource for people needing help with marital problems. In fact, because of the high prevalence and serious consequences of marital problems, marriage counselling is now a core service of these agencies. Doctors, lawyers, clergymen, juvenile and family courts, all refer people to family agencies for help.

People who are referred to, or apply directly to a family agency, generally recognize and want help with their relationship problems. They usually come at an earlier stage than to the family court, but nevertheless their problems are frequently deep-seated. Skilled, intensive and long-term counselling is needed to help these people resolve their difficulties.

Juvenile and family courts, particularly, tend to refer those who seem to require long-term counselling to family agencies and often expect these agencies to function with the authority of probation staff. But family agencies do not have this status, and partly because of this, but also because there is poor liaison between courts and family agencies, the latter seem to lose many of these people. Several respondents suggested that new legislation in Family Law should provide for purchase of service from qualified family agencies and that procedures for referrals, consultation and assessment between courts and family agencies should be formalized.

Most agencies charge a fee based on the ability of the client to pay, but otherwise these agencies are almost totally dependent for financial support on voluntary funds allocated by united community funds. With few exceptions, personnel are professional social workers, educated and trained to provide skilled counselling to people with complex marital problems.

There are 24 family service agencies in Ontario located in 16 cities, some of them under the auspices of children's aid societies. Almost all are in the southern part of the Province, thus there are large areas where these services are not available. Under The Child Welfare Act 1965, it is possible for children's aid societies¹ to offer a preventive family counselling service and several societies have moved into this area of work. But no significant expansion under children's aid societies' auspices can be anticipated since traditionally the societies were organized for the purpose of protecting neglected and dependent children and generally they see this as their primary purpose.

Even where there are established family agencies, services are extremely limited. Long waiting lists, insufficient qualified personnel and financial stringency were repeatedly reported. The lack in most communities of sufficient psychological and psychiatric resources to support the work of family agencies was also of concern.

Of the many proposals made by respondents, the one submitted most consistently by all types of organizations was that family agencies urgently need to expand, not only marriage counselling services, but also their preventive work, pre-marriage counselling and family life education. Many felt that government funds should be made available to family agencies for all these programs.

2. Pre-Marriage Counselling and Family Life Education

Pre-marriage counselling is provided to individuals and in group programs by family agencies and also under church auspices. As in the case of counselling on marital problems, pre-marriage counselling by family agencies, individually or in groups, is sought by people who need help with emotional problems.

¹ Since the Ontario Association of Children's Aid Societies is submitting a brief to the Family Law Project, it is not necessary to elaborate on their programs.

Group programs, organized under church auspices are offered in some areas to people recently married or about to be married. These usually deal with practical matters relating to marriage, such as budgeting, health, sex relationships and family planning and are given in the form of a series of lectures by doctors, lawyers, clergy, social workers and psychologists on a voluntary basis or for a small honorarium. With few exceptions, no fee is required and the programs are supported by congregations. There was some feeling that these group programs probably reach those who need counselling least, "those who would probably succeed in marriage anyhow."

Sometimes couples about to be married will consult with their minister, priest or rabbi, but there seems to be considerable variation among clergy in the emphasis given to this aspect of their work.

Family life education programs have been developed by family agencies, churches, Home and School Associations, and by some Boards of Education as part of the school curriculum. Some of the adult programs are similar in content and format to the pre-marriage courses. Others, developed under the auspices of family agencies, are small group discussions, focussing on family relationships. Although method, technique and content vary widely, the common objective of all is to promote healthy family life and to forestall some of the problems which lead to marriage breakdown.

There was almost unanimous agreement that pre-marriage courses and family life education are valuable, depending on the competence of personnel, and that more programs should be developed by family agencies and under church auspices. Insufficient funds and the lack of qualified leaders were consistently reported. The lack of coordination, the need to reach a younger age group in family life education and for research into the effectiveness of the different types of program were also cited.

Family planning is regarded as an integral part of marriage counselling and family life education. Most respondents were emphatic about the need to make information and instruction readily available and felt that Section 150 of The Criminal Code should be amended.

3. Conciliation Procedures

Respondents to the questionnaires supported, almost unanimously, conciliation procedures in family and divorce courts, with opinion equally divided as to whether these should be voluntary or compulsory. Some qualified their positions stating that conciliation procedures should be compulsory, "before the case is filed in the divorce court", or "during the six-month waiting period prior to the final decree", or "providing the grounds for divorce are widened and the service is given by professional people", or "where there are children, or where partners are under 25 years of age", or "where it is demanded by one party".

4. Legislative Changes Proposed by Respondents

A number of changes, both in federal and provincial legislation, were proposed by respondents. Amendments to Section 150 of The Criminal Code, The Divorce Act, and legislation to provide for a marriage counselling service attached to the courts were considered most urgent.

Marriage Counselling: Amendment to The Juvenile and Family Courts Act and The Divorce Act (Ontario) (Canada) to provide for a marriage counselling service attached to the courts and government funded was proposed by almost all respondents. There was strong support also for government funds being made available to family agencies for marriage counselling, through purchase of service by juvenile and family courts and by children's aid societies under The Child Welfare Act, and/or new legislation in family law which would provide family agencies with the necessary legal and financial backing.

Section 150 of The Criminal Code: Almost all respondents emphasized the importance of instruction in family planning as an integral part of marriage preparation and counselling and urged that information should be made readily and legally available to all segments of society.

The Divorce Act (Ontario) (Canada): Broadening the grounds for divorce was proposed by some churches, juvenile and family courts, family and other community agencies. The hardships for parents and children resulting from the present outmoded law were noted repeatedly.

The Deserted Wives and Children's Maintenance Act: The difficulty in collecting maintenance even where there are court orders was pointed out in a number of replies, but there was concern about the practice in some Departments of Public Welfare of requiring a wife to lay a charge of non-support before she is eligible for public assistance.

Other proposals in regard to legislation made by some respondents included: legal aid available in family and divorce courts, amendment to The Marriage Act to raise the minimum age of marriage, amendment to The Matrimonial Causes Act, and provision for judicial separation.

CONCLUSIONS AND RECOMMENDATIONS

It is apparent from the approach taken in this brief and from the views expressed in our sample survey, that a comprehensive marriage guidance program should include family life education, marriage preparation courses for couples planning marriage, marriage counselling, and family planning instruction. Some or all of these services are now available in parts of the Province, but they are unevenly distributed and often seriously deficient in both quantity and quality. Several approaches will be needed to effect any substantial improvement in the situation.

FAMILY LIFE EDUCATION

The purpose of family life education, as the name implies, is to educate for and promote healthy family life. It should be a continuing process which starts from childhood, directed at influencing attitudes, relationships and goals in life. The objectives of family life education can only be fully achieved by a thoughtful community approach which involves home, church, school and other community organizations.

Much valuable work is being done in family life education by churches, family agencies and schools, but by and large, efforts have been meagre because of insufficient financing and the limited supply of qualified group leaders. There is no clear definition of the term and subject matter and approaches differ widely. While there is value in diversity of method and technique, the effectiveness of the work has been weakened because the whole field is uncoordinated and there is no central organization to give direction or leadership.

At the national level, the Vanier Institute on the Family has been established to promote the well-being of Canadian families. It is believed that the Institute is presently planning a national study, probably linked with a national conference on Family Life Education. Such a conference involving theologians, educators, social workers, psychologists, and psychiatrists, could lead to the establishment of a coordinating group in Ontario. The Government should lend its support to such a move and make funds available for the development of resources for training leaders and expansion of family life education programs.

MARRIAGE PREPARATION

Aside from the specialized work of psychologists, psychiatrists and social workers, marriage education is regarded by most denominations as a basic function of the church. The quantity and quality of such education, however, says Dr. S. C. Best in a

summary report prepared for the Canadian Conference on Children¹ varies greatly. This is in line with the views expressed by clergymen in our very limited survey. The churches recognize the value of pastoral counselling and marriage preparation courses and the importance of training leaders, but as Dr. C. R. Feilding stated in his address to the Symposium on Counselling in Family Planning² "good facilities now exist in Canada for the development of basic supervised pastoral education (of which family planning might be a normal part), but the interest of the theological schools is not fully engaged in it and budgetary needs have not yet been faced . . . at present the colleges alone cannot afford to expand the programs."

It is clear that there is value in these marriage preparation courses and that they should be expanded. But as in the case of family life education, this will only be possible if public funds are available for training leaders and subsidizing courses.

COUNSELLING ON MARITAL PROBLEMS

Family service agencies are the main community resource for prevention of family breakdown where marital disharmony exists. Since prospects of achieving success are most favourable in the early stages of marriage conflict, the work of family agencies is crucial.

It has already been pointed out that there are large areas of the Province where there are no family counselling services and even where there are established agencies, their work is severely restricted because of limited financing and staff shortages. Clergymen, juvenile and family courts as well as family agencies emphasized the urgent need to expand family counselling services. Different approaches will be needed in different areas of the Province.

Since family agencies are almost totally dependent on voluntary funds, it is doubtful that the present method of financing will permit any significant expansion of their services. Therefore we believe that government funds should be made available to qualified agencies providing a marriage guidance service. Children's aid societies will also need to strengthen their programs and develop a professional counselling service to families.

County Welfare units of administration, long advocated by the Ontario Welfare Council³ could provide an integrated service to families and result in viable units, able to attract qualified staff. The Amendment to The Department of Public Welfare Act, May 1965, which provides that the provincial government will share 50 per cent of the cost for personnel directly involved in welfare operations of a county welfare unit or a district welfare administration board should encourage consolidation of services and enable county welfare units to hire trained, qualified staff.

The shortage of professionally qualified personnel is a problem, but resources for training people at the professional, undergraduate, and technical levels are increasing and we can anticipate a gradual improvement in this situation. Experimentation with panels of trained counsellors such as are used by the National Marriage Guidance Council in England, might be initiated as a supplement to professional service. Such lay counsellors would not, of course, be expected to function as professional social workers. But experience in England indicates that trained people, under the guidance and supervision of a professional, have an important part in the total scheme.

Juvenile and family courts: By the time problems reach the stage of court action, compulsory conciliation, in our opinion, could have an adverse rather than a positive effect. Nevertheless, many people who institute legal proceedings could be helped through skilled marriage counselling to reconcile their differences. Therefore we believe

¹ S. C. Best—Pre-marital Education for Parenthood, Canadian Conference on Children, 1960 (mimeographed).

² Bulletin. The Council for Social Service—June 1966, The Anglican Church of Canada.

³ Study of the Welfare Services of York County; Memorandum to the Minister of Public Welfare on the Report of the Advisory Committee on Child Welfare.

that a high quality professional counselling service should be available in family and divorce courts. The service should not be compulsory but should be offered routinely before a charge is laid in family court or action for divorce is filed.

Some juvenile and family courts in the Province now provide marital counselling but on the whole the service is most inadequate. Counselling is usually provided by probation staff who have a variety of other responsibilities, and their qualifications and training are not always suited for this highly skilled work.

The family court is a community resource which has a crucial role in matrimonial matters. Factors which adversely affect the level of performance in family courts have been noted above. Briefly: salaries paid to judges and magistrates are generally inadequate to attract the calibre of person required; counselling is not a statutory requirement and the overall standard of court services is dependent on the willingness and ability of municipalities to finance a service of high quality. As a result, the status of juvenile courts is generally very low.

In our view, major changes should be made in the way matrimonial matters are handled. We have already said that a marriage counselling service should be an integral part of family and divorce courts. Provision for the service should be written into the legislation; it should be financed by the government and offered routinely. We have given careful consideration to the question of who should provide ongoing service where conciliation seems possible. For several reasons, we have concluded that the courts should look to family service agencies, where available, to provide long-term counselling, providing provincial funds are made available to them. Firstly, most family agencies have the specialized knowledge, experience and skill to offer a good professional service. Secondly, it would be difficult, because of manpower shortage, for courts to recruit qualified staff in sufficient numbers. Nevertheless a skeleton staff of qualified counsellors in the courts is essential to do the initial interviewing, to determine whether conciliation is possible, and to explore the appropriateness of referral for family service. Cases should not be referred routinely to family agencies.

We are aware that it would be difficult to implement such a plan in less populated areas. We believe, however, that the proposal would be practical if family courts were set up on a regional basis, to coincide with other plans for regional administration by government.

A comparable service should be available in courts handling divorce cases. This might not be practicable in light of available resources. Ideally, we believe that all matrimonial matters should be handled in one court; there seems to be little rationale in the division of courts dealing with divorce, custody and maintenance of children and separation and desertion. An integrated court which would handle all these matters would have a number of advantages. It would be easier to broaden the functions of such a court under one administration. It would conserve manpower. In-service training programs for judges and counsellors could be developed more readily. Records could be kept in one place. Perhaps most important, we felt that it would result in raising the status of the family court. We realize that, although this plan appears to us to be logical, it might be difficult to implement, since divorce is a federal matter and family courts operate under provincial statute. But since juvenile and family courts, established under provincial statute for the purpose of dealing with juvenile delinquents are governed by The Juvenile Delinquents Act (Canada), we wonder whether a similar procedure could be adopted in regard to all matrimonial matters.

FAMILY PLANNING

It is not necessary to set out in detail the reasons why Section 150 of The Criminal Code should be amended. We believe that this is not necessary. Simply stated, instruction in family planning is now available to segments of our society. Frequently the people who can least afford large families are those to whom information about family planning is not readily available. In other words, the law favours the rich and penalizes the poor.

The need for adequate legislation to permit the legal dissemination of information and the sale of birth control devices is urgent. But this alone will not be sufficient. Family planning services should be developed in the Province as an integral part of public health and welfare programs.

In concluding, we should point out that we realize that our proposals will require a substantial financial investment by the Government. But money invested in education and preparation for marriage and marriage counselling at all levels has dividends, financial as well as in terms of human lives. Broken homes frequently lead to a need for some form of public assistance, or placement of children, which in the long run is costly. The financial outlay to repair damage to children in families where there is marital discord is considerable. Not infrequently resulting problems are so deep-seated, that the ability of these children to function later as parents is permanently affected. Even where divorce or separation is not forestalled, counselling can make the experience less hazardous for adults and children.



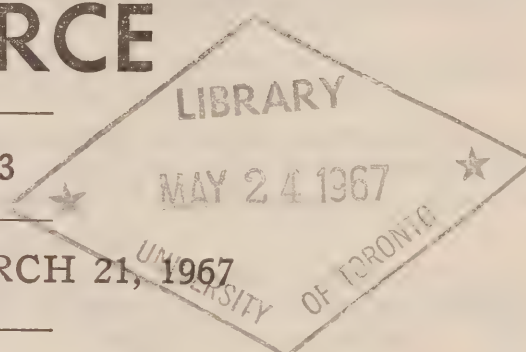
First Session—Twenty-seventh Parliament

1966-67

PROCEEDINGS OF
THE SPECIAL JOINT COMMITTEE OF THE SENATE
AND HOUSE OF COMMONS ON
DIVORCE

No. 23

TUESDAY, MARCH 21, 1967



Joint Chairmen:

The Honourable A. W. Roebuck, Q.C.
and
A. J. P. Cameron, Q.C., M.P.

WITNESSES:

Ron Basford, M.P., Sponsor of Bill C-44.
Andrew Brewin, M.P., Sponsor of Bill C-264.
Robert Prittie, M.P., Sponsor of Bill C-41.
Robert Stanbury, M.P., Sponsor of Bill C-55.
Arnold Peters, M.P., Sponsor of Bill C-19.

APPENDICES:

- No. 77—Bill C-44, An Act to provide in Canada for the Dissolution of Marriage.
No. 78—Bill C-264, An Act respecting Divorce.
No. 79—Bill C-41, An Act to amend the British North America Acts, 1867 to 1965, (Provincial Marriage and Divorce Laws).
No. 80—Bill C-55, An Act to provide in Canada for the Dissolution of Marriage.
No. 81—Bill C-19, An Act to provide in Canada for the Dissolution and the Annulment of Marriage.

ROGER DUHAMEL, F.R.S.C.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1967

MEMBERS OF THE
SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS
ON DIVORCE

FOR THE SENATE

Hon. A. W. Roebuck, Q.C., Joint Chairman

The Honourable Senators

Aseltine	Connolly (<i>Halifax North</i>)	Flynn
Baird	Croll	Gershaw
Belisle	Denis	Haig
Burchill	Fergusson	Roebuck—(12).

FOR THE HOUSE OF COMMONS

A. J. P. Cameron, Q.C. (*High Park*), Joint Chairman

Members of the House of Commons

Aiken	Forest	McQuaid
Baldwin	Goyer	Otto
Brewin	Honey	Peters
Cameron (<i>High Park</i>)	Laflamme	Ryan
Cantin	Langlois (<i>Mégantic</i>)	Stanbury
Choquette	MacEwan	Trudeau
Chrétien	Mandziuk	Wahn
Fairweather	McCleave	Woolliams—(24).

(Quorum 7)

ORDERS OF REFERENCE

Extracts from the Votes and Proceedings of the House of Commons:

March 15, 1966:

"On motion of Mr. McIlraith, seconded by Mr. Hellyer, it was resolved—that a Special Joint Committee of the Senate and the House of Commons be appointed to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either House;

That 24 Members of the House of Commons, to be designated by the House at a later date, be members of the Special Joint Committee, and that Standing Order 67(1) of the House of Commons be suspended in relation thereto;

That the Committee have power to engage the services of such technical, clerical and other personnel as may be necessary for the purpose of the inquiry;

That the Committee have the power to send for persons, papers and records, to examine witnesses, to report from time to time, and to print such papers and evidence from day to day as may be ordered by the Committee, and that Standing Order 66 be suspended in relation thereto; and

That a Message be sent to the Senate requesting Their Honours to unite with this House for the above purpose, and to select, if the Senate deems it so advisable, some of its Members to act on the proposed Special Joint Committee."

"By unanimous consent, on motion of Mr. McIlraith, second by Mr. Hellyer, it was ordered—That the order of the House of Monday, February 21, 1966 referring the subject-matter of the following bills to the Standing Committee on Justice and Legal Affairs, namely:—

Bill C-16, An Act to provide in Canada for the Dissolution of Marriage (Additional Grounds for Divorce).

Bill C-19, an Act to provide in Canada for the Dissolution and the Annulment of Marriage.

Bill C-41, An Act to amend the British North America Acts, 1867 to 1965, (Provincial Marriage and Divorce Laws).

Bill C-44, An Act to provide in Canada for the Dissolution of Marriage.

Bill C-55, An Act to provide in Canada for the Dissolution of Marriage.

Bill C-58, An Act respecting Marriage and Divorce.

Bill C-79, An Act to amend the Dissolution and Annulment of Marriages Act (Additional Grounds for Divorce).

be discharged, and that the subject-matter of the same bills be referred to the Joint Committee of the Senate and the House of Commons on Divorce".

March 16, 1966:

"By unanimous consent, on motion of Mr. Stewart, seconded by Mr. Byrne, it was ordered—That the subject-matter of Bill C-133, An Act to extend the grounds upon which courts now have jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief, be referred to the Special Joint Committee on Divorce".

"By unanimous consent, on motion of Mr. Stewart, seconded by Mr. Byrne, it was ordered—That the subject-matter of Notice of Motion No. 11 be referred to the Special Joint Committee on Divorce."

March 22, 1966:

"On motion of Mr. Pilon, seconded by Mr. McNulty, it was ordered—That a Message be sent to the Senate to acquaint Their Honours that this House will unite with them in the formation of a Joint Committee of both Houses to inquire into and report upon divorce in Canada, and that the Members to serve on the said Committee, on the part of this House, will be as follows: Messrs. Aiken, Baldwin, Brewin, Cameron (*High Park*), Cantin, Choquette, Chrétien, Fairweather, Forest, Goyer, Honey, Laflamme, Langlois (*Mégantic*), MacEwan, Mandziuk, McCleave, McQuaid, Otto, Peters, Ryan, Stanbury, Trudeau, Wahn and Woolliams."

February 24, 1967:

By unanimous consent, it was ordered—That the subject-matter of Bill C-264, Divorce Act 1967, be referred to the Special Joint Committee on Divorce.

LÉON-J. RAYMOND,

Clerk of the House of Commons.

Extracts from the Minutes of the Proceedings of the Senate:

March 23, 1966:

"Pursuant to the Order of the Day, the Senate proceeded to the consideration of the Message from the House of Commons requesting the appointment of a Special Joint Committee of the Senate and the House of Commons on Divorce.

The Honourable Senator Connolly, P.C., moved, seconded by the Honourable Senator Roebuck:

That the Senate do unite with the House of Commons in the appointment of a Special Joint Committee of both Houses of Parliament to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either House;

That twelve Members of the Senate, to be designated at a later date, act on behalf of the Senate as members of the said Special Joint Committee;

That the Committee have power to engage the services of such technical, clerical and other personnel as may be necessary for the purpose of the inquiry;

That the Committee have the power to send for persons, papers and records, to examine witnesses, to report from time to time, and to print such papers and evidence from day to day as may be ordered by the Committee, and to sit during sittings and adjournments of the Senate; and

That a Message be sent to the House of Commons to inform that House accordingly.

After debate, and—

The question being put on the motion, it was—
Resolved in the affirmative."

March 29, 1966:

"With leave of the Senate,

The Honourable Senator Beaubien (*Provencher*) moved, seconded by the Honourable Senator Inman:

That the following Senators be appointed to act on behalf of the Senate on the Special Joint Committee of the Senate and House of Commons to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, namely, the Honourable Senators Aseltine, Baird, Belisle, Bourget, Burchill, Connolly (*Halifax North*), Croll, Fergusson, Flynn, Gershaw, Haig, and Roebuck; and

That a message be sent to the House of Commons to inform that House accordingly.

The question being put on the motion, it was—
Resolved in the affirmative.”

May 10, 1966:

“Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Roebuck, seconded by the Honourable Senator Croll, for the second reading of the Bill S-19 intituled: “An Act to extend the grounds upon which courts now having jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief”.

The question being put on the motion—

In amendment, the Honourable Senator Connolly, P.C., moved, seconded by the Honourable Senator Hugessen, that the Bill be not now read the second time, but that the subject-matter be referred to the Special Joint Committee on Divorce.

After debate, and—

The question being put on the motion, it was—
Resolved in the affirmative.”

J. F. MacNEILL,
Clerk of the Senate.

MINUTES OF PROCEEDINGS

TUESDAY, March 21, 1967

Pursuant to adjournment and notice, the Special Joint Committee of the Senate and House of Commons on Divorce met this day at 3:45 p.m.

Present: For the Senate: The Honourable Senators Roebuck (*Joint Chairman*), Baird, Belisle, Burchill, Croll, Gershaw and Haig—7.

For the House of Commons: Messrs. Cameron (*High Park*) (*Joint Chairman*), Aiken, Baldwin, Brewin, Fairweather, Forest, McCleave, Peters, Stanbury and Wahn—10.

In Attendance: E. Russell Hopkins, Law Clerk and Parliamentary Counsel, and Peter J. King, Ph.D., Special Assistant.

The following witnesses were heard:

Ron Basford, M.P., Sponsor of Bill C-44.

Andrew Brewin, M.P., Sponsor of Bill C-264.

Robert Prittie, M.P., Sponsor of Bill C-41.

Robert Stanbury, M.P., Sponsor of Bill C-55.

Arnold Peters, M.P., Sponsor of Bill C-19.

The following are printed as Appendices:

No. 77—Bill C-44, An Act to provide in Canada for the Dissolution of Marriage.

No. 78—Bill C-264, An Act respecting Divorce.

No. 79—Bill C-41, An Act to amend the British North America Acts, 1867 to 1965, (Provincial Marriage and Divorce Laws).

No. 80—Bill C-55, An Act to provide in Canada for the Dissolution of Marriage.

No. 81—Bill C-19, An Act to provide in Canada for the Dissolution and the Annulment of Marriage.

At 6:00 p.m. the Committee adjourned to the call of the Joint Chairmen.

Attest.

Patrick J. Savoie,
Clerk of the Committee.

THE SENATE
SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE
OF COMMONS ON DIVORCE

EVIDENCE

TUESDAY, March 21, 1967.

The Special Committee of the Senate and the House of Commons on Divorce met this day at 3.30 p.m.

Senator Arthur W. Roebuck and Mr. A. J. P. Cameron, M.P., Co-Chairmen.

Co-Chairman Senator ROEBUCK: Ladies and gentlemen, the time has arrived but Mr. Cameron is at a press conference upstairs and he is the presiding co-chairman today. I am advised he will be down in a few minutes and I would like him to be here, so if you do not object I think we had better wait for a few minutes for him. Is that satisfactory?

Hon. MEMBERS: Agreed.

Co-Chairman Senator ROEBUCK: Honourable members, we have now waited fifteen minutes, which I think is all that is reasonable on our part. I have sent Mr. Savoie to tell Mr. Cameron that we were waiting, but as it is now fifteen minutes past the time I think under the circumstances we had better go ahead.

Mr. McCLEAVE: Could I raise a point of order, since the session might wind up? I do not know whether it is planned to wind it up or adjourn it. I spoke about this problem to Dr. John Stewart, the Member for Antigonish-Guysborough, who is Parliamentary Secretary to Mr. McIlraith, about our right to carry on in the new session, and I have a note from him which he has given me permission to place on the record of the committee, which I think perhaps should be done. He had spoken to Mr. Pennell, the Acting House Leader, but Mr. McIlraith gave the same undertaking verbally and has no objection to this going on the record. The Acting House Leader advised Dr. John Stewart that if the committee agrees that the evidence taken will be acceptable in the new committee, he will undertake—that is the Acting House Leader—to have the committee reconstituted very early in the new session if it does not report finally now, and that is initialled “J.B.S.”

Co-Chairman Senator ROEBUCK: I am sure that a similar undertaking could be obtained from the House Leader in the Senate, but I doubt if it is necessary. We will of course reconstitute immediately on our reassembly. I suppose there is no objection from anybody to taking the evidence which we have received in this session and using it in the next session.

We have some work to do today. According to the schedule, Mr. Prittie was first on the list but I do not seem him here. Then Mr. Brewin, Mr. Basford, Mr. Stanbury and Mr. Peters are all scheduled to address the committee. Mr. Cameron has sent me a message to start the proceedings and that he will be coming later on.

Mr. Brewin, would you like to start?

Mr. BREWIN: Mr. Basford tells me that his presentation will be extremely brief, and in that strong hope I would be quite happy if he went ahead.

Co-Chairman Senator ROEBUCK: Then perhaps Mr. Basford would come forward. There is one thing about you, Mr. Basford. I do not have to introduce you to this assembly.

Mr. Ron Basford, Member of Parliament for Vancouver-Burrard: We have been studying marketing in another committee. Marketing is the essence of putting something in a distinctive package, which I have done.

Honourable senators and members, I intend to be very brief because my bill, Bill C-44, is a fairly standard one, adopting in essence the provisions of the English divorce law. My purpose in introducing it in the house was I think similar to that of other members, simply by putting in private members' bills to encourage the Government and Parliament to take some action to amend the laws relative to dissolution of marriage. I think that action is forthcoming in the very work of your committee. I only regret that because of other activities I have been unable to participate in the work of your committee.

I would be happy to entertain specific questions about my bill, but because it is a standard one I do not propose at this time to present you with a detailed discussion of it. I think my hope is the hope of a great many Canadians, that there be parliamentary action and a recommendation from the committee for reform of our divorce laws.

I think that honourable senators and members who over the last few months have been involved in an examination of this question will have come to realize that there has been, as I think, a vast change in public opinion on this matter. I would report to you from my own province of British Columbia that in the last year our legislative assembly, for example, unanimously passed a resolution favouring divorce reform. I have discussed this with members of the legislative assembly to determine whether they received any adverse criticism of this resolution and none of them did. In fact they received, in so far as they could judge public sentiment and public feelings, overwhelming endorsement of the position of the legislative assembly in favour of divorce reform.

I have introduced my bill to help in the cause of obtaining some parliamentary action, because I think that there are hundreds and thousands of Canadians—both those directly affected by our present divorce laws and those who are concerned about them, such as members of the legal profession, members of the judiciary, welfare workers, et cetera—who are somewhat discouraged and disgruntled at us parliamentarians for the long time we appear to have taken in dealing with the question of divorce reform.

I would hope that with the bills in front of you and the work you have been doing over the last few months you would report in favour of divorce reform. If I might, I would ask that you append to your report a draft bill rather than simply making recommendations. If your report contained a draft bill, should it be possible to draw up and agree on one, I think this would speed action being taken by full Parliament itself.

As I say, I wanted to be brief because the purpose of my bill was simply to generate the action which has resulted, namely the hearings of this committee and what I hope will be a report in favour of divorce reform, but I am of course open to any questions on my bill itself.

Mr. McCleave: Clause 2 gives jurisdiction only to the courts and would in effect eliminate the proceedings here in connection with Newfoundland and Quebec divorces. Had you taken this into account in drafting the clause?

Mr. Basford: Yes, I had, because clause 2 gives jurisdiction to the courts in those provinces now exercising jurisdiction, and clause 3 establishes what is in effect a Canadian domicile for divorce or dissolution of marriage. There people in any part of Canada would be free to apply to those provincial courts now granting divorce to obtain divorce, and because of that I did not see the need to continue parliamentary action in this regard.

Mr. McCleave: Suppose we faced great protests from the judiciary or the administrators of justice in Ontario and New Brunswick—which I presume would be the places where the courts would have an extra burden if Quebec cases came before

them—would you not agree to the alternative that the committee take the step of giving the extra ground of jurisdiction to a commissioner and to the Senate itself? You are not opposed to that, are you?

Mr. BASFORD: No, I am not opposed to it. I think it is possibly an easier way to do it, because then throughout Canada divorce jurisdiction is at least being exercised at the same level and by the same bodies. I think it would tend to make the growth of jurisprudence more consistent. If the committee does not like that system and wants to maintain parliamentary jurisdiction, I certainly have no objection. Quite frankly, I would be surprised if Ontario and New Brunswick protested, but your information might be better than mine.

Mr. McCLEAVE: If we put it in the hands of the county courts, the county court judges in Ottawa and in Restigouche Country, New Brunswick, might be raising merry Cain with Parliament if they had to divide about 500 or 600 cases a year between them.

Mr. BASFORD: Yes, and the Parliament of Canada, it would seem to me, could thereby appoint judges.

Mr. McCLEAVE: I should like to ask two questions on grounds. The first is on (f), imprisonment. Did you consider granting relief to, say, a woman who was married to a man who was continually in prison, perhaps for short periods of time, but was likely to be almost a habitual offender? It seems to me your clause makes people who are guilty of one serious crime liable to have their marriages dissolved when the one serious crime might be the one bad thing they ever did in their lives.

Mr. BASFORD: If someone did become an habitual criminal and was so charged and convicted, coming from a city where they were crazy with habitual convictions on criminal charges, it seems to me that upon conviction that person would undoubtedly remain in gaol for three years and become subject to paragraph (f).

Mr. McCLEAVE: In drafting have you considered that the points under (g) might quite likely fall under (c), the cruelty paragraph?

Mr. BASFORD: Yes.

Co-Chairman Senator ROEBUCK: Have you considered the rather new thought that has come to us in the course of our hearings, of marriage breakdown by reason of imprisonment, putting that on a new basis? The suggestion is that when a man has gone to gaol divorce should be given on the ground of marriage breakdown.

Mr. BASFORD: I have thought about it but I cannot honestly say I have considered it, if I can draw a distinction between the two points. Probably your committee has heard a great deal more evidence and considered the question of marriage breakdown more carefully than I, and I hope that you will deal with and very carefully consider that question, which is as you say a fairly new concept in our thinking on divorce reform. The one thought I have is that the concept of marriage breakdown appears to me to be one put forward in substitution for the various specific grounds for divorce, because surely—it seems to me anyway in our development of our thinking and our jurisprudence on the subject—the reason why people want to enumerate more grounds for divorce is that they figure these specific grounds constitute breakdown of marriage. Therefore I think they are alternatives, and breakdown of marriage should not be treated as just another ground for divorce. If you are going to accept the concept of marriage breakdown—this is just my own thinking—that is the beginning and the end of the answer and the beginning and end of the grounds, and it is up to the judge to determine whether in fact there is marriage breakdown rather than just adding it on, for example in my bill as paragraph (i).

Senator HAIG: In Clause 5 (h) you deal with mental illness. Would that mean the respondent would have to be committed by a superior court to an institution? The medical prevention and cure of mental illness is increasing, so you would have to have a committal.

Mr. BASFORD: Under paragraph (h) I do not think a court committal order is a prerequisite.

Senator HAIG: The respondent might be under care and treatment for a couple of months over a year.

Mr. BASFORD: For a period of at least five years. I say that remembering that in my own province people can voluntarily commit themselves to an institution and then remain there.

Co-Chairman Senator ROEBUCK: And in other provinces as well. You do not have to have a committal.

Senator HAIG: But they would have to be under the care of an institution, either going there voluntarily or put there by a court order.

Mr. BASFORD: Yes.

Senator HAIG: So they would have to be in an institution.

Mr. BASFORD: I am sorry, I misunderstood your question. I thought you were saying a prerequisite would be a committal order. Paragraph (h) requires care in an institution by my reading of it.

Co-Chairman Senator ROEBUCK: Perhaps, Mr. Basford, you are in the same position as I was. I introduced a bill over a year ago now; I have learned a great deal in the following year and I said to the committee the less said about it the better. I was looking forward rather than back and I did not wish to defend the details of bill I introduced at that time. Perhaps you are in the same position if you have been reading the record of the many briefs we have received during this past year.

Mr. BASFORD: That sums it up precisely. That is why in my opening statement I did not deal with a detailed presentation of the bill, because it was introduced, as yours was, to get some action taken. I would think that at this point the members of the committee are far more knowledgeable on the subject than I am.

Co-Chairman Senator ROEBUCK: I felt that my bill was tuned up to be so conservative that it would get by. I think things have changed considerably in the last year, both in the country and in Parliament. Is that all you wish to say to us, Mr. Basford?

Mr. BASFORD: Yes, Mr. Chairman, unless there are further questions.

Co-Chairman Senator ROEBUCK: Thank you. Even if it is not necessary to go into the last details of the bill, dotting the i's and crossing the t's, you have made your contribution

Mr. BASFORD: Thank you, Mr. Chairman.

Co-Chairman Mr. CAMERON: The members of the committee are, of course, acquainted with Mr. Brewin, who is the Member for Greenwood in the Commons; he is a distinguished lawyer and a parliamentarian of eminence. He is sponsor of Bill C-264, an act respecting divorce, and he will now discuss his bill with the members of the committee.

Mr. Andrew Brewin, Member of Parliament for Greenwood: Mr. Chairman, honourable senators and members, I think I will be a little longer in the introduction of this bill than with the other bills because my bill attempts to strike new ground, or at least to embody ideas that have not been familiar for very long. In my judgment, the bill poses one of the most important issues facing this committee. I believe, with Mr. Basford and many others, that there is a very wide measure of agreement, both publicly and in this committee, that the law of divorce does require change and reform.

I suggest that there is one real alternative though which faces the committee in considering reform, and that is whether it will expand the grounds of divorce, or the matrimonial misconducts which are the present grounds of divorce, or accept and recommend to Parliament the acceptance of a new basis for dissolution of marriage, namely the principle of breakdown as the sole ground for granting divorce. I have

based this, as will appear later in my draft bill, on a book called *Putting Asunder*, which in fact is a report prepared by a group appointed by the Archbishop of Canterbury in England in January, 1964. Frankly, it was the reading of this book, in addition to other representations made to the committee, that persuaded me to draft this bill. I urge any of you who have not had the opportunity to do so, if you are concerned about this aspect of the subject before the committee, to get the book and read it because it is full of detailed explanation of why that committee felt as it did.

Co-Chairman Senator ROEBUCK: We sent a copy to every member of the committee.

Mr. BREWIN: I know that most of you suffer from the same problem that I do in that we get a lot of books, recommendations and literature, but I sincerely suggest to you that this is worth very careful study, because it deals in detail with the matters I shall be discussing, and I will not attempt to go through it in detail.

Co-Chairman Senator ROEBUCK: We also sent the book published by the Law Commission.

Mr. BREWIN: I have that too and I want to refer to it.

Co-Chairman Senator ROEBUCK: We sent that to every member of the committee.

Mr. BREWIN: There is one thing I think I should try to make clear at the outset, and here I wish to quote Lord Hodgson, speaking in the House of Lords in England, to which there is a reference at page 16 of the book:

There are only two theories alive on this problem—

that is the problem of divorce—

namely, are we going to act on the matrimonial offence or are we going to act on the breakdown of marriage theory?

I want to emphasize that, because both in this book and in other places, and in my representations to you, I want to make it clear that the breakdown theory is a substitution. In fact, the authors of this book—who incidentally include a good many distinguished lawyers as well as theologians, sociologists and so on—said they felt it was a substitute and not an addition to existing grounds.

The reason I drafted this bill was partly as a result of reading this book and partly because of the presentation to this committee of a brief by the United Church of Canada in which it urged the substitution of breakdown instead of matrimonial offences as the basis for dissolution of marriage. I therefore thought it suitable to put that in the form of a legislative draft in order that when we were discussing the matter in this committee we should not just have a general representation but could see it in black and white, so that if you accept the theory you would have something, no doubt subject to amendment and improvement, before you in legislative form.

May I now review what I have put in the bill itself. The main provision is in Clause 2, which proves what is really the core or basic proposition of the bill:

A petition for divorce may be presented to the court either by the husband or the wife, on the ground that a marriage has irretrievably broken down and that there is no reasonable possibility of reconciliation, and the court may grant dissolution of the marriage in such case.

There is no definition of "breakdown" here, and this is deliberate. There is no definition of "breakdown" because immediately you start defining it you narrow it in a sense. The only definition—which again I base upon *Putting Asunder*—is equating it with the situation that there is no reasonable possibility of reconciliation. This is not divorce by consent; the court would have to determine as a fact that the marriage had irretrievably broken down and that there was no reasonable possibility of reconciliation. That would be the issue before the court, and I may say that the report thinks that it is a triable issue.

Co-Chairman Senator ROEBUCK: Do you add separation at that point?

Mr. BREWIN: Not at this point. I deal with separation in clause 3, and I am coming on to that clause. Before I read clause 3 to you, may I say that the Law Commission in Great Britain, in this volume which Senator Roebuck says you have all received, which is a review on reform called *The Law Commission's Report on Grounds of Divorce*, set out the field of choice. It contains much that is very interesting and pertinent, but the only point I want to refer to is that they approved the principle of breakdown of marriage as set out in the archbishop's report *Putting Asunder*, but said that from a practical point of view it would create very serious problems in the courts in England. They said that at the present time divorces were granted for adultery and grounds like that, which were proved in a very cursory and summary fashion, whereas the principle of breakdown involved some sort of inquisition into the state of the marriage and a full inquiry, a full inquiry would put an intolerable strain on the existing courts and it would therefore be impracticable.

Mr. Ryan, who is on the staff of Queen's University, whom many of you heard when he gave evidence here with the Anglican delegation, pointed out that the same objections perhaps did not fully operate in Canada because there was already, at least in some parts of Canada, in the Province of Ontario with which I am familiar, a species of investigations by social workers. The procedure is that where the future of children is involved in dissolution of marriage the official guardian is asked to make a report, and he refers it to the children's aid or other suitable social agencies who make a report about the home. Mr. Ryan's suggestion was that through the use of social agencies and so on, who would conduct the inquisition and make a report to the court, the burden on the courts would not be so great.

Nevertheless, it was my view that there was a great deal of force in the argument of the Law Commission in England that there would be extreme practical difficulty, and I therefore propose to try to solve that by clause 3 of the bill I have drafted, which provides:

Where the parties are in fact living separately and apart and have lived separately and apart for a period of at least one year immediately preceding the date of the commencement of proceedings, then there shall be a *prima facie* presumption that the marriage has irretrievably broken down and that there is no reasonable probability of reconciliation.

I may say that in discussing this with a number of people, some have told me that a year was too long and others have said it was too short, so I am not particularly wedded to the period of a year, but I think a full period of separation is at least *prima facie* evidence—and I stress that it is only intended as *prima facie* evidence—that the marriage has broken down.

In clause 5, I deal with two problems. I give the court the right to refuse a decree of dissolution where it is not satisfied

that adequate and just provision has been made having regard to the financial circumstances and conduct of the spouses,

(i) for the maintenance of the other spouse—

and you notice that I have not distinguished between the husband and the wife; in these days of equality of the sexes if the wife is able to support the husband and it is just she should do so I do not think she should be in a different position from the husband—

(ii) for the custody and maintenance of any child or children of the marriage.

I have not attempted to spell out how the court will be satisfied. It could be by proof of agreement, it could be by proof of decree or judgment in some court of jurisdiction within the province, it could be by the province conferring jurisdiction on the court to deal with that matter on the application for dissolution. I believe that there would be no constitutional problem in saying that the court should not grant a decree unless it was satisfied that provision had been made. Indeed, in my view it would be irresponsible to contemplate the dissolution of a marriage until these matters had been dealt with.

Paragraph (b) is a different thing altogether:

where it appears to the court that for some other reason a decree may prove unduly harsh or oppressive to the respondent.

This is not to say the mere fact that a person could be described as a guilty party necessarily means he or she is unable to petition—I intend the contrary—but this provision exists in Australian law, and I was impressed with the argument of *Putting Asunder* that it should be included.

I omitted by oversight to refer to clause 4. This is designed to prevent what I think was described by one of the witnesses from the United Church as “quicky” divorces. It is based on the English law as I believe it is at the present time, that no petition for divorce shall be presented until after three years from the date of the marriage, except in cases where there is some particular hardship in the view of the court and an application has been made to the court to that effect.

Clause 6 provides the court with the right to adjourn the proceedings.

with a view to enabling the parties to seek to effect a reconciliation and for the purpose, if the parties request it, of consulting a qualified person or persons with experience or training in the field of marriage counselling.

I have not endeavoured to make that a compulsory provision, because I think that any attempt at compulsion usually makes it by its nature unsuccessful. This is something that reminds the court—and it is inherent in the idea of breakdown—that there are facilities which might assist the parties towards a reconciliation.

In clause 7 I have dealt with the question of jurisdiction. I made a mistake here owing to my ignorance. I had thought that county courts and district courts were superior courts, but I understand I was wrong in that. I would certainly like to see an amendment to give jurisdiction to county courts. The former Chief Justice McRuer came before the committee on that point, and I thoroughly agree with the argument he presented. That is just an oversight in the clause. I think county courts should have jurisdiction, and it may be that should be reviewed in the light of the situation in other provinces.

In subsection (2) I put in something that I think rights a wrong which has been called to our attention in a good many briefs:

the domicile of a married woman, wherever she was married, shall be determined as if she were unmarried.

I think that the contrary doctrine, the doctrine pronounced by the Privy Council on the basis of antiquated theories in the ecclesiastical courts about the unity of the spouses and the natural assumption in that era that if there was a unity the husband was the one who ruled the roost entirely and therefore the wife's domicile must be the same as her husband's, is not necessary, and for the purposes of the bill I think this is useful.

In clause 8, I have preserved the jurisdiction of the Senate, as exercised at the present time, but I have suggested that the grounds they act on should be those set out in the bill so that there would be uniformity.

In clause 9, I have explicitly excluded any effect of this bill on nullity. I think that is a separate subject, and anybody who wants to look into the question of nullity should deal with it separately.

By clause 10, I have repealed a number of acts.

Clause 11 is the height of naive optimism. I have suggested that it should come into force on July 1, 1967. It is a pious hope, but I do not think it will do any harm if it is not accepted with the rest of the bill.

There are a number of reasons for submitting this bill but I will not attempt to go over them in detail. I have already said that they are fully expressed in *Putting Asunder*, which is a detailed examination of the whole subject. One recalls that in

England, where *Putting Asunder* was written, they have since 1937 or thereabouts, since the time of Lord Herbert's bill, had additional grounds beyond those existing in Canada. According to that report the situation is apparently not found to be satisfactory and that committee came down firmly, following a suggestion made in an earlier report, which was a minority report at that time, in favour of breakdown.

That committee made two things very clear. First, they thought of breakdown as not an additional ground but a substitution. Secondly, in their view breakdown was a triable issue. It has sometimes been argued that it is a difficult thing to determine. In their view it was a triable issue quite apart from the question of consent, and it should be tried.

In their report they deal with the unhappy results of what they call the "accusatorial proceedings". These, they say, put the parties at odds more than they need be and bring the law into disrepute; one party is found to be guilty and the other innocent, although this is unreal.

They reject divorce by mutual consent and give a quotation, which I would like to read, from Lord Walker in an earlier report, in which he was a dissenter:

The true significance of marriage, as I see it, is lifelong cohabitation in the home for the family, and when the prospect of continuing cohabitation has ceased the true view is that the significance of marriage seems to require that the legal tie should be dissolved. Each empty tie as empty ties accumulate does increasing harm to the community and injury to the ideal of marriage.

This proposal is therefore put forward and accepted by this committee of churchmen on the ground that in their view it is more consistent with a lifelong union, which they think marriage should be. The United Church in its brief put before the committee the situation of tens of thousands of people living in Canada in what were in effect stable unions which could not be made legitimate.

It will be observed by the committee that the adoption of the principle of breakdown as opposed to the principle of matrimonial offences will in some ways widen the opportunities for obtaining a divorce. There may be circumstances which do not constitute grounds which would nevertheless be evidence that there was an irretrievable breakdown without hope of reconciliation. On the other hand, I think I should point out that in some cases it would narrow the basis for divorce. For example, a single act of adultery would not necessarily be regarded as a ground for dissolution where it could be shown that there remained a real opportunity for reconciliation. So the proposal broadens the ground in some respects and narrows it in others.

The principle of breakdown has been supported more or less clearly in a number of briefs filed before the committee, although I have not gone through all of them for that purpose. The committee will recall that, the idea of breakdown being relatively new in this country, a number of those who advocated a liberalization of the law by broadening the grounds for divorce had not at the time of presenting briefs to our committee given attention to the principle of breakdown. Nevertheless, the following briefs support the breakdown principle. I do not think I should take time to read the briefs to you, but they include the Canadian Jewish Congress, the National Council of Women, the United Church of Canada, the Canadian Committee on the Status of Women, the Anglican Church of Canada and, although I do not seem to have it in my list, the Canadian Mental Health Association.

The same view is strongly advocated by a lawyer in Toronto named Mr. MacDonald who, with a Mr. Ferrier, has written an article to which I would like to refer you in the *Canadian Bar Journal* of February 1967, Volume 10, No. 1, where the breakdown of marriage as a ground for divorce is fully examined by Mr. MacDonald and Mr. Ferrier. It is on page 6 of that brief.

Since this bill was given first reading in the house and some attention was called to it in the press I have had a number of requests for copies. I would like to point out—again I do not think, unless you want me to, I will take time to read them—I

have had letters expressing approval of the bill in principle if not in detail from the Canadian Committee on the Status of Women, the Seventh Day Adventist Church in Canada, the Pastoral Institute of Calgary, which is operated by the United Church who presented a brief to you, the Canadian Mental Health Association, and the Rev. Frank Fiddler, who was on the committee of the United Church. I have all these letters here if anybody is interested in them. The Anglican Church of Canada in their presentation specifically referred to bill C-264 and expressed their approval, with some slight limitation I think on clause 3 as drafted; otherwise they expressed their approval.

In paragraph 15 of the Law Commission report the following statement is made as to the objectives of divorce law:

A good divorce law should seek to achieve the following objectives: to buttress rather than to undermine the stability of marriage, and when regrettably a marriage has irretrievably broken down to enable the empty legal shell to be destroyed with the maximum fairness and the minimum bitterness, distress and humiliation.

It is my hope that Bill C-264 although I am sure it could be much improved in form, in substance achieves this objective.

The main argument I have heard in discussing this matter against the principle of the bill is that the proposal is a new one. Some people have said it may fail to be acceptable to the people of Canada and some people have said it is a step in advance of what has been done in other parts of the Commonwealth and the United States. I would only comment that I cannot believe this is a good enough answer. Why do we in Canada have to tread a path that other countries have trod before and found unsatisfactory, I think notably the United Kingdom? The proposal in the bill can scarcely be said to be wildly radical when it has the support of such groups as the United Church of Canada and the Anglican Church of Canada. It certainly cannot be thought to be disrespectful of the sanctity and permanence of marriage as an idea.

It would, I have suggested here in my notes, be following Canadian tradition if we were to advance slowly and accept the reforms made some thirty years ago in the United Kingdom, albeit with some minor modification. But I suggest it would be setting a new and worthwhile tradition for Canada to move in advance of other countries to a more humane and satisfactory basis for the dissolution of marriage. I feel quite sure the public would be prepared to commend us if we took our courage in our hands and accepted a more adventurous approach, and one which I believe would bring a greater measure of justice to those involved.

I should have said in opening that my colleague Mr. Gordon Fairweather joined me in presenting this bill to the house. I hope that before this committee completes its review of policy it will give the most earnest consideration to this approach, which, as I said in opening, is really something different. I think we are faced with a choice. For myself, I must say that I had never given any great thought to this question of breakdown of marriage until I read *Putting Asunder*, and I was completely converted by reading it. It was obviously written by someone with legal experience, and to my mind it deals with the objectives and problems entirely satisfactorily.

For these reasons, Mr. Chairman, I am very happy to be able to present Bill C-264 and I hope it will receive due consideration.

MR. BALDWIN: I am basically in agreement with the principle this bill envisages, but there are one or two collateral aspects of it that I want to question Mr. Brewin about. I have gradually come round over a period of time to accept the principle which is inherent in this bill. As I understand what Mr. Brewin said—and this would confirm my own views from reading the literature he has mentioned—the idea of breakdown of marriage is not to be brought forward as an additional ground but in substitution for the existing grounds, or such additional grounds which could be added as grounds on the accusatorial system. That is correct, is it?

MR. BREWIN: That is correct, yes.

Mr. BALDWIN: With that in mind I have been wondering for some time what our position would be, if we did legislate in the way suggested by your bill, as to the grounds which presently exist. I note you have proposed in the schedule that certain acts be repealed. By repealing those would we be getting rid of, for example, the ground of adultery which presently exists, bearing in mind that in some jurisdictions under the British North America Act, and a few other reasons, adultery has been incorporated into the law of Canada as a ground for divorce not always pursuant to a statute creating it as such? In other words, what I am asking is: would it be necessary to go a step further and say the exclusive grounds for dissolution of marriage shall be those you have mentioned in clause 2?

Mr. BREWIN: That is a very good point. Frankly, I had not given thought to it, perhaps because I am familiar with the situation in Ontario where there is statutory jurisdiction, where a statute is explicitly repealed. I would be very happy to have that carefully looked into, and if it is necessary to clarify the situation to do so, because certainly the purpose I had in mind was to wipe the slate clean and start with this different ground.

Mr. BALDWIN: That is what I thought. This only occurred to me fairly recently and I am glad to have this opportunity of bringing it up. We might be able to get some advice on this.

Mr. BREWIN: I am sure there are experts in this field who could clear that up for us if they did think it was necessary. I had assumed it was a series of statutes that made the law of England at various historic dates applicable in various parts and that these were covered by the repeal. If this is not so, I think it very necessary to make clear that this is intended to apply across Canada and to replace any other grounds as established by English law, pre-Confederation statutes or what-have-you.

Mr. McCLEAVE: Mr. Brewin, in clause 6, would you agree that one of the parties could seek reconciliation perhaps hedged about, even one short effort, so that people could use it as an indefinite stalling device?

Mr. BREWIN: I would think the court would have to try to look after that. It would be a danger. I certainly did not think of this as being a stalling device. I thought the court would more likely act on its own judgment and try to make sure that it was not just a stall by one of the parties.

Mr. McCLEAVE: One party might not feel the marriage had irretrievably broken down. That was in my mind.

Mr. BREWIN: That might be so.

Mr. McCLEAVE: Would you consider an amendment to clause 9 so that the right of judicial separation in a province where it is exercised could still be continued as law?

Mr. BREWIN: Yes. I must say I have not given much thought to that, again partly I suppose because we do not have judicial separation as such in the Province of Ontario. We have alimony actions which have a very similar effect. I would be quite happy to see that amendment.

Mr. McCLEAVE: Have you solicited the views of lawyers? I believe you quoted the MacDonald and Ferrier article, and the same gentlemen appeared before us. I still have a great deal of trouble in my own mind about irretrievable breakdown as a triable issue in this sense. Would the parties really know what they were faced with before a court? Would the judge himself know what he was faced with in having to make the decision without allegations of particular things such as adultery or cruelty or other elements which would be the basis of breakdown?

Mr. BREWIN: In *Putting Asunder* they suggest that the procedure leading to the granting of dissolution on the ground of breakdown would include a pretty detailed history of the marriage and the apparent causes of breakdown, which might well be the same as matrimonial offences. They came to the conclusion—and I was really adopting it—that it was a triable issue and that, while new attitudes and new procedures were called for, it was not beyond the power of the courts to make fairly clear the basis

upon which they were acting; no doubt jurisprudence about it would grow up, and there would be rights of appeal if individual judges took an idiosyncratic view of the law.

Senator HAIG: The petitioner would have to allege certain acts or offences which caused the breakdown.

Mr. BREWIN: No, sir. He would have to set out the history of the marriage, and this no doubt might include offences now known as matrimonial offences—continued commission of acts of adultery, continued cruelty—but it would not be an allegation of offences as such, it would be a statement of the situation of the marriage and that it had irretrievably broken down. It is for that reason, as I understand it, that the authors of this report reject definitions, which would again narrow it down to bringing yourself within the slots of particular offences. I think the courts would want to know the history and some sort of reasonable explanation of why the marriage had in fact broken down, but this would not necessarily be a recital of offences as such.

Mr. McCLEAVE: It seems to me that the only area where you reach broader ground than, for example, Mr. Basford, who has listed quite a number of grounds in his bill, is twofold: (a) undoubtedly the archbishop and his group were sick to death of the contrived adultery cases, and (b) there were areas of incompatibility which would not normally be covered in the law as it existed, for example, in England since the Herbert bill of 1937. I think those are the only two areas, and they would really boil down to incompatibility, because your faked adultery case is simply a way of finding a key to get out of a very bad marriage. It seems to me that really is the only area perhaps where the experience in English divorce reform of 1937 has not worked out particularly well.

Mr. BREWIN: In *Putting Asunder* there is a whole section devoted to arguments why the principle of breakdown must not be introduced into a law based on matrimonial offence.

Mr. McCLEAVE: I have not read that paragraph.

Mr. BREWIN: They list a number of reasons and say that the principles are mutually inconsistent. They are contemplating not only a new wording or basis but a new approach in which the mutual recriminations as to the fault of the parties—when often it is perhaps contributed to by faults of both parties—is removed. They also suggest that by listing offences you create a superficiality when, in order to get round the breakdown generally, you try to fit yourself into slots of offences, and it is easier to prove it that way. They want to change the whole approach, and I think this is not done by Mr. Basford's bill. I think the difference is quite a fundamental one.

Mr. McCLEAVE: I was only using this bill as an illustration because it contains grounds that are generally acceptable by divorce reformers. May I present this as an argument for your opinion? The fact that one party to a marriage may believe it has broken down and presents a petition under clause 2 of your bill could very well lead to the recriminations that you say we would be rid of if we removed the matrimonial offence approach.

Mr. BREWIN: It could. I do not suppose any bill could eliminate that possibility. I had a case the other day in my own constituency of a chap who had been living apart from his wife for 25 years and had had a family by his second and illegal union. His wife either would not or could not give him a divorce. He had only lived with her for a few months, and if I remember correctly she had had three or four illegitimate children before he married her which she had not disclosed before the marriage. There was no way in which he could dissolve the shell of a marriage. Technically he was the guilty party in every sense of the word, but there was nothing he could do about it. This was just one illustration that came to my personal attention.

Senator HAIG: That would be a marriage breakdown.

Mr. BREWIN: It would be a very clear marriage breakdown.

Mr. BALDWIN: That would be an irrebuttable presumption of breakdown.

Mr. BREWIN: I would think so.

Senator GERSHAW: We are indebted to Mr. Brewin, who has given us so much food for thought. It occurred to me that clause 4 ought to be left out altogether. If a marriage has irretrievably broken down it seems to me that there should be separation at any stage. The reason I mention that is because over the years there have been a lot of people coming to the senate for divorce in cases where a baby has been born prematurely, they have married with the intention of getting divorced, they hated each other, there was no affection, no chance of it ever being a proper marriage. I do not think there should be this three-year waiting period in such a case.

Mr. BREWIN: I put that in largely because of the representations in the brief of the United Church. They suggested it, as I understand it, in order to prevent people marrying in a hurry and thinking it is an easy thing to get out of. Clause 4 is not an absolute bar. If the court thinks some hardship is involved they can act more quickly. I am not wedded to clause 4 if the committee does not think it is an essential part of the bill. However, it seemed to me to be a reasonable provision. I think it is in the English law. I think something might be done to indicate to people getting married that unless there is a very clear-cut circumstance they cannot just except to get married today and be divorced the day after tomorrow.

Senator GERSHAW: On clause 3, I think one year is too short a period. Certainly a man may go to live somewhere else and transfer his affections, but in the case of sickness he may be away for the same time. I would think the period should be longer than one year.

Mr. BREWIN: Personally I did not feel wedded to the one-year period. I think the Law Commission report suggested six months, because they contended that if you made it too long a period you might be back to the faking of different grounds. However, I think that is a matter for discussion.

Mr. FOREST: In Quebec and Newfoundland, would clause 8 mean that the breakdown of marriage would be an additional ground to the existing adultery ground?

Mr. BREWIN: No, it is not intended as an additional ground. It says:

The Senate of Canada may dissolve a marriage for the grounds and upon the conditions set out herein,

so that—I may not have expressed it properly—this would be in lieu of adultery as a ground and obtain all over Canada. The court or tribunal that administered it would be different but the law would be the same. That was my intention. If it has to be changed or clarified the draftsman will have to improve on it.

Mr. FOREST: Under clause 5, in Quebec that would render necessary a judgment concerning the maintenance of the other spouse and custody of the children, but under paragraph (b) an agreement between the spouses would not be legal or binding.

Mr. BREWIN: Perhaps I need more advice on that clause. It is a tricky one. I had thought that as far as our jurisdiction, the federal jurisdiction, was concerned all you needed to do was to enunciate the principle that the court should not grant a divorce unless proper provision had been made, leaving it to the provinces, as they have done in very many cases, to provide legislation for maintenance and custody to be dealt with. I am dubious about the extent to which the federal jurisdiction ought to go, whatever the constitutional power may be, and how far it ought to go in trying to regulate this field.

I assume that an agreement, certainly in the jurisdiction of Ontario which I am familiar with, would quite often be treated as being what the parties thought was adequate and just provision, but if the court felt it had been forced on one party or was not fair or adequate it certainly would not be bound by any agreement of the parties. As to other jurisdictions having made other provisions, I suppose normally this would be accepted by the court. This would impose an obligation on the court granting the divorce to ensure that in one form or another these matters had been dealt with.

Senator BURCHILL: Are there any jurisdictions that you know of where this approach is the law?

Mr. BREWIN: No, I do not think so, not very close to this. We have already had briefs before this committee about the law in Scandinavian countries, and I think in one or two of them very similar provisions exist. In Australia and New Zealand they have included breakdown, or equivalent provisions, as an additional ground, but, as I have already explained, in my view it is not satisfactory as an additional ground. That is spelled out in detail in *Putting Asunder*, why they think the New Zealand and Australian laws are not the last word. Some of the members of the committee who are more assiduous in their reading may be able to inform you better than I can on precisely what the provisions are. I think in both Sweden and Denmark, as I recall it, there are provisions which are really breakdown provisions.

Mr. WAHN: Clause 3 makes separation for a year prima facie evidence that the marriage has irretrievably broken down. What depth of investigation would you expect the court to make in practice once that one-year separation was established? What do you visualize?

Mr. BREWIN: I visualize—I am sure this is not an exclusive view at all; it is just a possible view—that if and when this bill were passed, as part of the rules of the court there would be provision for a reference to some official such as the official guardian, or to some agency with responsibility—say a family court where a family court was available—to make and file a case report on the circumstances, to verify both the fact of separation and that one spouse had not been put upon by the other in some way, to look into whether there was need to worry about the children, for example, and maintenance.

Mr. WAHN: Putting aside the question of maintenance of the wife and children, what type of investigation would be made into the question whether the marriage had broken down because of this one-year separation period?

Mr. BREWIN: I think they would make a report on the circumstances.

Mr. WAHN: How would this be established? Supposing this difficult task were removed from a judge to somebody else, how would this somebody else perform this difficult task?

Mr. BREWIN: I think they would make a report, and no doubt some sort of form would be evolved. The report would contain a history of the marriage, when they separated, what reasons were advanced by the two parties. This would not replace a pleading by the petitioner but would be a report on the position.

Mr. WAHN: Would you visualize a private investigation outside the court by social service agencies which would then make a report?

Mr. BREWIN: Yes, it would be filed as a report, the court would look it over and if it thought on the report that it was a relatively straightforward matter, that there had been separation, there were no children and no complicating factors, then I suppose dissolution would go through very quickly as a matter of course.

Co-Chairman Mr. CAMERON: Are not you really talking about clause 6 now, reconciliation, where you get this type of report?

Mr. BREWIN: No, sir.

Co-Chairman Mr. CAMERON: It strikes me, if I interpret clause 2 correctly, the determination of that is a question of fact and you would prove it in the same way that you would provide a question of fact in any court of law. Under that clause the judge would say, "Well, I have a report from an organization. You prove your case."

Mr. BREWIN: Under clause 2 the judge would have the responsibility of making a finding of fact as he has to do today in dealing with the question of custody, but that is no reason in the world—and I think this was Mr. Ryan's suggestion—why ancillary to that decision there should not have been some form of investigation by a qualified social worker.

Mr. WAHN: Do you think it is desirable that the parties should be subjected to an inquest by a social worker with regard to their marital relations?

Mr. BREWIN: Yes, I do.

Mr. WAHN: If one party deserts another for a year so that in fact they have lived separately and apart, would that party be able to apply for a divorce? For example, if the husband deserts the wife and lives separately and apart for a period of more than a year, I presume under section 3 there would be a *prima facie* presumption that the marriage had irretrievably broken down?

Mr. BREWIN: Yes, but I suppose if the wife objected very strongly and said she had not been properly looked after, and there were other reasons, the court might refuse a divorce on the basis of clause 5 (b).

Mr. WAHN: Assuming proper financial provision were made, would the deserting husband have the right to divorce?

Mr. BREWIN: Yes.

Mr. WAHN: So where the period is so short as a year it really amounts to a licence to obtain a divorce by desertion, and if both parties are willing it amounts to divorce by consent, does it not, where the period of time is so short?

Mr. BREWIN: I think it does whether the period of time is short or long. As I said before, I am not wedded to the period of a year. If that is thought to be too short we might extend it a bit, but the principle is the same. It is perfectly true—

Mr. WAHN: If you—

Mr. BREWIN: Let me answer your question, Mr. Wahn. You have asked me a question and I suppose you would like an answer. Let me suggest to you that there is already a large element of consent in divorces, and there would continue to be an element of consent, but instead of consent taking the form of trumped up charges of adultery with someone it would take the form of proving that in fact the parties had been apart and there were no special reasons for believing or hoping they could ever be reconciled again. To that extent it would be, as you say, a possible licence to end the marriage. I would think myself that if the parties had in fact been separated for an appropriate period, be it a year or two years, or whatever period is decided, that is pretty good *prima facie* evidence that there is not much left of the marriage.

Mr. WAHN: I would suggest to the witness that to use this very convenient term “appropriate period” is really covering up the basic problem. Let me put it to the witness this way. If the so-called appropriate period is very short, then in fact it amounts to a licence to one spouse to get a divorce by deserting, provided he is prepared to pay, or it amounts to divorce by consent if both parties wish to terminate the relationship. If the period of time is longer, say three or four years, that is more substantial evidence that the marriage has in fact irretrievably broken down; but in that case does it not indicate that you do need other grounds for divorce? For example, a party should not be expected to wait four years in the case of extreme cruelty or in the case of continuous adultery.

Mr. BREWIN: You understand that this is only a presumption here. There are other grounds, as you say. A breakdown is not necessarily based upon separation or any such thing, as you say. It might be the marriage is shown to have clearly broken down six weeks after it had been consummated, after the marriage had taken place, by reason of extreme cruelty or something of that sort. This is not the sole basis for this. Quite frankly, I do not follow your point, that there is any difference in kind between a separation of a year and a separation of three or four years. It may be the view of the committee that a year is too short to determine even in a *prima facie* way that a marriage has broken down, but the exact time is only a matter of judgment and does not affect the principle. I certainly do not accept your argument on the other problem that this shows you must have individual grounds. I personally do not like clause 3 very much. It was only put in, as I said—I am not sure whether you were here then—to meet the difficulty raised by the Law Commission report, which was that if you had to have a detailed inquisition in every case it would impose an undue burden on the courts.

Mr. WAHN: Let me put it to you this way, Mr. Brewin. Perhaps I have not made my point clear. If the appropriate period for clause 3 were considered to be, say, three years, would you consider that unduly long?

Mr. BREWIN: I would be inclined to think so, but I would be subject to persuasion on it. If people with experience on this committee were to say they knew of separations of over a year which did not really indicate that the marriage had broken down and they felt on the basis of their experience that three years would be a better period, I would be prepared to accept their judgment. At the present time my inclination is to think that a year would be appropriate, particularly when in my view if you do not make it a reasonably short period you perhaps open the door to the very sort of chicanery and deception of the court that exists under the present situation.

Mr. WAHN: If you did accept the period of three years in clause 3, would you not agree that in a case of obvious cruelty a divorce should be permitted before the expiration of the three-year period?

Mr. BREWIN: Mr. Wahn, it is my assumption that facts justifying a proper finding of cruelty would be equivalent to finding that the marriage had broken down. It would be based on a different approach. The same facts that prove one would presumably prove the other.

Mr. WAHN: That is exactly what I thought you would say, and then my question is: why do you object to having cruelty as a ground for divorce?

Mr. BREWIN: I am afraid I would be repeating the whole argument I have made to this committee and the whole argument of *Putting Asunder*, which I think you have read. All I can do is to refer you back to that and say it is a totally different approach. It is a different thing to say cruelty is one thing and breakdown of marriage is something different. One is an offence in which one person is wrong and the other is right, one is guilty of misconduct, the guilty party, and the other is not. Breakdown may come from a series of causes contributed to by both parties; breakdown may be based upon many other causes, of which cruelty is perhaps a symptom and not a cause. Unless you accept the theory we are not together on it.

Mr. WAHN: For my part I am doing my best to get together. Would you not admit that a marital offence can cause the breakdown of marriage?

Mr. BREWIN: I have just said so.

Mr. WAHN: I merely point out that it is some indication that there is nothing inconsistent in my view with having specific grounds together with marital breakdown as a ground of general principle.

Mr. BREWIN: Rather than continuing this dialectical argument between ourselves I would refer you to these sections in *Putting Asunder*, which do not agree with the point you are making.

Senator CROLL: Mr. Brewin, I have been practising as one of the men who grant divorces in the senate. I have sub-consciously been giving divorces on the ground of marriage breakdown for almost ten years, so I am in your corner to begin with. What bothers me is this. I have read all the literature, and perhaps twenty years ago I had a bill on divorce in the house which was defeated. Are you satisfied that the people understand what we are talking about? Does it not occur to you that on this basis we need at least four or five years of debate in the House of Commons on this principle to get it across to the people?

Mr. BREWIN: No, sir, I do not believe we do. I think the people are ready for this. On all the occasions I have heard of, in church assemblies and other groups, when this proposal has been put forward it has met with quick and ready acceptance, because I believe it makes sense. I do not believe we should wait four years for this to permeate further, and I do not think anybody suggests that we should continue with the present law. I do not think we should just add a series of grounds now and hope to progress further in a few more years. It seems to take a hundred years in this country to reform

our laws. If we are going to reform them I would like to reform them on the basis upon which we are in fact operating.

Senator CROLL: But Mr. Brewin, here is Ian Wahn—I think one of the really intelligent members of the House of Commons—who is all in favour of this and has been for years, who is having great difficulty in reconciling this. If he has difficulty, think of the poor fellow in the street.

Mr. BREWIN: Mr. Wahn, as you say, is a highly intelligent member of the House of Commons. I have found that some of my colleagues, even of high intelligence, do not always jump to the conclusions that I would. I think Mr. Wahn may be convinced even yet, but you have got to allow some area for perhaps disagreement. I think Mr. Wahn may be difficult to persuade partly because he himself has long been a foremost advocate of other forms of divorce reform. I know that when I advocate something I am tenacious about it. Maybe that is one reason why he has difficulty. As I say, the principles I have expounded are not my own principles; they are principles expounded by people who have spent years studying this matter.

Senator CROLL: They have not made quite the impression in Great Britain that you suggest they have made, because I have read considerable literature and opinion that does not agree with what you are suggesting here and that the archbishop's group suggests.

Mr. BREWIN: I would not suggest that it can be universally accepted. Certainly not. What I am suggesting is that the people who propounded this proposition—which commends itself to me at least, and to a good many other people I know who have taken the trouble to read the report—are themselves highly experienced in this field. That is all I am saying.

Senator CROLL: What I am afraid of is that the idea of breakdown of marriage will raise hopes in the minds of people that they could not possibly achieve with respect to these marriages that will not work, despite the fact that you have certain precautionary measures which you have in mind.

Mr. BREWIN: I know there is a lot of heartbreak today because of the present state of the law, and I do not know why the principle of breakdown should be the cause of more misunderstanding and unhappiness than exists today, or would exist if all we decide to do is expand some of the grounds.

Senator CROLL: I think the breakdown of marriage has about it in the minds of the public an aura of collusion. Two people walk in and say "Our marriage has broken down" period. Where do you go from there?

Senator HAIG: Get a divorce.

Senator CROLL: Exactly. That is what I am getting at.

Mr. BREWIN: They will soon find out that is not what is involved here. People can read, you know.

Senator CROLL: My suggestion is that is the impression we are getting out to them, and I do not think they know enough about it.

Mr. BREWIN: I have more confidence in the intelligence of people than apparently you have. That is all I can say.

Senator CROLL: It is not a matter of having confidence in the intelligence of people. I think I know what people think as well as you do. The idea of getting across to them something that is new takes a little time. That is what I am saying. You cannot just say, "This is it." It takes a little time, and one of the ways I think we might be educating them is through debates in the House of Commons, which have an educating effect.

Mr. BREWIN: I think the quickest and best education would be for us to enunciate the principle that we think is best. I am not saying this is the best. It would be up to the committee to decide what is the best principle. If they think this is the best principle, then I would not spend my time worrying too much about public opinion being able to accept it and understand it. Perhaps I should put it the other way round—understand it

and accept it. When this committee reports there will be debates in both houses, interest will be aroused, and if it is the best principle I do not think we need worry about four or five years' public education frankly.

Co-Chairman Mr. CAMERON: Are there any more questions?

Mr. BALDWIN: Could I ask something supplementary to a question asked by Mr. McCleave with regard to the possibility of the courts being able to establish a satisfactory jurisprudence on the issue of irretrievably broken down marriages? May I ask you a leading question, Mr. Brewin? Would you not feel that courts which have reasonably successfully grappled with the M'Naughten rules for a number of years could deal with the irretrievable breakdown of marriage?

Mr. BREWIN: That is a difficult subject for me because I am not sure they have wrestled so successfully with the M'Naughten rules, but I think they would manage to handle this problem all right.

Mr. McCLEAVE: I wonder if Mr. Brewin could answer one parting shot in the same spirit as Mr. Baldwin's? What is the difference between irretrievably and retrievably broken down?

Mr. BREWIN: Well, that is a matter of semantics. I think one is the opposite of the other, is it not? "Retrievable" means you can get it back again; "irretrievable" means, as I understand it, that you cannot.

Mr. McCLEAVE: How could you say it could never be gotten back again?

Mr. BREWIN: As a reasonable conclusion of fact. No one can be so wise as to be 100 per cent certain, but I think that in human affairs we act on probability and moral conviction. I am quite sure the word "irretrievably" would not be beyond the judgment of courts in arriving at a decision—and conceivably be wrong on occasions.

Co-Chairman Mr. CAMERON: Senator Roebuck, would you thank Mr. Brewin?

Co-Chairman Senator ROEBUCK: I do not know that that is necessary. We have given you a grand hearing, Mr. Brewin, and I think we have all learned something from what you have said to us. I did not take part in the cross-examination, but I can assure you of this, that the subject of marriage breakdown will be thoroughly considered by this committee. I do not think I should go further than that.

Co-Chairman Mr. CAMERON: We have three other members of the House of Commons who have sponsored private members' bills on this subject-matter, Mr. Prttie, Mr. Stanbury and Mr. Peters. Mr. Prttie tells me he will not take very long, Mr. Stanbury tells me he will not take too long, Mr. Peters feels he will take more time. I am going to call on Mr. Prttie, then Mr. Stanbury, and if we have any time we will call on Mr. Peters.

Mr. Robert Prttie, Member of Parliament for Burnaby-Richmond: Mr. Chairman, gentlemen, I think you realize why my submission will not take very long. A couple of months ago in one of the Vancouver daily newspapers there was an editorial entitled "Divorce Reform. Where's the Action?" Early in 1965 I introduced the same type of bill as I have in Bill C-41. I think it was a desperation sort of measure. I had given up hope that the federal Parliament was going to take any action to expand the grounds for divorce, so I drafted this bill which would have given the provinces, by an amendment to the B.N.A. Act, concurrent jurisdiction with the federal authority.

To my knowledge two provinces have passed resolutions stating they would be willing to act in this field, or requesting the federal Government to change the grounds; the Legislature of British Columbia passed a unanimous resolution in 1965, and in the same year the Legislature of Manitoba passed a resolution, not unanimously but by one vote. As the explanatory note in my bill explained, if we could not get action in Ottawa then perhaps the power could be given to the provinces. This is not really what I want. I would much prefer to see the laws relating to divorce on a national basis rather than have what they have in the United States, where each state can legislate on its own.

This was the only point of my bill at the time, to try to illustrate that some provinces were more ready than others.

Mr. Chairman, I am not a barrister, I am not learned in the law, and I really have not much to add to explain the reasons for the bill. If there is to be a recommendation from this committee that the law be changed, certainly I would prefer it to apply to the whole country rather than to individual provinces.

Co-Chairman Mr. CAMERON: Are there any comments on Mr. Prittie's presentation?

Senator GERSHAW: I must say it is original. It is the first time I have ever seen divorce coupled with agriculture and immigration!

Co-Chairman Mr. CAMERON: Have you any questions, Senator Roebuck?

Co-Chairman Senator ROEBUCK: No. Mr. Prittie is in exactly the same position as I was. I introduced a bill a whole year ago and I do not want it thrown up at me now, because in the meantime we have learned a very great deal about this subject and we are looking forward, not back. We are all hoping for a very fine report from this committee, and I think we will achieve it. We have not got to that yet, but in the meantime we have stored up a very great deal of knowledge as a result of our studies and the time will come when we put it into effect I think.

Mr. PRITTIE: Thank you, Mr. Chairman.

Mr. Robert Stanbury, Member of Parliament for York-Scarborough: Mr. Chairman, I have the same advantage or disadvantage as the Co-Chairman Senator Roebuck. Being a member of this committee I have learned a great deal since our hearings began. My bill is one of those introduced at the very beginning of this Parliament. It was drafted before I was sworn in as a member, and with the very limited knowledge of the field which I had acquired as a practising solicitor and barrister I have learned a great deal, as has Senator Roebuck, although it is hard for me to believe that he could have learned from these hearings.

I must say, my feelings may be quite different when the committee comes to prepare its report. I do want to express some concern that we not completely abdicate our responsibility to define what the grounds for dissolution are going to be. If we accept some theory other than on which dissolution of marriage has taken place in the past, I hope that we will not simply leave it to judges to enact specific grounds which we have not enacted. For instance, it may be that judges will come to some agreement on what period of desertion will constitute a breakdown of marriage. They may come to some agreement at their judges' meetings on the appropriate degree for a person to be subject to the influence of drugs or alcohol to constitute a breakdown of marriage. I would not want us simply to abdicate to the courts the definition of the circumstances under which dissolution of marriage should take place.

Another concern I have is that we not make dissolution of marriage even more difficult and more expensive than it is now by requiring some very long, cumbersome and complicated process for couples to go through before they could reach this solution of their problems.

Co-Chairman Senator ROEBUCK: It has been suggested that we have two steps in the procedure. First you have judicial separation, and after a decree of judicial separation and a wait of a year the parties come back and ask for a divorce. You would not favour something of that kind, would you?

Mr. STANBURY: I would not want to see one rigid system supplemented by another, and I think that some of the propositions put before us have elements of rigidity which are perhaps almost as bad as what we have been living with. I would like to get away from the idea that one party to a marriage is guilty and the other party is innocent.

Co-Chairman Senator ROEBUCK: But if there are such would you close your eyes to it?

Mr. STANBURY: There are cases when courts will have to decide which party is sufficiently at fault so as to be deprived of custody of a child, for instance, or sufficiently at fault so that he or she will be required to pay costs etcetera. I think that the courts will have to determine fault in some degree, whether or not it is called that in the legislation. My doubts about some completely new approach would at present resolve around the necessity not to abdicate to the courts completely the definition of the circumstances under which people should be entitled to dissolution of their marriages, and to keep the process for obtaining dissolution of marriage as simple as possible.

Co-Chairman Mr. CAMERON: Are there any questions of Mr. Stanbury?

Senator CROLL: I am impressed with what Robert has just said. What I have understood from his statement is that it is our responsibility to write the law and it is not for the courts to say that this is what we meant. With that in mind I do not know how to write the law for the breakdown of marriage. That has been going through my mind all the time. I like the term, I like the concept, but I do not know how you do it in a realistic fashion. Can someone help me out?

Mr. STANBURY: It seems to me that even under the present process of dissolution of marriage the court does determine just what you have to determine in the senate, that a marriage has come to an end. One party suggests to the court that the marriage has been brought to an end by the action of the other and then the court determines whether or not that has actually taken place. I think the marriage breakdown theory is a very appealing one and it may help us in the development of the law with respect to the dissolution of marriage. However, it seems to me that it will be incumbent on us to give the guidelines for the symptoms of what will constitute the breakdown of marriage or the courts will have to do it themselves. There may be less certainty for the parties; there may be less consistency across the country because judges in different areas may come to agreement on different standards, different criteria. I still have the concern that it may be less satisfactory if we avoid defining, in some way at least, the symptoms of breakdown, which is really what the grounds set out in most of the draft bills constitute, I suggest.

Mr. McCLEAVE: Would not you agree also, in answering Senator Croll's plea for somebody to help in coming to grips with this, that when dealing with custody of children somebody is bound to wag the finger of moral blame at one party or the other, so the court assigns the children to the care of the person who will provide the best moral atmosphere for them?

Mr. STANBURY: I would think it is inherent in the whole judgment that has to be made.

Mr. McCLEAVE: So that breaks down the marriage breakdown theory right there?

Mr. STANBURY: I think the marriage breakdown theory threatens to break down the system which it attempts to set up, because if I understand the theory correctly it would seem that there would be a massive requirement for social scientists to support it.

Senator CROLL: What do you mean by saying if you understand it correctly? Mr. Brewin just told us that everybody understands it correctly, and I should have thought you were one of those intelligent members.

Mr. BALDWIN: There are degrees of understanding.

Mr. STANBURY: I am not sure I can aspire to Mr. Brewin's attainments, as I understand them. However, I do think there is a danger that we may set up a system which will fall under its own weight. We simply do not now have the social scientists to staff our prisons, our mental hospitals and so on. Maybe we are daring to think we can process the social problem that we have in our divorce courts with what would seem to be a cumbersome system.

Mr. BALDWIN: In clause 6 (b) one of the grounds for dissolution of marriage is that

the other party to the marriage has been guilty of cruelty.

I am a little puzzled. Would not that be putting almost the same degree of responsibility and burden on the courts in its attempt to come to grips with what is the measure of cruelty essential to dissolve the marriage as they would have in connection with Mr. Brewin's proposal of irretrievable breakdown? Is not there a similarity there?

Mr. STANBURY: Courts have made attempts to define cruelty sufficient to constitute a ground for dissolution of marriage.

Mr. BALDWIN: In other jurisdictions.

Mr. STANBURY: In other jurisdictions. Also our courts have defined cruelty sufficient for other matrimonial offences, and they have at least a basis for developing a definition of cruelty.

Mr. BALDWIN: Just one more question and then I have finished. In their early days the courts in struggling with this question of cruelty went through the same difficult process that they would go through in trying to come to an acceptable definition of "irretrievable breakdown". Defining cruelty judicially caused many agonizing moments in the lives of a number of courts.

Mr. STANBURY: I think though that perhaps there is no need for us to start over again. At least, I would like to see us avoid a period of years when there is uncertainty of that kind in trying to define a new ground for divorce, because during that period it will be most difficult for legal advisers to give people adequate advice on their legal position.

Mr. BALDWIN: New legal aid would mean more work for the lawyers.

Mr. STANBURY: It may provide a great deal more work for lawyers as well as for social workers. I am suggesting that over a period of some years there will be a great deal of uncertainty until this theory is developed. It may be that the theory should be developed legislatively, as Senator Croll suggested, rather than subjecting the litigants to this process over a period of years.

Mr. BALDWIN: The slings and arrows of litigation!

Mr. McCLEAVE: Would Mr. Stanbury agree to change the wording to "that the other party to the marriage has treated the petitioner with cruelty," which is the phrase used in the English act?

Mr. STANBURY: I think probably that is better wording. I can pick all kinds of holes in this bill now and I would not want the committee to consider it except as an attempt to be sure that this parliament deals with the subject of divorce during this session. Mr. Prittie in his comments uttered a cry of dismay that no one had bothered to deal with this subject for so long. Now we have finally come to the point where I am sure it will be dealt with; we are going to have a much more rational law on divorce, and I hope one of the reasons is because some of us have taken the trouble to draft bills, inadequate though some of them may be, to indicate to the government that there is strong feeling in the country that this should be dealt with.

Co-Chairman Senator ROEBUCK: Thank you, Mr. Stanbury.

Co-Chairman Mr. CAMERON: Mr. Peters, it is now half-past five. Would you like to start? What does the committee feel? Would you like to leave Mr. Peters till another day? How long will you be, Mr. Peters?

Mr. PETERS: I do not think I will be too long.

Co-Chairman Mr. CAMERON: Then we will hear you now.

Mr. Arnold Peters, Member of Parliament for Timiskaming: Mr. Chairman, I too believed that we needed a change in the divorce laws of Canada, particularly after some small acquaintance with it. I believed that Bill C-19 was probably the best type of legislation that Canada could have, but since I have participated in these hearings I have come to the conclusion that the ultimate is not this type of legislation but marriage breakdown. However, as a legislator I think it is not possible to put the marriage breakdown theory into effect, not for the reason Senator Croll gave, but for a completely different reason. I do not think the courts are capable of administering it,

probably for the reasons that have been suggested as to the ancillary sections that will be necessary to the courts—the social workers and investigating bodies to establish the breakdown of marriage.

To the best of my knowledge the courts have always operated on a set of terms, and I believe the courts would eventually develop the little red book that the senate now uses, which sets out the terms, although it is not in the act, on which the senate operates this divorce court. It sets out a series a regulations and things to do. I think the courts would eventually have to do this. Therefore, it would behove parliament to do that rather than allow the courts to develop by precedent various common-law practices which in effect would establish what we ourselves would establish.

I think that parliamentarians—and this is something that I suppose we are plagued with—are far behind the country. We are conservative, not the people in the country, and if we could come up with machinery to administer the breakdown theory I am quite sure the country would be farther ahead in its thinking than we as legislators. The reason changes have not been made is not the lack of understanding in the country. Of the thousands of letters I have received in the last five or six years I have not had one from any person, to my knowledge, who said he did not agree that the grounds of divorce should be broadened. In most cases they presented a specific case, usually their own, to show why the law was working to their disadvantage. For that reason I think the country has been ready for this for some time.

I also believe the bill I have put forward contains the proposal that was made—which I did not really understand before Mr. Hopkins, legal counsel for the senate, presented it—as to the common-law practice which really should have been attached to Canadian law when it was accepted in the provinces by the various means with which the different provinces got their law from the British precedent, in that at that time in England, where they had a unitarian-type government, maintenance of the wife and custody of the children were already in effect, and what we did in Canada was really contrary to the law. As Mr. Hopkins pointed out, our responsibility is fairly clear, or at least there is certainly an avenue which this committee should consider in terms of maintenance and custody, which has been a debatable point for a long time and which I did not take into consideration.

I am not a lawyer, so I have many difficulties that other people might not have, but I attempted in clause 2 to bring into the federal act the right of passing substantive legislation which the provinces could accept by accepting the legislation, and I believe that where it is applicable the system of provincial administration is probably a very good way of handling divorce legislation in Canada.

I have tried in clause 4 to put in a Canadian domicile similar to that mentioned by a number of other people, giving the wife the same domicile as she would have if she were a single person. I am sure this will satisfy the suffragettes, or whatever we call those advocating the equality of women. Canadian domicile for marriage and divorce purposes should be one of the changes proposed by this committee.

In regard to alimony, custody and maintenance of children, when this bill was prepared for me I took into consideration the provincial arrangements now being made. Because of what Mr. Hopkins said I am of the opinion that this is not necessarily correct and that the committee should study this much further to ascertain whether or not by the granting in the British North America Act to the federal Government the right of marriage and divorce there did not also attach to it the right of the federal Government to provide for the issue of the marriage. If we have the right, then I think the federal Government should exercise it.

In the grounds for dissolution of marriage I have not really added anything to what has already been discussed. In fact, I have only three grounds for dissolution—adultery, desertion and cruelty. Some people argue that adultery should be the only ground. It cannot be correct to maintain the theory that marriage is indissoluble but yet argue that divorce cannot be granted except in the case of adultery, because this means that it is dissoluble under certain circumstances, and I therefore think it foolish not to add other grounds which, in my opinion after studying many, many cases, I find

to be the real underlying causes of divorce. I believe that in many successful marriages adultery would not be certifiable as causing a marriage breakdown, although there may be adultery by both parties, so in my opinion adultery is not that kind of exception.

I think there can be two kinds of desertion. There can be voluntary desertion, where one partner leaves the other, and there can be an involuntary type of desertion which takes place when one partner is incarcerated over a period of time. A person who is incarcerated due to mental difficulty, or is an alcoholic or a drug addict is in most cases deserting the marriage involuntarily to all intents and purposes. I think that desertion, particularly of an involuntary nature, will always have to remain the responsibility of the petitioner. For instance, as you will have noticed in the Ottawa papers last week, a man left his wife in 1928 and was reunited with her only the other day after that period of many, many years, and if that is not considered to be desertion that would obviously not constitute a breakdown of the marriage.

Co-Chairman Senator ROEBUCK: Supposing you said a marriage had broken down by reason of one partner being incarcerated in prison for a period of time, or something of that sort, would not that accomplish what the advocates of marriage breakdown are after and make the thing practical?

Mr. PETERS: I think that is what we are trying to do. I have in mind the fact that I am not a lawyer and therefore probably look at it differently, but I have always been shocked by the fact that lawyers, for the defence and otherwise, the courts, all those connected with the courts, were well aware that many divorce cases brought on the ground of adultery were not really for adultery at all but for marriage breakdown for a number of reasons, and the divorce has been granted on an adultery charge that was obviously phoney. What I am trying to do is to legalize the grounds on which marriages have broken down. I am quite sure we will not have them all, but I have put in a number of limitations. It is two years for wilful desertion. Refusal to consummate the marriage and habitually being guilty of cruelty each has a limitation of two years, but for convictions of crime the aggregate of imprisonment should be more than five years.

This is where I run into difficulty personally with the marriage breakdown theory, because I would think it is entirely up to the offended partner—although that is not the right word—to decide whether or not continual incarceration, or a number of periods of incarceration for varying periods of time, really constitute a breakdown of the marriage. In my experience the wives of some prisoners in the penitentiary still have no desire, even after a long period of time, to obtain a divorce, and it obviously would not be granted except on the request of the petitioner.

In the United States, for instance, a doctor was charged with adultery with a mental patient. Being with one of his mental patients I presume it would be rape. The case involved a great deal of money and was considered to be almost a set-up against the doctor, for the simple reason that unless that type of charge could be instituted no relief for the petitioner would be possible.

It seems to me that there are involuntary grounds of desertion which have to be established to take care of what we would in general terms call the breakdown of marriage theory. I have no particular interest in the time. I allow only one year if the respondent has been guilty of trying to murder the petitioner. Maybe this is too long in view of one of the cases before us the other day. I think the time limits are not too important. With mental confinement, for example, it is almost impossible today to get a medical opinion that someone is permanently mentally disabled, so there should be a period after which the deserted petitioner, though the desertion is involuntary, has the right to obtain relief on that ground.

I believe the sanctity of marriage must be protected, but in Canada we have not protected it if we have 200,000 people living in common-law unions; there is certainly something wrong with the whole religious concept of our nation when this has knowingly been allowed to develop to the stage where it amounts to such a very large proportion.

It seems to me that we must have a period for which the marriage should exist before divorce is possible. Some young people would like to get unmarried a week after the marriage, or after the first set of bills starts coming in and there is not much money to go around. We must therefore have a clause saying that a divorce action could not be instituted until, as this bill suggests, three years has elapsed, except for adultery, non-consummation or depravity. The court should of course be given the right to make exceptions because of circumstances that we will not be able to cover in any kind of bill.

We have covered void, voidable marriages and annulment.

Then we went on to something else that I think has to be covered, although I am not sure whether this is the right wording. It was more or less taken from the New Zealand and Australian acts. I refer to setting up of reconciliation procedures. Under clause 9, a judge can refer a case to social workers. After the judge has heard a summary of the evidence and referred the case to a social worker he cannot hear the case again, it must be heard by another judge. This clause gives the court the right to insist that marriage counselling be engaged in. It gives the judge a considerable amount of power, but does not allow him to rehear that case after an attempt at reconciliation has been unsuccessful.

Mr. McCLEAVE: Why? Is this in the Australian and New Zealand acts?

Mr. PETERS: The reason for it is because in my opinion a judge who has already decided that there are certain factors which have been brought to his attention indicating that with proper counselling there is a chance of the marriage being saved would, when rehearing the case, have a tendency to say, "I thought it could be saved before and I still think so," and he would be prejudiced against those he had sent to the reconciliation service which in that case had been unsuccessful.

Mr. McCLEAVE: What I was trying to ascertain was whether, since you say this reconciliation procedure was taken from the Australian and New Zealand acts, this provision was in those acts as well.

Mr. PETERS: Yes. In other words, we just stole it. I understand it is called plagiarism. Under clause 11 the statements made before the reconciliation service would then not be admitted into court. There is also a provision which prevents the period that they might get together from being considered a bar to marriage being engaged in for a period of time.

I think that is all. I do suggest that we should try in this whole process to make it possible for people whose marriages really have broken down to go to the court nicely, without having to resort to a phoney hotel adultery charge and so on, receive a divorce and come away with their self-respect. Although I think it is necessary to lay the blame on one party, this should be minimized by the court wherever possible so that no stigma attaches to the guilty party, as we have known it in the past. Consideration should also be given to making the cost as reasonable as possible. In my experience, some of the divorce actions before the senate have cost the party \$5,000 to \$15,000.

Co-Chairman Senator ROEBUCK: Very seldom, Mr. Peters. That might happen when people fight amongst themselves.

Mr. PETERS: I was thinking of one case in particular when a man indicated that he had paid \$5,000 in one year for detective fees, although I was not able to establish that. I think the cost should be kept as reasonable as possible, and this should be part of our procedure.

I should also like to suggest that we consider two other things. One is that the problem of marriage should be discussed by this committee in terms of whether or not the ministers and priests of the nation should act in a civil service jurisdiction, marrying people on our behalf. I personally am of the opinion that many ministers and priests are having great difficulty in remarrying people when it is against their convictions, yet our licence to them makes it, not mandatory, but certainly an obligation on them to marry a couple rather than leaving them unmarried.

Mr. McCLEAVE: They can go somewhere else, cannot they?

Mr. PETERS: In some provinces they can and in some they cannot, I understand. It seems to me that some consideration should be given to marriage in terms of the ecclesiastical and state responsibility.

Lastly, I would like to say that in my opinion a suggestion made by one of the witnesses before the committee the other day is well worth while, that a study of the family marital relationship should be referred to some organization which can conduct such a study. I think the Vanier Institute of the Family was mentioned. I would suggest that the divorce law should contain a provision making it mandatory to review marriage and divorce legislation periodically so that we do not have to wait for necessary change until public pressure builds up to its present state. Such a body should be able to recommend amendments on the strength of an almost continuous study by an organization such as the Vanier Institute of the Family.

Co-Chairman Senator ROEBUCK: You could not put that into a bill. There would have to be an understanding in the commons, or perhaps in this joint committee.

Mr. PETERS: I would like to see written into the bill something similar to what is written into the Bank Act, which has to come up periodically. I am of the opinion, as I think most members of the committee are, that the ultimate is the breakdown theory, and although most members of the committee are of the opinion that the time has not yet arrived for us to legislate by simply saying it should be based on marriage breakdown, time will make it much more popular, and the only way I can see of getting it into legislation is for us continually to review it and update the legislation as our court procedures might indicate.

Senator BURCHILL: You do not go along with the new concept of the breakdown of marriage as Mr. Brewin outlined it this afternoon?

Mr. PETERS: Well, I would certainly like to think we could put this into effect now, because it is much more advanced than my thinking has been in this field. I personally do not think the courts could handle it yet.

Senator BURCHILL: But that is not along the lines you have suggested?

Mr. PETERS: No. What I have done is exactly the opposite and set out, to the best of my knowledge, the maximum number of grounds that are legitimate. I do not believe in "quicky" divorces. I believe in the sanctity of marriage as an institution. I have set out what I would consider, not frivolous but real grounds that have developed over the years as effective grounds for divorce, which have continually been arrived at in a roundabout way by calling it adultery.

Mr. Chairman, I apologize for presuming on your time, but I would just like to add this. I believe that consideration also has to be given to parliamentary divorce. If we pass substantive legislation, federal law, allow the provinces to pass enabling legislation and some of the provinces do not take advantage of that opportunity, the Exchequer Court as we have it now should be empowered solely to grant divorces on the grounds provided in the federal legislation and the responsibility of Parliament completely alleviated.

When the legislation was passed setting up the present situation we held out for a five-year review or termination of that legislation, and in my discussions with the Minister of Finance of the time we were assured that this would be granted. However, ministers change and times change and this may not be accomplished. I would like to see a right of petition allowed on much broader grounds so that the Exchequer Court would handle divorces for those provinces which did not have divorce courts, but Parliament in general would be able to handle petitions that were exceptions to what we would consider the normal law and might take into consideration those things that we had not heard of. I do not contemplate getting rid entirely of that right to petition Parliament, but in those fields where the Exchequer Court is now handling divorces I

believe the sole jurisdiction should be given to that court, and the right to petition Parliament should be reserved for other reasons, probably exceptions to the normal grounds.

Co-Chairman Senator ROEBUCK: That would not be covered by our present reference.

Mr. McCLEAVE: What on earth do you mean "enabling legislation by the provinces"?

Mr. PETERS: As I have said, I am not a lawyer, but as I understand it the federal Government can pass all kinds of legislation and the province then has to pass enabling legislation for their own jurisdiction, and they can take as much or as little of federal legislation as they wish.

Mr. McCLEAVE: No.

Co-Chairman Senator ROEBUCK: No. What you mean is you would give the province the right to say certain acts of ours shall apply to that province or shall not apply to that province. Is that your idea?

Mr. PETERS: This is not what I want. This is what I thought enabling legislation was. What I would like to see is all the provinces having the same law.

Co-Chairman Senator ROEBUCK: Certainly.

Mr. PETERS: I would think the province would have to pass that law rather than the federal Government telling them this was going to be their law.

Co-Chairman Senator ROEBUCK: Oh no. This is within our jurisdiction.

Mr. PETERS: Is it?

Co-Chairman Senator ROEBUCK: Absolutely.

Mr. McCLEAVE: We are masters in this field, Mr. Peters, thank heavens.

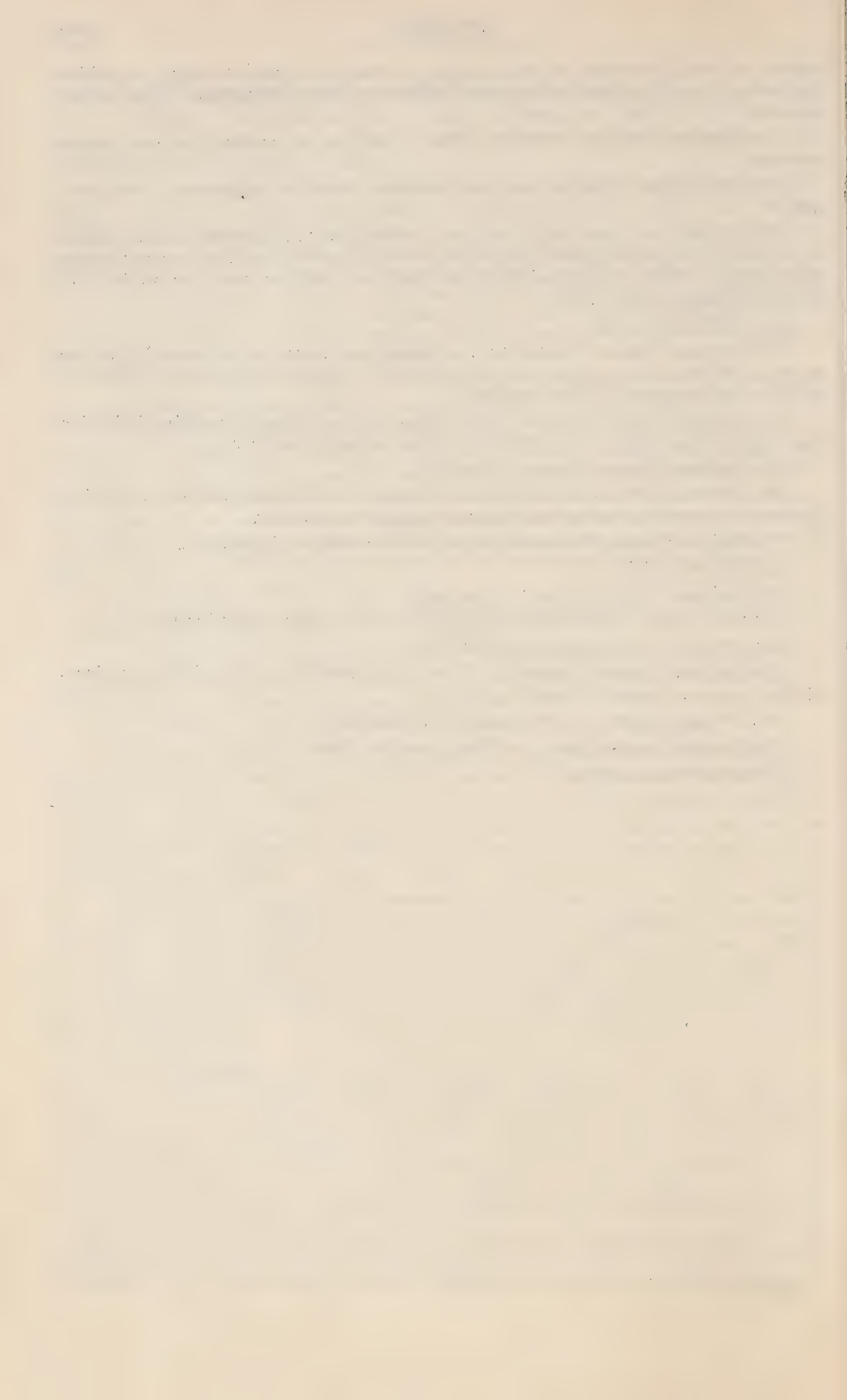
Mr. PETERS: I am pleased to hear that.

Co-Chairman Senator ROEBUCK: There is no need for us to ask the provinces whether we can or cannot. It is ours to say.

Mr. PETERS: Thank you very much, Mr. Chairman.

Co-Chairman Senator ROEBUCK: Thank you, Mr. Peters.

The committee adjourned.



APPENDIX "77"

C-44.

First Session, Twenty-Seventh Parliament, 14 Elizabeth II, 1966.

THE HOUSE OF COMMONS OF CANADA.

BILL C-44.

An Act to provide in Canada for the Dissolution of Marriage.

First reading, January 24, 1966.

Mr. BASFORD.

ROGER DUHAMEL, F.R.S.C.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1966

1st Session, 27th Parliament, 14 Elizabeth II, 1966.

THE HOUSE OF COMMONS OF CANADA.

BILL C-44.

An Act to provide in Canada for the Dissolution of Marriage.

HER Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

- Short title. **1.** This Act may be cited as the *Canada Divorce Act*. 5
- Jurisdiction **2.** Courts in those provinces of Canada now or hereafter having jurisdiction to grant a divorce *a vinculo matrimonii* shall have jurisdiction for all purposes of this Act.
- Domicile. **3.** (1) For purposes of this Act, a party to a marriage who is domiciled in any province of Canada shall be deemed to be domiciled in any other province of Canada. 10
 (2) For the purposes of this Act, where a husband has been domiciled in a province or provinces during a period of the marriage, but is not so domiciled at the commencement of the hearing of a petition by a wife, the wife shall be deemed to be domiciled in a province if, as an unmarried woman, she would be so domiciled and, in such case, the domicile of the wife shall be the domicile of both parties to the marriage. 15 20
- Interpre- **4.** In this Act,
tation. “petition” includes a cross-petition;
 “petitioner” includes a cross-petitioner;
 “proceedings” includes cross-proceedings; and
 “respondent” includes a petitioner against whom there is a cross-petition. 25

EXPLANATORY NOTES.

This Bill is to provide a law for the dissolution of marriage that will be applicable to all persons domiciled in Canada.

The provisions of the Bill will be administered by those provincial courts now exercising a divorce jurisdiction. Present provincial laws respecting alimony, guardianship and maintenance of children would continue. Present provincial matrimonial laws would also continue in existence but Parliament would retain its jurisdiction over divorce and nullity of marriage.

Grounds of
dissolution.

5. A court having jurisdiction under this Act may, upon petition by one of the parties to the marriage, decree dissolution of the marriage upon one or more of the following grounds:

Adultery.

(a) that, since the celebration of the marriage, the respondent has committed adultery; or 5

Desertion.

(b) that the respondent has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition; or

Cruelty.

(c) that the respondent has since the celebration of the marriage treated the petitioner with cruelty; or 10

Sexual
offences.

(d) that, since the marriage, the respondent has committed rape, sodomy, or bestiality; or

Drunkenness
and use of
narcotics.

(e) that, since the marriage, the respondent has for a period of not less than three years 15

(i) been a habitual drunkard; or

(ii) habitually been intoxicated by reason of taking or using to excess any sedative, narcotic, or stimulating drug or preparation, or 20

has, for a part or parts of such a period, been a habitual drunkard and has, for the other part or parts of the period, habitually been so intoxicated; or 25

Imprison-
ment.

(f) that, since the marriage, the respondent has been in prison for a period of not less than three years after conviction for an offence punishable by death or imprisonment for life, or for a period of five years or more, and is still in prison at the date of the petition; or 30

Convictions
for crime.

(g) that, since the marriage and within a period of one year immediately preceding the date of the filing of the petition, the respondent has been convicted: 35

(i) for attempting to murder or unlawfully to kill the petitioner; or

(ii) for having committed an offence involving the intentional infliction of grievous bodily harm on the petitioner, or the intent to inflict grievous bodily harm on the petitioner; or 40

Mental
illness.

(h) that the respondent is incurably of unsound mind and has been under care and treatment for a period of at least five years immediately preceding the presentation of the petition. 45

Enquiry by
the court.

6. (1) On a petition for divorce it shall be the duty of the court to inquire, so far as it reasonably can, into the facts alleged and whether there has been any connivance or condonation on the part of the petitioner and whether any collusion exists between the parties and also to inquire into any countercharge which is made against the petitioner. 5

Decree of
divorce.

(2) If the court is satisfied on the evidence that—

- (a) the case for the petition has been proved; and
- (b) where the ground of the petition is adultery, the petitioner has not in any manner been accessory to, or connived at, or condoned the adultery, or where the ground of the petition is cruelty the petitioner has not in any manner condoned the cruelty; and 10
- (c) the petition is not presented or prosecuted in collusion with the respondent or either of the respondents; 15

the court shall pronounce a decree of divorce, but if the court is not satisfied with respect to any of the aforesaid matters, it may dismiss the petition: 20

Proviso.

Provided that the court shall not be bound to pronounce a decree of divorce and may dismiss the petition if it finds that the petitioner has during the marriage been guilty of adultery or if, in the opinion of the court, the petitioner has been guilty— 25

Unreason-
able delay.

(i) of unreasonable delay in presenting or prosecuting the petition; or

Cruelty.

(ii) of cruelty towards the other party to the marriage; or

Desertion or
separation.

(iii) where the ground of the petition is adultery or cruelty, of having without reasonable excuse deserted, or having without reasonable excuse wilfully separated himself or herself from, the other party before the adultery or cruelty complained of; or 30 35

Wilful
neglect or
misconduct.

(iv) where the ground of the petition is adultery or unsoundness of mind or desertion, of such wilful neglect or misconduct as has conduced to the adultery or unsoundness of mind or desertion. 40

Repeal,
R.S., 1952
cc. 84 and
176.

7. The *Divorce Jurisdiction Act*, and Sections 4, 5 and 6 of the *Marriage and Divorce Act*, are repealed.

APPENDIX "78"

C-264.

First Session, Twenty-Seventh Parliament, 14-15 Elizabeth II, 1966-67.

THE HOUSE OF COMMONS OF CANADA.

BILL C-264.

An Act respecting Divorce.

First reading, January 24, 1967.

MR. BREWIN.

1st Session, 27th Parliament, 14-15 Elizabeth II, 1966-67.

THE HOUSE OF COMMONS OF CANADA.

BILL C-264.

An Act respecting Divorce.

HER Majesty, by and with the advice and consent of the Senate and the House of Commons, enacts as follows:

- Short title.
- 1
- This Act may be cited as the *Divorce Act, 1967*.
- Petition for Divorce.
2.
- A petition for divorce may be presented to the Court either by the husband or the wife, on the ground that a marriage has irretrievably broken down and that there is no reasonable possibility of reconciliation, and the court may grant dissolution of the marriage in such case.
- 5
- Presumption that marriage has broken down.
3.
- Where the parties are in fact living separately and apart and have lived separately and apart for a period of at least one year immediately preceding the date of the commencement of proceedings, then there shall be a *prima facie* presumption that the marriage has irretrievably broken down and that there is no reasonable probability of reconciliation.
- 10
- 15
- Time limit.
4.
- No petition for divorce shall be presented to the court unless at the date of the presentation of the petition three years have passed since the date of the marriage, provided that a judge of the court may, upon application being made to him in accordance with the rules of the court, allow a petition to be presented before three years have passed, on the ground that the case is one of extreme hardship suffered by the petitioner, and in determining any application under this section for leave to present a petition before the expiration of three years from the date of the marriage, the judge shall have regard to the interests of any children of the marriage and to the question whether there is a reasonable probability of a reconciliation between the parties before the expiration of the said three years.
- 20
- 25

EXPLANATORY NOTES.

At the present time, generally speaking, the sole ground for dissolution of marriage in Canada is the commission of adultery. There are a number of Bills introduced by private members which are being considered by the Special Joint Committee of the Senate and the House of Commons on Divorce. These Bills propose amendments to the present law which add to the matrimonial offences entitling the husband or wife to obtain divorce.

The purpose of the present Bill, however, is to substitute a totally new principle known as the "breakdown principle". The purpose of this is to achieve the objective of reinforcing the stability of marriage on the one hand, but where a marriage has irretrievably broken down, to enable the empty legal relationship to be discontinued with a maximum fairness and a minimum of distress and humiliation.

The Bill does not provide for divorce by consent, but does provide that a marriage is to be presumed to have broken down where the parties have lived separate and apart for one year. The Bill provides further that no divorce except under special order of the court shall be secured for three years after marriage, and it further provides that a divorce shall not be granted until the court is satisfied that adequate provision has been made for the maintenance of the other spouse and for the custody and maintenance of any children of the marriage.

The proposal is in accordance with representations to the committee made by various parties and notably by the United Church of Canada. It is also in accordance with the proposal contained in the report of a group appointed by the Archbishop of Canterbury published on the 29th of July, 1966 and reviewed by the Law Commission of the U.K.

Court may
refuse to
grant decree.

5. The court may refuse to grant a decree of dissolution of the marriage

- (a) where the court is not satisfied that adequate and just provision has been made having regard to the financial circumstances and conduct of the spouses,
 - (i) for the maintenance of the other spouse, and
 - (ii) for the custody and maintenance of any child or children of the marriage,
- (b) where it appears to the court that for some other reason a decree may prove unduly harsh or oppressive to the respondent.

Adjournment
of pro-
ceedings.

6. In any proceeding under this Act the court may adjourn the proceedings with a view to enabling the parties to seek to effect a reconciliation and for the purpose, if the parties request it, of consulting a qualified person or persons with experience or training in the field of marriage counselling.

Jurisdiction.

7. (1) The courts which shall have jurisdiction to grant decrees dissolving a marriage under this Act shall be the superior courts having civil jurisdiction, in the provinces of Nova Scotia, New Brunswick, Prince Edward Island, Ontario, Manitoba, Saskatchewan, Alberta and British Columbia, and shall have jurisdiction in case either of the spouses is domiciled within the said provinces.

Domicile.

(2) For the purpose of this Act the domicile of a married woman, wherever she was married, shall be determined as if she were unmarried, and if she is a minor, as if she were adult.

Jurisdiction
of Senate,
1963, c. 10.

8. The Senate of Canada may dissolve a marriage for the grounds and upon the conditions set out herein, in accordance with the provisions of the *Dissolution and Annulment of Marriages Act*.

Nullity.

9. Nothing herein shall affect the jurisdiction of any court to grant a declaration of nullity of a marriage.

Repeal.

10. The Acts or parts of Acts set out in Schedule I hereto are repealed.

Coming
into force.

11. This Act shall come into force on the first day of July, 1967.

SCHEDULE I.

1. *Marriage and Divorce Act*, R.S., 1952 c. 176 except ss. 2 and 3 thereof.
2. *Divorce Jurisdiction Act*, R.S., 1952, c. 84.
3. An Act further to amend the law respecting the Northwest Territories, 1886, c. 25.
4. An Act respecting the application of certain laws therein mentioned to the Province of Manitoba, 1888, c. 33.
5. *Divorce Act (Ontario)*, R.S., 1952, c. 85.
6. *British Columbia Divorce Appeals Act*, R.S., 1952, c. 21.

APPENDIX "79"

C-41.

First Session, Twenty-Seventh Parliament, 14 Elizabeth II, 1966.

THE HOUSE OF COMMONS OF CANADA.

BILL C-41.

An Act to amend the British North America Acts,
1867 to 1965, (Provincial Marriage and Divorce Laws).

First reading, January 24, 1966.

Mr. PRITTIE

1st Session, 27th Parliament, 14 Elizabeth II, 1966.

THE HOUSE OF COMMONS OF CANADA.

BILL C-41.

An Act to amend the British North America Acts,
1867 to 1965, (Provincial Marriage and Divorce Laws).

HER Majesty, by and with the advice and consent of the
Senate and House of Commons of Canada, enacts
as follows:

Repeal:
United
Kingdom
statute, 1867,
s. 3, s. 91 (26).

1. The class enumerated as 26 in section 91 of the
British North America Acts, 1867 to 1965, and extending to 5
all matters coming within the subjects of marriage and
divorce, is repealed.

Repeal and
substitution:
s. 95.

2. Section 95, and the heading thereto, of the said
Acts are repealed and the following substituted therefor:

“Agriculture, Marriage and Divorce and other
Matrimonial Causes, and Immigration.

Concurrent
powers of
legislation
respecting
agriculture,
etc.

95. In each province the legislature may make 10
laws in relation to agriculture in the province, to
marriage and divorce and other matrimonial causes in
the province, and to immigration into the province;
and it is hereby declared that the Parliament of Canada
may from time to time make laws in relation to agri- 15
culture in all or any of the provinces, to marriage or
divorce or other matrimonial causes in all or any of
the provinces, and to immigration into all or any of
the provinces; and any law of the legislature of a
province relative to agriculture, to marriage or divorce 20
or other matrimonial causes, or to immigration shall
have effect in and for the province as long and as far
only as it is not repugnant to any Act of the Parliament
of Canada.”

Short title
and citation.

3. This Act may be cited as the *British North* 25
America Act 1966, and the *British North America Acts,*
1867 to 1965, and this Act may be cited together as the
British North America Acts, 1867 to 1966.

EXPLANATORY NOTE.

The Parliament of Canada has the exclusive power to legislate divorce reform: yet no government of Canada has brought the subject into the House for a free debate; no government has ever permitted a private member's public bill on the subject to come to a vote; no government has ever referred the subject to a select committee of parliament or to a royal commission for study and report. Politically, the attitude of Canadian governments is to ignore the existence of a grievance and to refuse to exercise the monopoly jurisdiction the federal authority possesses.

The purpose of this Bill, therefore, is to give to the provinces original concurrent jurisdiction with Canada in the same way as the provinces and Canada share jurisdiction with respect to agriculture and immigration. The federal government thus retains legislative power to protect the rights of minorities in any province or to supersede provincial legislation by multi-provincial legislation. On the other hand, this bill would enable a province to opt-out of a continuing federal legislative refusal to initiate divorce reform.

An appreciation of the distribution of substantive and procedural divorce powers under our constitution is found in the opinion of His Lordship Thane A. Campbell, Chief Justice of the Prince Edward Island Supreme Court, in *Reference re Constitutional Validity of an Act to amend an Act for Establishing a Court of Divorce in Prince Edward Island*, (1952) 2 D.L.R. 513.



APPENDIX "80"

C-55.

First Session, Twenty-Seventh Parliament, 14 Elizabeth II, 1966.

THE HOUSE OF COMMONS OF CANADA.

BILL C-55.

An Act to provide in Canada for the Dissolution of Marriage.

First reading, January 24, 1966.

Mr. STANBURY.

ROGER DUHAMEL, F.R.S.C.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1966

1st Session, 27th Parliament, 14 Elizabeth II, 1966.

THE HOUSE OF COMMONS OF CANADA.

BILL C-55.

An Act to provide in Canada for the Dissolution of Marriage.

HER Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

- | | | |
|------------------|---|----------------|
| Short title. | 1. This Act may be cited as the <i>Divorce Act</i> . | |
| Application. | 2. The provisions of this Act as to the dissolution of marriage shall be in force in each province and territory of Canada. | 5 |
| Jurisdiction. | 3. (1) In each province and territory in which there is a court having jurisdiction to grant a divorce <i>a vinculo matrimonii</i> , such court shall have jurisdiction for all purposes of this Act.
(2) In any other province or territory, the Parliament of Canada shall retain such jurisdiction. | 10 |
| Domicile. | 4. (1) For the purposes of this Act, a party to a marriage who is domiciled in any province of Canada shall be deemed to be domiciled in every other province of Canada.
(2) For the purposes of this Act, where a husband has been domiciled in a province or provinces during a period of the marriage but is not so domiciled at the commencement of the hearing of a petition by a wife, the wife shall be deemed to be domiciled in a province if, as an unmarried woman, she would be so domiciled and, in such case, the domicile of the wife shall be the domicile of both parties to the marriage. | 15
20
25 |
| Inter-pretation. | 5. In this Act,
"petition" includes a cross-petition, and
"petitioner" includes a cross-petitioner. | |

EXPLANATORY NOTES.

The purpose of this Bill is to provide for the dissolution of marriage on a just and common basis throughout Canada.

The law would be administered by existing provincial and territorial courts and by Parliament where no such courts exist.

Essentially, the grounds for divorce provided for in this Bill are adultery, cruelty and desertion, but include involuntary desertion by reason of incurable insanity and three years' separation without reasonable likelihood of reconciliation.

Grounds of
dissolution.

6. A court having jurisdiction under this Act, or the Parliament of Canada, may upon petition by one of the parties to the marriage decree dissolution of the marriage upon one or more of the following grounds:

Adultery and
sexual
offenses.

(a) that, since the marriage, the other party to the marriage has committed adultery, rape, sodomy or bestiality; 5

Cruelty.

(b) that, since the marriage, the other party to the marriage has been guilty of cruelty to the petitioner; 10

Desertion.

(c) that, since the marriage, the other party to the marriage has deserted the petitioner for a continuous period of not less than two years immediately preceding the filing of the petition, and there is no reasonable likelihood of co- 15 habitation being resumed;

Separation.

(d) that, since the marriage, the parties to the marriage have separated and thereafter have lived separate and apart for a continuous period of not less than three years immediately 20 preceding the filing of the petition, and there is no reasonable likelihood of cohabitation being resumed;

Mental
illness.

(e) that the other party to the marriage is, at the date of the filing of the petition and at the date 25 of commencement of the hearing of the petition, of unsound mind and there is no reasonable likelihood of soundness of mind being regained.

Repeal,
R.S., 1952,
c. 84.

7. The *Divorce Jurisdiction Act* is repealed.

R.S., 1952,
c. 176.

8. The long title of the Marriage and Divorce 30 Act is repealed and the following substituted therefor:
"An Act respecting Marriage."

Sections
repealed.

9. (1) Section 1 of the said Act is repealed and the following substituted therefor:

Short title.

"**1.** This Act may be cited as the *Marriage Act*." 35

(2) Sections four, five and six of the said Act are repealed.

Coming
into force.

10. This Act shall come into force on a day to be fixed by proclamation of the Governor in Council.

APPENDIX "81"

C-19.

First Session, Twenty-Seventh Parliament, 14 Elizabeth II, 1966.

THE HOUSE OF COMMONS OF CANADA.

BILL C-19.

An Act to provide in Canada for the Dissolution
and the Annulment of Marriage.

First reading, January 24, 1966.

Mr. PETERS.

1st Session, 27th Parliament, 14 Elizabeth II, 1966.

THE HOUSE OF COMMONS OF CANADA.

BILL C-19.

An Act to provide in Canada for the Dissolution
and the Annulment of Marriage.

HER Majesty, by and with the advice and consent of the
Senate and House of Commons of Canada, enacts as
follows:

- | | | |
|-----------------------------|--|----------------|
| Short title. | <p>1. This Act may be cited as the <i>Canada Divorce Act</i>.</p> | 5 |
| Application. | <p>2. The provisions of this Act as to the dissolution of marriage and as to the annulment of marriage shall be in force in each of those provinces of Canada in which there is a court having jurisdiction to grant a divorce <i>a vinculo matrimonii</i>.</p> | 10 |
| Courts having jurisdiction. | <p>3. In each province to which this Act applies, the court, having jurisdiction to grant a divorce <i>a vinculo matrimonii</i> shall have jurisdiction for all purposes of this Act.</p> | |
| Domicile. | <p>4. (1) For the purposes of this Act, a party to a marriage who is domiciled in any province of Canada shall be deemed to be domiciled in every other province of Canada.</p> <p>(2) For the purposes of this Act, where a husband has been domiciled in a province or provinces during a period of the marriage but is not so domiciled at the commencement of the hearing of a petition by a wife, the wife shall be deemed to be domiciled in a province if, as an unmarried woman, she would be so domiciled and, in such case, the domicile of the wife shall be the domicile of both parties to the marriage.</p> | 15
20
25 |

EXPLANATORY NOTES.

The purpose of this Bill is to provide a law for the dissolution and annulment of marriage that is common to all persons domiciled in Canada; that is capable of administration by the courts with propriety and justice; and that is founded, in each case, upon a judicial judgment that a marriage relationship is repudiated or does not exist—but without providing means to use the law to escape the marriage relationship.

The Bill proposes to have the law administered by the existing provincial courts under their own rules of procedure. Present provincial laws respecting alimony, guardianship and maintenance of children would continue. The present provincial matrimonial laws would also continue. Parliament would retain its jurisdiction over divorce and nullity of marriage.

Clause 2: This clause applies the divorce and nullity provisions to all provinces having a divorce court. Quebec and Newfoundland do not have such courts.

Clause 3: These provincial courts apply the Act.

Clause 4: At present a court in a province may only hear a divorce action if the husband has his domicile in that province except in certain cases covered by the *Divorce Jurisdiction Act*. *Subclause (1)* gives a court jurisdiction to hear a divorce action if the parties are domiciled in any one of the ten provinces. Thus, for example, a wife in Quebec may petition in Ontario although her husband has changed his domicile to British Columbia. *Subclause (2)* provides for the case where the husband has acquired a domicile outside Canada since the marriage while the wife remains in Canada; under these circumstances, she may acquire a provincial domicile of her own and a court may hear her petition. This provision is wider than the present right given by the *Divorce Jurisdiction Act*.

Definitions.
 "Petition."
 "Petitioner."
 "Proceed-
 ings."
 "Respond-
 ent."

5. In this Act,
 "petition" includes a cross-petition;
 "petitioner" includes a cross-petitioner;
 "proceedings" includes cross-proceedings; and
 "respondent" includes a petitioner against 5
 whom there is a cross-petition.

Grounds for
 dissolution
 of marriage.

6. A court having jurisdiction under this Act may,
 upon petition by one of the parties to the marriage, decree
 dissolution of the marriage upon one or more of the follow- 10
 ing grounds:
- (a) that, since the marriage, the other party to the
 marriage has committed adultery;
 - (b) that, since the marriage, the other party to the
 marriage has, without just cause or excuse,
 wilfully deserted the petitioner for a period of 15
 not less than two years;
 - (c) that the other party to the marriage has wil-
 fully and persistently refused to consummate
 the marriage, if the court is satisfied that, as
 at the commencement of the hearing of the 20
 petition, the marriage had not been consum-
 mated;
 - (d) that, since the marriage, the other party to the
 marriage has, during a period of not less than
 one year, habitually been guilty of cruelty to 25
 the petitioner;
 - (e) that, since the marriage, the other party to the
 marriage has committed rape, sodomy, or
 bestiality;
 - (f) that, since the marriage, the other party to the 30
 marriage has, for a period of not less than two
 years
 - (i) been a habitual drunkard; or
 - (ii) habitually been intoxicated by reason of
 taking or using to excess any sedative, 35
 narcotic, or stimulating drug or prepara-
 tion, or
 has, for a part or parts of such a period, been a
 habitual drunkard and has, for the other part
 or parts of the period, habitually been so 40
 intoxicated;
 - (g) that, since the marriage, the petitioner's
 husband has, within a period not exceeding
 five years
 - (i) suffered frequent convictions for crime in 45
 respect of which he has been sentenced in
 the aggregate to imprisonment for not
 less than three years; and

Clause 6: This clause sets out the grounds for divorce. These grounds are qualified by *Clause 7* which provides that, except in certain cases, no divorce action can be brought sooner than three years after marriage. They are also qualified by *Clause 9* which provides for a reconciliation procedure. Essentially, the grounds hereby provided for divorce are adultery, desertion and cruelty; they are so defined as to prove the repudiation or non-existence of the marriage relationship. *Subclause (a)* provides for adultery; *subclauses (b), (c), (f), (g), (h), (j), and (k)* are desertion in one form or another; *(l)* is involuntary desertion; *(d)* and *(i)* are cruelty, either habitual or dangerous to the life of the other party; *(e)* is a variety of desertion that repudiates the marriage relationship through perversion or depravity; *(m)* is a general form of physical desertion that may be mutual or by one party but is limited to a minimum five year period; and *(n)* provides for desertion that is unexplainable except by presumption of the death of the missing partner.

- (ii) habitually left his wife without reasonable means of support;
- (h) that, since the marriage, the other party to the marriage has been in prison for a period of not less than three years after conviction for an offence punishable by death or imprisonment for life or for a period of five years or more, and is still in prison at the date of the petition; 5
- (i) that, since the marriage and within a period of one year immediately preceding the date of the filing of the petition, the other party to the marriage has been convicted, on indictment, of 10
 - (i) having attempted to murder or unlawfully to kill the petitioner,
 - (ii) having committed an offense involving the intentional infliction of grievous bodily harm on the petitioner or the intent to inflict grievous bodily harm on the petitioner; 15
- (j) that a party to the marriage has habitually and wilfully failed, throughout the period of two years immediately preceding the date of the filing of the petition, to pay maintenance to the other party 20
 - (i) ordered to be paid under an order of a court in a province, or 25
 - (ii) agreed to be paid under an agreement between the parties to the marriage providing for their separation,if the court is satisfied that reasonable attempts have been made by the petitioner to enforce the order or agreement under which the maintenance was ordered or agreed to be paid; 30
- (k) that the other party to the marriage has, for a period of not less than one year, failed to comply with a decree of restitution of conjugal rights made by a court in a province; 35
- (l) that the other party to the marriage
 - (i) is, at the date of the filing of the petition, of unsound mind and unlikely to recover, and 40
 - (ii) since the marriage and within a period of six years immediately preceding the date of the petition, had been confined for a period of, or for periods aggregating, not less than five years in an institution where persons may be confined for unsoundness of mind in accordance with law, or in more than one such institution, 45

if the court is satisfied that, at the commencement of the hearing of the petition, the other party is still confined in such an institution and is unlikely to recover;

- (m) that the parties to the marriage have separated 5
and thereafter have lived separately and apart
for a continuous period of not less than five
years immediately preceding the date of the
filing of the petition, and there is no reasonable
likelihood of cohabitation being resumed, not- 10
withstanding
 - (i) that the cohabitation was brought to an
end by the action or conduct of one only
of the parties, whether constituting deser- 15
tion, or not, or
 - (ii) that there was in existence at any relevant
time a decree of a court suspending the
obligation of the parties to the marriage to
cohabit or an agreement between those 20
parties for separation;
- (n) That the other party to the marriage has been
absent from the petitioner for such time and
in such circumstances as to provide reasonable
grounds for presuming that he or she is dead.

When leave
required.

7. (1) Subject to this section, proceedings for a 25
decree of dissolution of marriage shall not be instituted
within three years after the date of the marriage except by
leave of the court.
- (2) Nothing in this section shall be taken to
require the leave of the court to the institution of proceedings 30
for a decree of dissolution of marriage on one or more of the
grounds specified in paragraphs (a), (c), and (e) of section six,
and on no other ground, or to the institution of proceedings
for a decree of dissolution of marriage by way of cross-
proceedings. 35
- (3) The court shall not grant leave under this
section to institute proceedings except on the ground that
to refuse to grant that leave would impose exceptional hard-
ship on the applicant or that the case is one involving
exceptional depravity on the part of the other party to the 40
marriage.
- (4) In determining an application for leave to
institute proceedings under this section, the court shall have
regard to the interests of any children of the marriage and
to the question whether there is any reasonable probability 45
of a reconciliation between the parties before the expiration
of the period of three years after the date of the marriage.

Clause 7: This clause provides that, normally, a divorce action cannot be instituted within 3 years after marriage except for adultery, non-consummation, and depravity. Leave can be granted by the court in other cases but only under safeguards.

Grounds for
annulment of
marriage.

Void
marriage.

Voidable
marriage.

8. (1) A court may decree nullity of marriage upon the ground that the marriage is void or upon the ground that the marriage is voidable.

(2) A marriage is void where

- (a) either of the parties is, at the time of the marriage, lawfully married to some other person; or 5
- (b) the parties are within the prohibited degrees of consanguinity or affinity; or
- (c) the marriage is not a valid marriage under the law of the place where the marriage takes place, by reason of a failure to comply with the requirements of the law of that place with respect to the form of solemnization of marriages; or 10
- (d) the consent of either of the parties is not a real consent because 15
 - (i) it was obtained by duress or fraud; or
 - (ii) that party is mistaken as to the identity of the other party, or as to the nature of the ceremony performed; or 20
 - (iii) that party is mentally incapable of understanding the nature of the marriage contract; or
- (e) either of the parties is not of marriageable age under the law of the place where the marriage takes place. 25

(3) a marriage, not being a marriage that is void, is voidable, where, at the time of the marriage

- (a) either party to the marriage is incapable of consummating the marriage, if the court is satisfied that the incapacity to consummate the marriage also existed at the time when the hearing of the petition commenced and that 30
 - (i) the incapacity is not curable, or
 - (ii) the respondent refuses to submit to such medical examination as the court considers necessary for the purpose of determining whether the incapacity is curable, or 35
 - (iii) the respondent refuses to submit to proper treatment for the purpose of curing the incapacity, 40

except that a decree of nullity of marriage shall not be made on this ground where the court is of opinion that by reason of the petitioner's knowledge of the incapacity at the time of the marriage, or the conduct of the petitioner since the marriage, or the lapse of time, or for any other reason, it would, in the particular circumstances of the case, be harsh and oppressive to the respondent, or contrary to the public interest, to make a decree; 50

Clause 8: This clause sets out the grounds for annulment of marriage.

- (b) either party to the marriage is
 - (i) of unsound mind;
 - (ii) a mental defective;
 - (iii) subject to recurrent attacks of insanity or epilepsy; or 5
- (c) either party to the marriage is suffering from a venereal disease in a communicable form; or
- (d) the wife is pregnant by a person other than the husband; except that a decree of nullity of marriage shall not be made by virtue of paragraph (b), (c), or (d) unless the court is satisfied that 10
 - (i) the petitioner was, at the time of the marriage, ignorant of the facts constituting the ground; 15
 - (ii) the petition was filed not later than twelve months after the date of the marriage; and
 - (iii) marital intercourse has not taken place with the consent of the petitioner since the petitioner discovered the existence of the 20 facts constituting the ground. 20

Reconciliation.

9. (1) It is the duty of the court in which a matrimonial cause has been instituted to give consideration, from time to time, to the possibility of a reconciliation of the parties to the marriage (unless the proceedings are of such a nature that it would not be appropriate to do so), and if at any time it appears to the Judge constituting the court, either from the nature of the case, the evidence in the proceedings, or the attitude of those parties, or of either of them, or of counsel, that there is a reasonable possibility of such a reconciliation, the Judge may do all or any of the following: 25 30

- (a) adjourn the proceedings to afford those parties an opportunity of becoming reconciled or to enable anything to be done in accordance with either of the next two succeeding paragraphs; 35
- (b) with the consent of those parties, interview them in chambers, with or without counsel, as the Judge thinks proper, with a view to effecting a reconciliation; 40
- (c) nominate
 - (i) an approved marriage guidance or other appropriate organization or a person with experience or training in marriage conciliation; or 45
 - (ii) in special circumstances, some other suitable person,
 to endeavour, with the consent of those parties, to effect a reconciliation.

Clauses 9-12: These clauses provide a reconciliation procedure to be used by the court where possible.

(2) If, not less than fourteen days after an adjournment under subsection (1) has taken place, either of the parties to the marriage requests that the hearing be proceeded with, the Judge shall resume the hearing, or arrangements shall be made for the proceedings to be dealt with by another Judge, as the case requires, as soon as practicable. 5

Hearing
when recon-
ciliation
fails.

10. Where a Judge has acted as conciliator under paragraph (b) of subsection (1) of section 9 but the attempt to effect a reconciliation has failed, the Judge shall not, except at the request of the parties to the proceedings, continue to hear the proceedings, or determine the proceedings, and, in the absence of such a request, arrangements shall be made for the proceedings to be dealt with by another Judge. 15

Statements
not
admissible
evidence.

11. Evidence of anything said or of any admission made in the course of an endeavour to effect a reconciliation is not admissible in any court or in proceedings before a person authorized by law, or by consent of the parties, to hear, receive, or examine evidence. 20

12. A marriage conciliator shall, before entering upon the performance of his functions as such a conciliator, make and subscribe, before a person authorized to take oaths, an oath or affirmation of secrecy.

Repeal.
R.S. 1952,
cc. 84 and 176.

13. The *Divorce Jurisdiction Act* and sections 25 four, five and six of the *Marriage and Divorce Act* are repealed.

Commence-
ment.

14. This Act shall come into force on a day to be fixed by proclamation of the Governor in Council.

Clause 13: This clause repeals federal laws that are covered by this Bill.

Clause 14: This clause provides for the Act to become effective when proclaimed so as to permit a period during which the provincial courts may, where necessary, amend their matrimonial rules of procedure.



First Session—Twenty-seventh Parliament
1966-67

PROCEEDINGS OF
THE SPECIAL JOINT COMMITTEE OF THE SENATE
AND HOUSE OF COMMONS ON
DIVORCE

No. 24

THURSDAY, APRIL 20, 1967

Joint Chairmen:

The Honourable A. W. Roebuck, Q.C.
and
A. J. P. Cameron, Q.C., M.P.

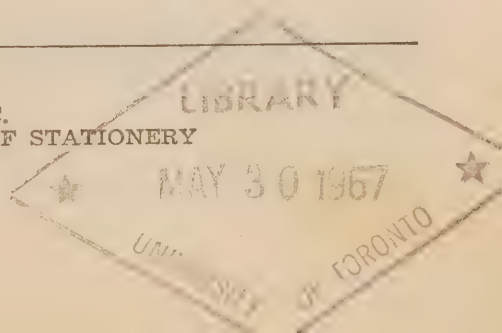
WITNESS:

James Byrne, M.P., Sponsor of Bills C-16 and C-79

APPENDICES:

- No. 82—Bill C-16, An Act to provide in Canada for the Dissolution of Marriage. (Additional Grounds for Divorce.)
No. 83—Bill C-79, An Act to amend the Dissolution and Annulment of Marriages Act. (Additional Grounds for Divorce.)
No. 84—Brief by the Government of the Province of Manitoba.
No. 85—Statement by the Canadian Catholic Conference.
No. 86—Brief by Daryl E. McLean, Dalhousie University, Dalhousie, N.B.
No. 87—Brief by the Minus One Club, Red Deer, Alberta.
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ROGER DUHAMEL, F.R.S.C.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1967



MEMBERS OF THE
SPECIAL JOINT COMMITTEE OF THE SENATE AND
HOUSE OF COMMONS ON DIVORCE
FOR THE SENATE

Hon. A. W. Roebuck, Q.C., Joint Chairman

The Honourable Senators

Aseltine	Connolly (<i>Halifax North</i>)	Flynn
Baird	Croll	Gershaw
Belisle	Denis	Haig
Burchill	Fergusson	Roebuck—(12)

FOR THE HOUSE OF COMMONS

A. J. P. Cameron, Q.C., (*High Park*), Joint Chairman

Members of the House of Commons

Aiken	Forest	McQuaid
Baldwin	Goyer	Otto
Brewin	Honey	Peters
Cameron (<i>High Park</i>)	Laflamme	Ryan
Cantin	Langlois (<i>Mégantic</i>)	Stanbury
Choquette	MacEwan	Trudeau
Chrétien	Mandziuk	Wahn
Fairweather	McCleave	Woolliams—(24)

(Quorum 7)

ORDERS OF REFERENCE

Extracts from the Votes and Proceedings of the House of Commons:

March 15, 1966:

"On motion of Mr. McIlraith, seconded by Mr. Hellyer, it was resolved—that a Special Joint Committee of the Senate and the House of Commons be appointed to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either House;

That 24 Members of the House of Commons, to be designated by the House at a later date, be members of the Special Joint Committee, and that Standing Order 67(1) of the House of Commons be suspended in relation thereto;

That the Committee have power to engage the services of such technical, clerical and other personnel as may be necessary for the purpose of the inquiry;

That the Committee have the power to send for persons, papers and records, to examine witnesses, to report from time to time, and to print such papers and evidence from day to day as may be ordered by the Committee, and that Standing Order 66 be suspended in relation thereto; and

That a Message be sent to the Senate requesting Their Honours to unite with this House for the above purpose, and to select, if the Senate deems it so advisable, some of its Members to act on the proposed Special Joint Committee."

"By unanimous consent, on motion of Mr. McIlraith, seconded by Mr. Hellyer, it was ordered—That the order of the House of Monday, February 21, 1966 referring the subject-matter of the following bills to the Standing Committee on Justice and Legal Affairs, namely:—

Bill C-16, An Act to provide in Canada for the Dissolution of Marriage (Additional Grounds for Divorce).

Bill C-19, an Act to provide in Canada for the Dissolution and the Annulment of Marriage.

Bill C-41, An Act to amend the British North America Acts, 1867 to 1965, (Provincial Marriage and Divorce Laws).

Bill C-44, An Act to provide in Canada for the Dissolution of Marriage.

Bill C-55, An Act to provide in Canada for the Dissolution of Marriage.

Bill C-58, An Act respecting Marriage and Divorce.

Bill C-79, An Act to amend the Dissolution and Annulment of Marriages Act (Additional Grounds for Divorce).

be discharged, and that the subject-matter of the same bills be referred to the Joint Committee of the Senate and the House of Commons on Divorce".

March 16, 1966:

"By unanimous consent, on motion of Mr. Stewart, seconded by Mr. Byrne, it was ordered—That the subject-matter of Bill C-133, An Act to extend the grounds upon which courts now have jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief, be referred to the Special Joint Committee on Divorce".

"By unanimous consent, on motion Mr. Stewart, seconded by Mr. Byrne, it was ordered—That the subject-matter of Notice of Motion No. 11 be referred to the Special Joint Committee on Divorce."

March 22, 1966:

"On motion of Mr. Pilon, seconded by Mr. McNulty, it was ordered—that a Message be sent to the Senate to acquaint Their Honours that this House will unite with them in the formation of a Joint Committee of both Houses to inquire into and report upon divorce in Canada, and that the Members to serve on the said Committee, on the part of this House, will be as follows: Messrs. Aiken, Baldwin, Brewin, Cameron (*High Park*), Cantin, Choquette, Chrétien, Fairweather, Forest,oyer, Honey, Laflamme, Langlois (*Megantic*), MacEwan, Mandziuk, McCleave, McQuaid, Otto, Peters, Ryan, Stanbury, Trudeau, Wahn and Woolliams."

February 24, 1967:

By unanimous consent, it was ordered—That the subject-matter of Bill C-264, Divorce Act 1967, be referred to the Special Joint Committee on Divorce.

LÉON-J. RAYMOND,
Clerk of the House of Commons.

Extracts from the Minutes of the Proceedings of the Senate:

March 23, 1966:

"Pursuant to the Order of the Day, the Senate proceeded to the consideration of the Message from the House of Commons requesting the appointment of a Special Joint Committee of the Senate and the House of Commons on Divorce.

The Honourable Senator Connolly, P.C., moved, seconded by the Honourable Senator Roebuck:

That the Senate do unite with the House of Commons in the appointment of a Special Joint Committee of both Houses of Parliament to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either House;

That twelve Members of the Senate, to be designated at a later date, act on behalf of the Senate as members of the said Special Joint Committee;

That the Committee have power to engage the services of such technical, clerical and other personnel as may be necessary for the purpose of the inquiry;

That the Committee have the power to send for persons, papers and records, to examine witnesses, to report from time to time, and to print such papers and evidence from day to day as may be ordered by the Committee, and to sit during sittings and adjournments of the Senate; and

That a message be sent to the House of Commons to inform that House accordingly.

After debate, and—

The question being put on the motion, it was—

Resolved in the affirmative."

March 29, 1966.

"With leave of the Senate,

The Honourable Senator Beaubien (*Provencher*) moved, seconded by the Honourable Senator Inman:

That the following Senators be appointed to act on behalf of the Senate on the Special Joint Committee of the Senate and House of Commons to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, namely, the Honourable Senators Aseltine, Baird, Belisle,

Bourget, Burchill, Connolly (*Halifax North*), Croll, Fergusson, Flynn, Gershaw, Haig, and Roebuck; and

That a message be sent to the House of Commons to inform that House accordingly.

The question being put on the motion, it was—

Resolved in the affirmative.”

May 10, 1966:

“Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Roebuck, seconded by the Honourable Senator Croll, for the second reading of the Bill S-19 intituled: “An Act to extend the grounds upon which courts now having jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief”.

The question being put on the motion—

In amendment, the Honourable Senator Connolly P.C., moved, seconded by the Honourable Senator Hugessen, that the Bill be not now read the second time, but that the subject-matter be referred to the Special Joint Committee on Divorce.

After debate, and—

The question being put on the motion, it was—

Resolved in the affirmative.”

J. F. MACNEILL,
Clerk of the Senate.

MINUTES OF PROCEEDINGS

THURSDAY, April 20, 1967.

Pursuant to adjournment and notice, the Special Joint Committee of the Senate and House of Commons on Divorce met this day at 3:45 p.m.

Present: For the Senate: The Honourable Senators Roebuck (*Joint Chairman*), Baird and Burchill—3.

For the House of Commons: Messrs. Cameron (*High Park*) (*Joint Chairman*), Aiken, Fairweather, McCleave and Peters—5.

In attendance: Peter J. King, Ph. D., Special Assistant.

The following witness was heard.

James Byrne, M.P., Sponsor of Bills C-16 and C-79.

The following are printed as Appendices:

No. 82. Bill C-16, An Act to provide in Canada for the Dissolution of Marriage. (Additional Grounds for Divorce.)

No. 83. Bill C-79, An Act to amend the Dissolution and Annulment of Marriages Act. (Additional Grounds for Divorce.)

No. 84. Brief by the Government of the Province of Manitoba.

No. 85. Statement by the Canadian Catholic Conference.

No. 86. Brief by Daryl E. McLean, Dalhousie University, Dalhousie, N.B.

No. 87. Brief by the Minus One Club, Red Deer, Alberta.

At 4:30 p.m. the Committee adjourned to the call of the Joint Chairmen.

Attest

Patrick J. Savoie,
Clerk of the Committee.



THE SENATE
SPECIAL JOINT COMMITTEE OF THE SENATE
AND THE HOUSE OF COMMONS
ON DIVORCE
EVIDENCE

OTTAWA, Thursday, April 20, 1967

The Special Joint Committee of the Senate and the House of Commons on divorce met this day at 3.45 p.m.

The Honourable Senator ARTHUR ROEBUCK and A. J. P. CAMERON, M.P., (*High Park*), Co-Chairmen.

Co-Chairman Senator ROEBUCK: Honourable Senators and Members of the House of Commons, we have now a quorum and are ready to proceed with this the last meeting of the committee for the hearing of evidence.

We have had a great and, as I think you will all agree with me, a remarkable series of addresses and briefs on the subject to which we are committed. We have just one witness today, James Byrne, M.P., who introduced in the Commons two Bills the substance of which, along with others, was referred to this committee for its consideration. All the other authors of these bills have been heard, with the exception of Mr. Bryne, and if it is the will of the committee we will now hear from him.

Mr. Byrne, will you take the floor?

Mr. JAMES BYRNE M.P.: Mr. Chairman, Honourable Senators and Members of the House of Commons, I want to apologize at the outset for not having prepared a document to present to you, but the fact is that my experience with prepared documents has not been particularly encouraging. Furthermore, my Bill C-16 was referred to this committee rather early in the session at a time when I was preparing my address dealing with capital punishment, and that bill had priority. I was hopeful that this bill would be called, and for that reason of course I left it relatively simple, since one hour is the amount of time allotted for such bills.

I was under the impression that the feeling of the Members of the House of Commons, particularly since the ecumenical council at Rome had been held, was that there was a change in the thinking of adherents of the Catholic faith, of whom I am one, in relation to the question of divorce: not so much that Catholics were changing their attitude towards divorce but rather that they were endeavouring to appreciate the other point of view more fully than had been traditional.

My personal feeling has changed somewhat since I have been a Member of Parliament: one becomes somewhat like a father confessor to one's constituents and begins to hear much more about family relationships. The result has been that in the time I have been a Member the conviction has been taking shape in my mind that something should be done about broadening the grounds for divorce for those who believe in divorce; and indeed the one ground that was deemed the proper one under the existing legislation was probably the one that was least acceptable in the sense, as I see it, that there were other circumstances such as desertion, cruelty, incurable insanity, and so on, that should be considered even before adultery.

If anyone took time to read the evidence that used to come before the members of the House of Commons when the passing of private bills for the dissolution of marriage was the prerogative of Parliament, one could see that much of the evidence was open to the charge of having been fabricated. The fabrication of such evidence was damaging to the morale of one of the parties involved and that person's future happiness so that it seemed improper to continue such legislation.

It was my feeling that, at least at this time, if Catholics showed a disposition to accept a broadening of the grounds for divorce, such legislation might stand a better chance of passing the House during the one hour allotted to the consideration of a private member's bill. Hence the reason why I as a Catholic have undertaken to introduce this bill. That is about all I have to say.

Mr. McCLEAVE: May I ask Mr. Byrne one question, Mr. Chairman. I notice, Mr. Byrne, you do not provide for cruelty in the grounds set out in either of your bills, so that if this approach were adopted it would mean that Nova Scotia, since that province did not repeal its existing statute, would have an extra ground for divorce while the other provinces would have all the other grounds for divorce that you recommend. Have you any particular reason for believing, or have your researches led you to believe, that cruelty should not be a ground?

Mr. BYRNE: I discussed this matter with the Law Officers, at which time I said I had no wish to imply that my bill should provide for any type of frivolous grounds, and it seemed to me that cruelty was something regarding which it was rather difficult to obtain evidence.

I have read, as others have done, that in some instances a man and wife get along—by battering each other about without ever reaching the stage where they wished to separate. I was also anxious to leave it relatively simple and not get into too many details. However, since the question has been referred to, and the committee will undoubtedly be making recommendations, I assure you that I shall be prepared to accept much broader grounds if that is acceptable and has the assurance of passing the House. If that were likely, I would accept much wider grounds than these.

Mr. McCLEAVE: If people fight and enjoy fighting, it is not likely that they will seek divorce on the ground of cruelty. If, however, somebody has suffered physical injury and is black and blue, that person is apt to invoke the ground of cruelty.

Mr. BYRNE: Yes; I agree with you, and if the committee makes a recommendation that is much broader than this, there will be no problem as far as I am concerned: I shall be prepared to support it.

Senator BURCHILL: I have been wondering to what extent Mr. Byrne was influenced, in presenting his bill, by public opinion, particularly in his own constituency.

Mr. BYRNE: I have certainly been influenced by the opinions of my constituents, the representations that have been made to me. The question has been asked: When on earth are you people in the House of Commons going to do something about divorce. For many years I could only reply that it did not seem likely that any action would be taken. Now I believe it is possible. After your constituents have been making persistent representations to you, you become as it were a father confessor.

Mr. McCLEAVE: Or Ombudsman.

Mr. BYRNE: Perhaps that is a better term.

Co-Chairman Senator ROEBUCK: Are there any further questions?

Mr. PETERS: Does Mr. Byrne intend to discuss Bill C-79?

Mr. BYRNE: This seemed necessary because of the situation in Quebec.

Co-Chairman Senator ROEBUCK: You have been speaking of the general one, and Mr. Peters calls attention to the fact that you have introduced two bills and the one to which you have been referring is the one which provides, in Section 1, for the repeal of Section 3 of the Dissolution and Annulment of Marriages Act and the substitution of the proposed Section 3. The old Section 3 is the provision under which The Senate administers divorce for the province of Quebec and the province of Newfoundland. As I read your two bills, you have provided exactly similar amendments for each jurisdiction.

Mr. BYRNE: That is right.

Co-Chairman Senator ROEBUCK: One bill could be made applicable to both jurisdictions.

Mr. BYRNE: Yes.

Co-Chairman Senator ROEBUCK: If there are no more questions from the committee, I think we can thank Mr. Byrne for coming to us. Thank you, Mr. Byrne.

Mr. BYRNE: Mr. Chairman and gentlemen, I wish to thank you for affording me this opportunity of appearing before your Committee.

Co-Chairman Senator ROEBUCK: We have little more to do, but there is something important I wish to bring to your attention.

I should point out that very early in our history we extended an invitation to all the Churches to give us their views on the matters that were before the committee. We have heard from all the major Churches and we have been in touch with the Catholic Church, and very recently a very remarkable and, to me, highly acceptable document was passed by the Canadian Catholic Conference, which I understand is a body composed of 102 Bishops.

I would like to summarize it but I do not think I am capable of doing so. I suppose all members of the committee have read it and what the newspapers have said about it. Personally I feel grateful to the Canadian Catholic Conference for accepting our invitation to give us the benefit of their knowledge, their wisdom and their wishes, which they have done in a comprehensive way in this document.

I think I am safe in saying that their document will be of considerable assistance to us in arriving at decisions necessary to fulfil our duty. I am grateful to them for having given us this document.

Mr. McCLEAVE: You have the power, Mr. Chairman, to direct that it be printed as part of our proceedings?

Co-Chairman Senator ROEBUCK: I was going to suggest that a motion be made to have the document printed because the one they sent to us, being a Statement of the Canadian Catholic Conference to the Special Joint Committee of the Senate and House of Commons on Divorce, reads into itself a further statement which is entitled: A Statement of the Canadian Catholic Conference to the House of Commons Standing Committee on Health and Welfare, so that both documents should be included in Mr. McCleave's motion if, as I gather, he intends to move it.

Mr. McCLEAVE: Yes, that they form part of our record. I so move.

Motion agreed to.

Co-Chairman Senator ROEBUCK: There is only one thing more and that is to give you some assurance that the grass has not been growing under our feet during the long interval since we had our last meeting.

As you all know, very early in our history we had the advantage of the assistance of Dr. Peter J. King, Professor of History at Carleton University who has been our executive assistant throughout all these meetings. He and I have been collaborating in getting something on paper, so that we are very nearly ready, at this the concluding meeting, to call for conferences.

If I did not tell you this you would wonder where we were going. Somebody has to do that work. It is the work not of a great body but of one or two persons and that work, now, has been very nearly completed by my Co-Chairman and myself, with the assistance of Dr. King. Very shortly we will call the Steering Committee together for their first look at it and then the general body will have a meeting as soon as possible.

Having got on paper something of a comprehensive character, we are so far advanced that, unless there is controversy among ourselves, which I do not anticipate, I would be disappointed if we were not able to make a report to Parliament very early in the new session. This I regard as something upon which we can congratulate ourselves. It will be gratifying if we can carry out that programme. I would like to see our report in the hands of both Houses at least by the end of May, and perhaps earlier than that.

Mr. McCLEAVE: There is one point I would like to bring up. There is at Dalhousie University a young student who is greatly interested in reconciliation proceedings in different jurisdictions, including those under the British system and some under the American, and I asked her to be good enough to prepare a paper that could be presented as an appendix to our proceedings. I have received only a limited number of copies. I could not ask her to do more because it would have been too expensive for her. She cannot afford it. I have read her material and it is excellent. I do not know whether the committee would want everything of this nature printed but it is highly commendable and would fill only about 25 pages in our Proceedings. It gives first-rate summations in jurisdiction where they have done good practical work in the United States.

Co-Chairman Senator ROEBUCK: You are moving that it be included in our records.

Mr. McCLEAVE: Yes.

Mr. PETERS: I second the motion.

Senator BURCHILL: What is her standing?

Mr. McCLEAVE: She is in the third year of law and there is a family-law section in which she is specializing. There are about fifteen in that class. Mr. Brewin, another member of the committee and myself have been down there to speak to them and they were very much interested in the work of the committee.

Co-Chairman Senator ROEBUCK: Do you suggest that we multigraph the document and circulate it?

Mr. McCLEAVE: I suggest that it become part of our Minutes. Some appendices have been printed. Mr. Savoie can see that it is edited.

Co-Chairman Senator ROEBUCK: Subject to such editing as Mr. Savoie thinks necessary, the document shall be included in our records of today.

Mr. FAIRWEATHER: Mr. Chairman, referring to the Catholic Bishop's presentation, which I am sure was read with great appreciation, do you and your Co-Chairman feel that the Bishops should be thanked?

Co-Chairman Senator ROEBUCK: I would be pleased to receive instructions from the committee to extend its thanks to the Conference.

Mr. FAIRWEATHER: I so move.

Senator BURCHILL: I second the motion that the thanks of the committee be extended to the Canadian Catholic Conference for the informative and highly acceptable document they have placed in our hands.

Senator BAIRD: Why did they not present it themselves?

Co-Chairman Senator ROEBUCK: The full Conference could not be here and I do not suppose they appointed anyone to act in their behalf. They simply gave it to us with great courtesy and consideration. When the Secretary told me it was ready, or very nearly so, and on its presentation to us they were going to give it

to the Press, I said to them, "You would not give it to the Press, would you, before my Co-Chairman and I have at least had a chance to read it", they immediately appreciated our position and exercised great care to see that it was in Mr. Cameron's hands and mine before they gave it to the Press. And that was in complete accord with protocol.

Mr. McCLEAVE: There should be a note on the record that the Members and Senators express their appreciation of the hard work that you, Mr. Chairman, and your Co-Chairman, as well as Dr. King and Mr. Savoie have done in seeking out the widest possible range of sound opinion in this very difficult field. The results of our efforts will form a fruitful source not only for coming legislation but for possible reform in the next ten or twenty years. We have compiled an outstanding amount of evidence. Perhaps we are not the most spectacular committee in the world, but our work will stand up for a long time.

Co-Chairman Senator ROEBUCK: On behalf of my Co-Chairman sitting beside me, and Mr. Savoie and Dr. King, I thank you for your kind expression, and that is a good note on which to adjourn.

We expected a report from the Attorney General of Manitoba but it has been delayed. However, Mr. Savoie tells us it is on the way and we may expect it. I would like to have a motion to the effect that if it does arrive it shall be made a part of the proceedings of this committee.

Mr. PETERS: I so move.

Motion agreed to.

Co-Chairman Senator ROEBUCK: To that, I may add that very early in our proceedings I communicated with the Attorney General of Ontario and asked him for the opinion of his Department, and his own, on two outstanding questions of law. One was the desirability of the Parliament of Canada exercising its ancillary right to deal with matters incidental to divorce at the time divorce is granted; and, secondly, I pointed out to him that the courts of all the provinces of Canada, with the exception of Ontario have the right to decree judicial separation, which is in effect divorce without the right to remarry. The province of Ontario has not got that right, according to the decision of Judges in Ontario.

In 1930 we passed the Ontario Jurisdiction Act in the Matter of Divorce. We granted the Courts the right to dissolve marriages but we did not include judicial separation, I think inadvertently, and I asked him for his opinion on that regard. He told me he had referred the matter to the Law Officers of his committee and would have a memorandum for us; but afterwards the Government of Ontario put in the Speech from the Throne that paragraph with regard to divorce, and following that, I believe, they appointed a committee to inquire into the whole subject of divorce.

I wrote a letter to the Attorney General, agreeing that it was quite within their rights to proceed as they had done, but I did ask a decision on two questions of law and I intimated I would be obliged to him if he would let me have the answers. I have not heard from him, and of course we must proceed under these circumstances without the advantage of his advice. At all events, should we receive a memorandum from him I would like to have authority to include it in the records of this meeting.

Mr. FAIRWEATHER: Include that in my previous motion.

Co-Chairman Senator ROEBUCK: Thank you. Is there anything else? Your Co-Chairman will call the Steering Committee together for preliminary review, and the general committee very shortly—how soon I cannot tell you.

The hearing was thereupon adjourned.

APPENDIX "82"

First Session, Twenty-Seventh Parliament, 14 Elizabeth II, 1966

THE HOUSE OF COMMONS OF CANADA

Bill C-16

An Act to provide in Canada for the Dissolution of Marriage
(Additional Grounds for Divorce)

First reading, January 24, 1966.

Mr. BYRNE

1st Session, 27th Parliament, 14 Elizabeth II, 1966

THE HOUSE OF COMMONS OF CANADA

Bill C-16

An Act to provide in Canada for the Dissolution of Marriage
(Additional Grounds for Divorce)

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

Short Title

1. This Act may be cited as the *Canada Divorce Act*.

Application

2. The provisions of this Act as to the dissolution of marriage shall be in force in each of those provinces of Canada in which there is a court having jurisdiction to grant a divorce *a vinculo matrimonii*.

Courts Having Jurisdiction

3. In each province to which this Act applies, the court having jurisdiction to grant a divorce *a vinculo matrimonii* shall have jurisdiction for all purposes of this Act.

Grounds for Dissolution of Marriage

4. A court having jurisdiction under this Act may, upon petition by one of the parties to the marriage, decree dissolution of the marriage upon one or more of the following grounds:

- (a) that, since the marriage, the other party to the marriage has committed adultery;
- (b) that the other party to the marriage is at the date of the filing of the petition afflicted with an incurable mental illness;
- (c) that the parties to the marriage have separated through desertion of one party or otherwise and thereafter have lived separately for a continuous period of not less than three (3) years immediately preceding the date of the filing of the petition;
- (d) that, since the marriage, the other party has suffered frequent convictions for crime in respect of which he has been sentenced in the aggregate to imprisonment for not less than three years.

Repeal. R.S. 1952, c. 176

5. Sections four, five and six of the *Marriage and Divorce Act* are repealed.

Commencement

6. This Act shall come into force on a day to be fixed by proclamation of the Governor in Council.

EXPLANATORY NOTES

The purpose of this Bill is to provide for additional grounds for the dissolution of marriage.

The Bill proposes to have the law administered by the existing provincial courts under their own rules of procedure.

A corresponding measure is being introduced to deal with divorces granted by the Senate of Canada.

2. This clause applies the divorce provisions to all provinces having a divorce court. Quebec and Newfoundland do not have such courts.

3. The provincial courts apply the Act.

4. This clause sets out the grounds for divorce.

5. This clause repeals federal law covered by this Bill.

APPENDIX "83"

C-79

First Session, Twenty-Seventh Parliament, 14 Elizabeth II, 1966

THE HOUSE OF COMMONS OF CANADA

Bill C-79

An Act to amend the Dissolution and Annulment of Marriages Act
(Additional Grounds for Divorce)

First reading, January 24, 1966.

Mr. BYRNE.

1st Session, 27th Parliament, 14 Elizabeth II, 1966

THE HOUSE OF COMMONS OF CANADA

Bill C-79

An Act to amend the Dissolution and Annulment of Marriages Act
(Additional Grounds for Divorce)

1963, c. 10

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

1. Section 3 of the *Dissolution and Annulment of Marriages Act* is repealed and the following substituted therefor:

Officer's Recommendation

"3. The Senate shall adopt a resolution for the dissolution or annulment of a marriage only upon referring the petition therefor to an officer of the Senate, who shall hear evidence, and report thereon, but such officer shall not recommend that a marriage be dissolved or annulled except upon one or more of the following grounds:

- (a) that, since the marriage, the other party to the marriage has committed adultery;
- (b) that the other party to the marriage is at the date of filing of the petition afflicted with an incurable mental illness;
- (c) that the parties to the marriage have separated through desertion of one party or otherwise and thereafter have lived separately for a continuous period of not less than three (3) years immediately preceding the date of the filing of the petition;
- (d) that, since the marriage, the other party has suffered frequent convictions for crime in respect of which he has been sentenced in the aggregate to imprisonment for not less than three years."

Commencement

2. This Act shall come into force on a day to be fixed by proclamation of the Governor in Council.

EXPLANATORY NOTE

The purpose of this bill is to amend chapter 10 of the statutes of Canada for 1963 to provide additional grounds for the dissolution of marriage by the Senate.

A corresponding bill dealing with the law of divorce as administered by the existing provincial courts is being introduced as a separate measure.

APPENDIX "84"

BRIEF

To: THE SPECIAL JOINT COMMITTEE OF THE SENATE
AND HOUSE OF COMMONS ON DIVORCE

By: THE GOVERNMENT OF THE PROVINCE OF MANITOBA
LEGISLATIVE BUILDINGS
WINNIPEG 1, MANITOBA

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1. CONCLUSIONS

1. Society generally is in favour of divorce reform.
2. The question of religion is no longer the insurmountable barrier it once was to change in divorce law.
3. Domicile of the husband in the province in which relief is sought should no longer be the only basis for jurisdiction to grant a divorce decree.
4. Common-law relationships are encouraged by the present divorce law and the incidence of them would be decreased by reforming our laws of divorce.
5. The law is being brought into disrepute by the present law of divorce:
 - (a) The present law encourages otherwise law abiding citizens to commit adultery, perjury and to enter into collusive agreements;

- (b) Those who can afford private investigators and maintenance settlements are granted relief, whereas those who cannot afford them are often forced into a common-law relationship;
- (c) Even when an offence is committed and both parties to the marriage are desirous of obtaining a divorce, it may be denied because of collusion subsequent to the offence.

6. There are instances in our present divorce law which encourage parties to seek relief from the courts rather than attempt a reconciliation.

7. The commission of the matrimonial offence of adultery no longer remains acceptable as the sole ground of divorce.

8. The law does not require that proper arrangements for the care of the children of the marriage are made prior to the granting of a decree of divorce to the parents.

2. RECOMMENDATIONS

9. For the court to have jurisdiction, the petition would be required to be filed either:

- (a) In the province where the husband is domiciled, or
- (b) In the province where the petitioner has been resident for one year immediately prior to the filing of the petition, provided the husband was domiciled in any province in Canada either at the time of the filing of the petition, or at the time of the last cohabitation with his wife.

10. To change the law of condonation, collusion and delay as bars to divorce, with a view to the maintaining of the marriage rather than encouraging divorce.

11. The law be reformed so that the matrimonial offence of adultery is no longer the sole ground for divorce and to consider, particularly in light of all the information and material available to the Joint Committee, the following three approaches to divorce:

- (a) Widening the grounds for divorce to those set out in the resolution of the Manitoba Legislature (with grounds of cruelty and desertion not to be defined);
- (b) Marriage breakdown being the sole ground for divorce;
- (c) Conciliation courts.

12. The Court be required to satisfy itself that proper arrangements for the care of any children of the marriage be a necessary prerequisite for the granting of a decree of divorce to the parents.

13. A marriage should be voidable on grounds such as those contained in *The Matrimonial Causes Act, 1950 (U.K.)*. (This recommendation is put forward on the assumption that the Joint Committee's terms of reference include consideration of annulment of marriage).

3. INTRODUCTION

14. On April 9, 1965, the Legislative Assembly of the Province of Manitoba passed a resolution recommending to the Government of Canada that the grounds for the dissolution of marriage be widened and that where a petitioner has for a period of seven years or upwards been continually absent from his or her spouse and has no reason to believe that his or her spouse has been living within that time be allowed to petition for a dissolution of the marriage.

15. The Government of Manitoba accordingly welcomes the establishment by the Parliament of Canada of the Special Joint Committee on Divorce and has followed its deliberations with interest.

16. The resolution of the Legislative Assembly is Appendix A to this Brief.

4. SOCIETY GENERALLY IN FAVOUR OF DIVORCE REFORM

17. There can be little question that throughout Canada the majority of Canadians are interested in seeing our divorce law reformed. Thus, the essential question is to determine the extent and areas in which reform is desirable.

18. Basically, our divorce law is that which existed in England over one hundred years ago, and while that law has and is still being radically changed in England as well as in other common law countries, no such change has taken place in Canada.

19. A perusal of the debate in Hansard on the resolution in the Legislative Assembly (Appendix B) shows that with very few exceptions those opposing the resolution were critical of some of the specific provisions of the resolution rather than the principle of divorce reform. A reading of the published proceedings of the Joint Committee indicates that this attitude was also present in the submissions made to the Committee.

5. RELIGION AS A BARRIER TO DIVORCE REFORM

20. In the past religion has been an almost insurmountable barrier to changes in divorce law in Canada. This position has been modified. Even those whose faith does not permit divorce nevertheless do not object to reform of our divorce law.

21. Excerpts from the Briefs submitted to the Joint Committee and from the debate on the resolution in the Legislative Assembly (Appendix B) appear to bear out this statement.

22. In the brief of the United Church reported at page 373 of Volume 8 of the proceedings of the Joint Committee, the following statement is made at page 376:

"Since the Christian Church has, in the past, been influential in securing strict legislation regulating divorce, we believe that the Church, while upholding its view on monogamy before its own members and society, should offer to consider reasonable grounds for divorce not only for those of its own members whose marriages have broken down but also for those citizens in our secular, pluralistic society who do not accept the Christian point of view."

23. In the brief of the Canadian Jewish Congress reported at page 732 of Volume 14 of the Proceedings of the Joint Committee, the following statement is made at page 734:

"We consider revision of these laws as necessary social legislation, and we support it because of our commitment to the preservation of democratic values which include (a) respect for the law, (b) belief that laws must not discriminate against those who are financially unable to obtain redress, and (c) belief that the laws must be instruments of social justice.

"It is in this context that we view the laws governing the divorce procedures in most of the Canadian provinces, which recognize adultery as the sole ground of divorce, as being in conflict with each of these

values, completely inadequate and, in a sense, promoting immorality by making immorality itself or the assertion of it through trumped up evidence as necessary in divorce proceedings."

24. Mr. Russell Paulley (Leader of the New Democratic Party), (Radisson) speaking in the debate in the Legislative Assembly stated:

"Others during this debate Madam Speaker, have taken a stand because of the fact of their particular religious affiliation and I respect them for it. I want to say Madam Speaker, I too am a Catholic; although not a member of the Roman Catholic fraternity I am a Catholic, I am an Anglican and I am proud of it.

"But I want to place on the record Madam Speaker, the position of my church...

"I quote...Madam Speaker from page 11 of the Archbishop of Rupertsland's Third Charge to the Diocesan Synod in June of 1964 here in the City of Winnipeg and I quote from His Grace's text:

"Now we turn to another question, marriage and divorce. In a secular society we have no hope of imposing Christian teaching about divorce on the whole Canadian community, and indeed it is doubtful if we should ever try to impose it. To convince the Canadian people that our Lord's teaching is the only right teaching is one thing; to impose it is another. I believe that the divorce laws of Canada will have to be changed because they no longer reflect the Canadian conscience."

25. In the brief of the Canadian Catholic Conference submitted to the Joint Committee on or about April 6, 1967 and not yet reported, the following statement is made:

"Canada is a country of many religious beliefs. Since other citizens, desiring as do we the promotion of the common good, believe that it is less injurious to the individual and to society that divorce be permitted in certain circumstances, we would not object to some revision of Canadian divorce laws that is truly directed to advancing the common good of civil society.

"It is not for us to go into detail about grounds for divorce which would be acceptable or not; this, we believe, should be left to well-informed consciences of our legislators."

6. DOMICILE AS BASIS FOR DIVORCE JURISDICTION

26. Domicile is perhaps the most difficult hurdle a person seeking a divorce must overcome.

27. At present, a divorce action must be launched in the province of domicile of the husband, in order for the Court of that province to have jurisdiction to grant the decree.

28. Many judges have in the result relaxed the rigorous rules of proof of domicile in an effort to do effective justice between the parties. However, there is always the lingering concern when the proof is borderline, that at a later date, someone may attack the decree on the ground that the Court which granted it was without jurisdiction.

29. Further, since the husband may change his domicile at will, the wife can never be certain when she brings her action that the province in which she sues is in fact the domicile of her husband.

30. *The Divorce Jurisdiction Act* of 1930 allows a wife whose husband has deserted her and has been living separate and apart from her for at least two

years, to sue for divorce in the province in which her husband was domiciled immediately prior to such desertion. Because there must be desertion before the statute can operate, the statute has obvious limitations. There is no right to sue if the separation is due to the husband's cruelty, habitual drunkenness or failure to maintain his wife and children.

31. In cases where separation orders are granted against the guilty husband, the wife is given an order for maintenance against her husband. Often when such an order is made, the husband will leave the province in an effort to avoid having to pay the maintenance. Thus the wife can suffer a double hardship. She is not only deprived of the maintenance but in many cases of the right to have her marriage dissolved.

32. Many submissions to the Joint Committee have advocated that there should be one unrestricted common Canadian domicile. While in principle this would appear to be most expedient and beneficial, it could also cause considerable difficulty and hardship.

33. Firstly, it would be a departure from the existing law of domicile which governs not only divorce but wills, estates, and succession, being matters of property and civil rights and within provincial jurisdiction. Accordingly, confusion could result with two types of domicile.

34. Secondly, a common Canadian domicile could be used as an instrument of abuse and vindictiveness. A spouse resident in British Columbia could institute proceedings in Newfoundland, knowing that the action could not be defended without serious financial hardship or loss of employment to the other spouse.

35. In an effort to maintain the concept of a provincial domicile but alleviate the hardships that it can create, the Province of Manitoba recommends that a change be made in our divorce law to permit a petition to be filed not only in the province where the husband is domiciled, but also where the petitioner has been resident for one year immediately prior to the filing of the petition, provided the husband was domiciled in any province in Canada, either at the time of the filing of the petition or at the time of the last cohabitation with his wife.

36. Likewise, the enactment by the respective provincial governments of the draft statute of the Law of Domicile which was approved by the Conference of Commissioners on Uniformity of Legislation in Canada, at the proceedings of the Third Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada in 1961, would alleviate many of the problems caused by our current law of domicile as it relates to divorce.

7. INEQUITIES AND INADEQUACIES IN THE PRESENT LAW OF DIVORCE

37. While it is recognized that there are other grounds for divorce, viz, rape, sodomy, bestiality and bigamy, for all practical purposes the sole ground for divorce in Manitoba is adultery.

38. At present, a man can be consistently and brutally cruel to his wife, be an habitual drunkard, or fail to maintain his wife and children, and yet the wife cannot have the marriage contract dissolved. On the other hand, a person whose spouse commits an isolated act of adultery is entitled to such relief.

39. Such a law can no longer be considered proper or right and has and can only lead to abuse.

40. There can be no question that one of the reasons for the large number of common-law relationships in Canada is due, at least in part, to the fact that

divorce can be had only on the proof of the commission of adultery by the other spouse.

41. It becomes difficult for the ordinary citizen to respect the law where the parties to the marriage may be denied a divorce because they have entered into a collusive arrangement subsequent to commission of the matrimonial offence.

42. The present system of requiring evidence of adultery as an essential condition for a divorce is an incentive to perjury, collusion or to the commission of adultery.

43. In the briefs already submitted to the Joint Committee, there is ample evidence that our present law of divorce brings law, in general, into disrepute.

44. When a spouse seeks a divorce, her legal counsel must advise her that proof of adultery is a prerequisite. Often to obtain this evidence a private investigator must be employed. The spouse may have to be kept under surveillance for a continued period of time before the necessary evidence is obtained and the attendant expense can be prohibitive.

45. Further, when the parties to a marriage are well-to-do, they are better able to have the marriage dissolved, since there are ample funds available for maintenance settlements. Thus spouses in this financial state are willing to reveal existing evidence of adultery to the other spouse. On the other hand, husbands with less financial resources, may not be willing to disclose evidence, since the wife, upon establishing adultery, would likely succeed in a maintenance action against the husband. The amount the Court might award to the wife may not be an excessive amount for her necessary maintenance but, nevertheless, it could be an oppressive amount for the husband to pay.

46. There are instances in our present divorce law which encourage parties to a troubled marriage to seek relief from the Courts rather than attempt a reconciliation.

47. C.H.C. Edwards, now Dean of Faculty of Law of the University of Manitoba, in a very enlightening article in the *Manitoba Law School Journal*, Vol. I, No. 2, 1963, at page 177, deals with two of these, namely, the absolute bars of condonation and collusion. He points out that the new *English Matrimonial Causes Act 1963* puts an end to the difference which previously existed in England (and still exists in Canada) between the position of a husband and that of a wife. He states:

"A simple act of intercourse by a husband (unless induced by a fraudulent misstatement of fact) with knowledge of his wife's adultery raised a conclusive presumption of condonation, whereas similar conduct by a wife did not amount to condonation unless there was actual forgiveness."

48. The Act provides that adultery shall not be deemed to have been condoned for the purpose of matrimonial proceedings by reason only of a continuation or resumption of cohabitation between the parties for one period not exceeding three months, or of anything done during such cohabitation, if it took place with a view to effecting a conciliation.

49. Thus, in England, the parties need no longer be deterred from a trial period of up to three months cohabitation (whether or not accompanied by sexual intercourse) by a fear that their genuine attempts at reconciliation will later prejudice their rights to matrimonial relief if these attempts do not succeed.

50. Under Section 3 of the Act, adultery which has been condoned is not capable of being revised.

51. On the question of collusion, Section 4 of the Act still requires the Court to inquire whether any collusion exists between the parties, but where collusion exists it is now a discretionary rather than an absolute bar. The parties are required to disclose to the Court any agreement or arrangement made between them.

52. Dean Edwards, at page 179 of the article, states:

"The new English Act now not only enables the Court to exercise its discretion when collusion is found, but also enables an application to be made to the Court for its opinion as to the reasonableness of any contemplated arrangements made before the hearing, about such matters as financial provision for the wife and children, the custody of the children, the division of the matrimonial home and its contents, and, of course, costs in general. Thus legal practitioners who in the past have frequently avoided any such arrangements (practical and necessary though they may have been) for fear of the taint of collusion may now take the opportunity of seeking the court's blessing beforehand."

53. Concluding the article, also at page 179, Dean Edwards states:

"Section 4, relating to collusion, may seem at first sight to be startling, but what possible harm can there be in making open and definite arrangements for the benefit of innocent parties (including the children) when a divorce is pending, and allowing the parties to do decently and properly what is at present so often done furtively and badly?"

54. In addition to the absolute bars of collusion and condonation, there is the discretionary bar of delay which tends to force the "innocent" spouse into Court to obtain a divorce rather than become involved in attempts at reconciliation. The "innocent" spouse has to be concerned whether the "offending" spouse will disappear, whether the witnesses will always be available, or whether the Court will deny relief on the ground that the application should have been made earlier.

55. The present law does not require that proper arrangements for the children of a marriage be made prior to the granting of a decree of divorce to the parents, and the Province of Manitoba supports the view of those who have taken the position before your Committee that such arrangements be a prerequisite to the granting of a divorce.

56. *The Matrimonial Proceedings (Children) Act, 1958* (6 & 7 Eliz. 2, c. 40) particularly commends itself to the Province of Manitoba. A copy of this Act is to be found in Appendix 1 at page 25 of Vol. 1 of the proceedings of the Joint Committee.

8. REFORM OF THE BASIS ON WHICH DIVORCE IS TO BE GRANTED

57. The resolution of the Legislature Assembly (Appendix A) recommends that the grounds for dissolution of marriage be:

- (a) Adultery.
- (b) Desertion for three years.
- (c) Cruelty.
- (d) Incurable unsoundness of mind, where there has been continuous care and treatment for at least five years.
- (e) Rape, sodomy or bestiality on the part of the husband.
- (f) Judicial separation for at least three years.

- (g) Presumption of death of the other spouse, where the other spouse has been continually absent for at least seven years and the petitioning spouse has no reason to believe that the other spouse has been living within that time.

58. With respect to desertion and cruelty, the Government of Manitoba would not recommend that these two grounds be defined by statute. It is submitted that the circumstances of each case would vary greatly and that it would be in the best interests of society to permit the Court with the abundance of common law available to it, to decide in a particular case whether the ground alleged had been established.

59. When the resolution was debated by the Legislative Assembly, the marriage breakdown theory as the sole ground for divorce had not been fully developed and had not received the thorough and thoughtful examination it now has.

60. The procedure of having the Court enquire into the condition of the marriage and its probable survival rather than determining the guilt or innocence of a person against whom the commission of any offence has been alleged would certainly appear to be more in keeping with the thinking of present day society.

61. It is the view of the Government of Manitoba that this theory has merit and warrants the Committee's thorough study and fullest consideration.

62. Since the Committee's recommendations will no doubt have a profound, long-term effect on what changes are made in our law of divorce and matrimonial causes, the Government of Manitoba would recommend that the Joint Committee also enquire into the functions and operations of the conciliation courts used in the State of California.

63. Not too much is known about these courts but to the extent of the information available, it would appear that they have been extremely successful in saving marriages and reuniting families.

9. JURISDICTION OF MANITOBA COURTS TO DEAL WITH DIVORCE AND MATRIMONIAL CAUSES

64. *The Divorce and Matrimonial Causes Act, 1857, 20 & 21 Vic. c. 85 (Imp.)* enacted a substantive law of divorce and matrimonial causes which by virtue of an *Act Respecting the Application of Certain Laws therein Mentioned to the Province of Manitoba, 51 Vict. c. 33 (Can.), S. 1*, is in force in the Province of Manitoba, and the Court of Queen's Bench of the Province of Manitoba has jurisdiction to administer that law by virtue of *The Queen's Bench Act, R.S.M. 1954, c. 52, S. 50*. (See Appendix C).

65. Any doubts in this regard were resolved by the decision of the Privy Council in *Walker v. Walker* 1919 A.C. 947.

66. Since *The Matrimonial Causes Act, 1857*, included not only jurisdiction as to divorce but also judicial separation, restitution of conjugal rights, maintenance, alimony and an action for damages against the adulterer in a divorce action; these additional remedies are available in Manitoba.

67. The Court of Queen's Bench of the Province of Manitoba has exercised jurisdiction in these areas and its right to do so has not been successfully challenged.

68. Although there was earlier legislation relating to the maintenance of wives and children, in 1936 Manitoba enacted *The Wives' and Children's Maintenance Act* which has substantially the same provisions as the present statute (R.S.M. 1954, C. 294). (See Appendix D).

69. Under the present Act an aggrieved husband or wife may make application before a County Court judge or a police magistrate for a separation order.

70. Under this statute a wife may obtain an order if the husband has been convicted of an assault upon her, has deserted her without lawful excuse, has been guilty of persistent cruelty to her, is an habitual drunkard, or has neglected or refused without reasonable excuse to provide reasonable maintenance and support. The order for separation may provide that the wife be no longer bound to cohabit with her husband, for custody of children, support for the wife and children, and costs. The statute further declares the grounds upon which a husband may obtain an order against his wife.

71. The issue of whether *The Wives' and Children's Maintenance Act* encroaches upon the federal jurisdiction of "Marriage and Divorce," or is within the bounds of provincial competence as affecting only "Property and Civil Right," would appear to have been put beyond question by *The Adoption Act Reference* 1938 S.C.R. 419.

72. Speaking of *The Children of Unmarried Parents Act* and *The Deserted Wives' and Children's Maintenance Act*, both Ontario statutes, the latter being similar to *The Wives' and Children's Maintenance Act*. Duff, C.J. at page 419, stated:

"...these statutes broadly speaking, aim at declaring and enforcing the obligation of husbands and parents to maintain their wives and children and these, self-evidently are peculiarly matters for provincial authority."

73. Other provinces have comparable legislation to *The Wives' and Children's Maintenance Act*, and beyond doubt the Act serves a vital role in matrimonial matters. Rather than become involved in the somewhat costly and cumbersome procedure of obtaining a judicial separation in the Court of Queen's Bench, the "Family Court," as it is called in Winnipeg, handles by far the bulk of domestic matters other than divorce.

74. The proceedings in the Family Court are initiated by the laying of an information, usually after consultation with a family counsellor, where the appropriate complaint is made. There are no pleadings and counsel need not formally enter the picture until the hearing.

75. The preservation of a court or tribunal which is easily accessible, inexpensive, and with family counsellors available, is of paramount interest to all. Perhaps our Family Court should be considered the formative stage of an expanded program for establishing an institution, body or court concerned primarily with promoting continued union and advising people whose marriage has broken down.

76. There is in Manitoba a dearth of judicial opinion delineating the precise constitutional authority of the Province and the Dominion to legislate on matters ancillary to divorce.

77. No doubt, the reason for this is due to the fact that the Court of Queen's Bench of the Province of Manitoba has jurisdiction to deal with all matters of divorce and matrimonial causes; Parliament and the Legislative Assembly having adopted for Manitoba the Law of England as of 1870 so far as the same would be applicable to matters within their respective jurisdictions. Accordingly, the question of whether in a specific case the jurisdiction of the Court

stems from the Dominion by the Act of 1888 or from the Province by the *Queen's Bench Act* has been largely academic.

78. One case in which the question was dealt with was *Mitchell v. Mitchell & Croome* 44 Man. R. 23. In this case the Court of Appeal of the Province of Manitoba held that a claim for damages against a co-respondent is a matter of "Property and Civil Rights in the Province" and not a matter of "Marriage and Divorce" within the jurisdiction of the Dominion.

79. In delivering the judgment of the Court, Richard J.A., at page 27, stated as follows:

"The claim against the co-respondent, in the form it is before us, arises out of the action for divorce but is only incident thereto. In many divorce actions no claim is made for damages. The claim does not affect the marriage status, which is dealt with in divorce actions without regard to any claim there may be for damages. It seems clear therefore that the claim for damages against the co-respondent is a matter of property and civil rights in the province and within the jurisdiction of the provincial Legislature and not a matter of marriage and divorce within the jurisdiction of the Dominion. The Appeal Court of Alberta has so held in the case of *Elkowech v. Elkowech* [1921] 2 W.W.R. 345, 16 Alta. L.R. 19, which was followed by the Court of Appeal in Saskatchewan in *Rider v. Rider and Maynard* [1925] 1 W.W.R. 1051, 19 Sask. L.R. 384.

"If the claim against a co-respondent were considered to be a part of and not as merely incident to a divorce action it would still be that, while the Dominion has exclusive jurisdiction over the substantive law of divorce which has been introduced into this province, the administration of justice relative thereto is within the competence of the province: *Bilsland v. Bilsland*, 31 Man. R. 422, [1922] 1 W.W.R. 718."

80. This decision was approved and adopted by the Court of Appeal of the Province of Ontario in *Mowder v. Roy* 1946, O.R. 154 at page 166.

81. However, the problem of whether any amendment to our federal law of divorce is *ultra vires* of the Parliament of Canada could be overcome by the province passing an Act similar to Section 10 of *The Matrimonial Causes Act* R.S.O. 1960, c. 232, providing that any provisions of the federal Act which "are or may be within the legislative competence of" the Legislative Assembly are enacted by the Province.

82. To date, the judicial view has been that the legislative power to deal with the substantive law of alimony (See *Rousseau v. Rousseau* (1920) 3 W.W.R. 384 (B.C.) and *Holmes v. Holmes* (1923) 1 D.L.R. 294, (1923) 1 W.W.R. 86, 16 Sask. L.R. 390) and maintenance. See *Langford v. Langford* (1936) 1 W.W.R. 175, 50 B.C.R. 303) belongs to the provinces.

83. In Manitoba, Section 51 of *The Queen's Bench Act* empowers the Court to grant alimony and while on numerous occasions the section has been dealt with by the Court, the Province's right to grant jurisdiction has not been challenged.

84. An exhaustive review of the law of alimony as it exists in Manitoba was given by Williams, C.J.Q.B. in *Jackowicz v. Bate* (1959) 66 Man. R. 174.

85. Until the word "divorce" as used in Section 91 (26) of the B.N.A. Act has been judicially defined, the question of whether judicial separation or restitution of conjugal rights is within exclusive provincial or federal authority or are susceptible of treatment either by the Province or the Dominion, is not likely to be answered.

86. The Honourable Mr. Justice Bora Laskin, in his *Canadian Constitutional Law* (3rd Edition 1966) at page 1028, asks, but does not answer, the question. He is content to refer the reader to *Power on Divorce* (2nd Edition 1964).

87. Power, at page 1, states:

"The word 'divorce' in sec. 91 has not been judicially defined. Since, however, the B.N.A. Act of 1867 was passed by the imperial parliament after its enactment of the *Divorce and Matrimonial Causes Act* of 1857 in which 'divorce' means the dissolution of a marriage—divorce a *vinculo matrimonii*—it has been assumed, and the assumption "must now be considered beyond question, that the word has at least the same meaning in the B.N.A. Act. It seems, however, that the contention is at least an arguable one especially since divorce is associated in sec. 91 (26) with the word "marriage", that 'divorce' therein includes 'judicial separation,' formerly known as 'divorce a mensa et thoro'. Although parliament is given exclusive authority over 'marriage and divorce,' except the 'solemnization of marriage in the province' no dominion legislation deals with judicial separation but should parliament contemplate the passing of a comprehensive Act in the exercise of its powers over 'marriage and divorce' it will, perhaps, consider whether it has jurisdiction to include provisions governing that subject and the advisability of doing so."

88. It would seem that an argument could be made that since by *The Divorce and Matrimonial Causes Act*, 1857, the term "*divorce a mensa et thoro*" was replaced by the term "judicial separation," that Parliament intended the term "divorce" to be restricted to "dissolution of marriage" and that the words "Marriage and Divorce" in Section 91 (26) of the B.N.A. Act are to be read "Marriage and Dissolution of Marriage."

89. This latter view would appear to be supported by Martin, J. A. in *Rousseau v. Rousseau* (supra) where, at pages 386 and 387, he indicates that before the province could be said to be encroaching on the federal field, the provincial legislation would have to affect the validity of the marriage contract. Surely, two persons who are living separate and apart under a decree of judicial separation are in law nonetheless married.

90. Another distinction is that while jurisdiction for dissolution of marriage is based on domicile, jurisdiction for judicial separation is based on residence—(See *Jacobs v. Jacobs and Ceen* (1950) p. 146).

10. ANNULMENT OF MARRIAGE

91. On the assumption that the Committee's term of reference includes consideration of annulment of marriage, the Government of Manitoba would recommend that in addition to any other grounds on which a marriage is presently by law void or voidable, a marriage should be voidable on the grounds:

- (a) that the marriage has not been consummated owing to the wilful refusal of the respondent to consummate the marriage; or
- (b) that either party to the marriage was at the time of the marriage of unsound mind or suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or
- (c) that the respondent was at the time of the marriage suffering from venereal disease in a communicable form; or
- (d) that the respondent was at the time of the marriage pregnant by some person other than the petitioner.

92. It would be a condition of granting relief under (b), (c), and (d) that the Court be satisfied:

- (i) that the petitioner was at the time of the marriage ignorant of the fact alleged;
- (ii) that proceedings were instituted within a year from the date of the marriage; and
- (iii) that marital intercourse with the consent of the petitioner had not taken place since the discovery by the petitioner of the existence of the grounds for a decree.

93. The foregoing grounds are largely those contained in *The Matrimonial Causes Act, 1950 (U.K.)*.

All of which is respectfully submitted.

APPENDIX A

CERTIFIED COPY of a Resoution agreed to in the Legislature of Manitoba on Friday, April 9th, 1965, on motion of Mr. Gray as amended by Messrs. Hillhouse and Johnston.

* * *

RESOLVED that this Legislative Assembly recommends to the Government of Canada:

(a) that dissolution of marriage may be claimed by either husband or wife on the grounds that the respondent:

(i) has since the celebration of the marriage committed adultery; or

(ii) has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition; or

(iii) has since the celebration of the marriage treated the petitioner with cruelty; or

(iv) is incurably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition; or

(v) has, there the wife is the petitioner, been guilty since the celebration of the marriage, of rape, sodomy, or bestiality; or

(vi) has been legally separated from the petitioner for at least three years by virtue of a judgment of a court of superior jurisdiction on grounds on which an order of separation can be made under *The Matrimonial Causes Act, 1857 (Imp)*; and amendments thereto; and

(b) that any married person who alleges that reasonable grounds exist for supposing that his or her spouse is dead, may present a petition to the Court to have it presumed that the said spouse is dead and to have the marriage dissolved; and that for such proceedings, the fact that for a period of seven years or upwards the other party to the marriage has been continuously absent from the petitioner, and the petitioner has no reason to believe that the other party has been living within that time, shall be admissible in evidence as prima facie proof that the other party is dead.

* * *

Certified to be a true copy:
Charland Prud'homme,
Clerk of the Legislative
Assembly of Manitoba.

APPENDIX B

EXCERPTS FROM DEBATES AND PROCEEDINGS
OF LEGISLATIVE ASSEMBLY OF MANITOBA

Vol. XI, No. 14; 2:30 p.m., Friday, March 5th, 1965.
4th Session, 27th Legislature, at Page 297.

Madam Speaker: The proposed resolution standing in the name of the Honourable the Member for Inkster.

Mr. Gray: Madam Speaker, I beg leave to move, seconded by the Honourable Member from Seven Oaks: Resolved that this Legislative Assembly recommends to the Government of Canada that it take steps to introduce amendments to the laws governing dissolution of marriage by divorce, to provide the following as reasons for dissolution of a contract of marriage, any one of which may be applicable: (1) Adultery; (2) Desertion for more than two years; (3) Persistent physical or mental cruelty; (4) Insanity, continuous or recurrent; (5) Imprisonment for two or more years; (6) Legal separation for more than two years.

Madam Speaker presented the motion.

Mr. Gray: Madam Speaker, the resolution speaks for itself. It was debated in this House for many times, and I felt the justification of this change is so strong that it should be introduced again. I shall be very brief in my remarks, except reading to you some supports of men in this world who have made a study of it. The Library, this library and others, have much material in support of it which I am not going to read, but I have just taken out some of the most important items.

In 1886, the Parliament of Canada enacted a law stating that, and I quote: "To remove all doubts, all laws of the United Kingdom after July 15, 1870 are to be regarded as being in force in the Northwest Territories unless Parliament repeal or alter them." These Territories are later Manitoba—The United Kingdom's divorce law, with adultery the only admissible cause for divorce. This act has not been revised and it means, Madam Speaker, the people of Manitoba are subject to divorce laws which are 107 years old.

In that 107 years attitudes towards divorce have changed so radically that I can say without fear of contradiction that all religious institutions, with probably the single significant exception of the Roman Catholic Church and its communicants, will accept liberalized divorce laws. Indeed, even the Roman church is currently reviewing its stand on divorce as we have noticed in the press during the last few years. Does the state have the right to legislate for morality? Does the state have the right to impose the standards of conduct, for example, of every citizen regardless of his or her faith or lack of faith? I believe the answer of these questions to be known, and I believe that all the honourable members, upon reflection, will agree with me.

To return to the existing situation, what have our rigid divorce laws accomplished? Undoubtedly they have prevented a large number of divorces. They have also, however, done much to increase the cruel practice of desertion, the incidence of couples living apart, separated without the opportunity to attempt to build a proper home for their children with another mate. They have sustained and extended the practice of common law marriages, in which children who may be the product of such alliances have no right to their father's name. Moreover, it has not been demonstrated that unhappy marriages, which by virtue of the divorce laws have been forced to continue, provide a better home environment for the children than do homes created by remarriage. What sort of companionship and understanding exists in a home where the husband hates the wife; or where the wife is incurably insane, living in our mental institutions; or

where the man is an habitual criminal of low character. There are shared experiences in such homes to be sure, but few of them can be pleasant. Few of them can have a healthy influence on children.

Our present divorce laws have also forced many of our citizens into acts of collusion and perjury in order to gain relief from a marriage which has become intolerable for both parties. No one will ever convince me that a man or a woman bent on meeting his mistress or her lover secretly will leave the doors unlocked so that detectives are able to barge in and take pictures.

A divorce law authority, Mr. Power, has written—and I have his book right here—“Undoubtedly there are matrimonial offenses such as actual cruelty and desertion which are often more serious insofar as they render life intolerable than an isolated act of adultery is, and it offends the idea of justice that a young man and woman whose fate is to be married to a partner who has become incurably insane should be unable under the law to obtain release from that tragic reality.”

We will not allow people to obtain release from this sort of tragic reality unless they first prostitute themselves, make a vulgar display of themselves in front of paid strangers. The whole process disgusts everyone with a concern for the dignity of man. In allowing divorce on the grounds of adultery, we have made divorce in some circumstances, a regrettable necessity. Let us now ensure that we establish an idealistic set of circumstances in which divorce is possible. I'm definitely certain, on reading most of the material I have in front of me, that people could live happier if they had other opportunities or other reasons to start a new life.

Mr. T. P. Hillhouse, Q.C. (*Selkirk*): Madam Speaker, in rising to support this resolution I do so in respect of the principle embodied therein, but unfortunately I cannot support the specific grounds which the Honourable Member for Inkster has included as grounds for divorce. I feel therefore that this resolution should be amended, and the amendment which I intend to move will be in conformity with the grounds for divorce that prevail in the United Kingdom.

In supporting this resolution, Madam, I do so with a full knowledge that it is not going to solve or in any way assist our grave social problem of marriage break-ups. In my opinion, that is about the gravest social problem with which we are confronted today. But I do feel, Madam, that where a marriage has broken up, where it is beyond repair, that it is foolish to allow that marriage to persist. I think that these people who have tried to make a go of marriage, who have failed, should be given an opportunity and a chance to start afresh. Divorce, Madam, is not what ends a marriage, it is simply the legal recognition that a marriage has failed and humanly speaking is beyond repair.

It is true that in Canada today adultery is the only ground for divorce, but speaking as a lawyer, the adultery alleged in a divorce petition, although constituting the legal grounds for granting the divorce, is in my opinion in very few cases the actual cause of the people going to court and seeking a divorce. In my opinion, that marriage was broken up before these people came into court. It is my opinion, Madam, that there are as many causes of marriage failure in this province as there are human frailties, and I think the time has come for us to recognize these other causes of marriage failure and include them in grounds for divorce.

We, in Canada today, in spite of the fact that we recognize that marriages are in most instances broken up before people come to court, we still persist in making a petitioner in a divorce action to allege and prove adultery. Now to me, I think that's absolutely absurd, because all we are doing is forcing these people in some instances to commit an act which is abhorrent to them or in other instances, to set up a set of circumstances from which a court could legally presume that adultery had taken place.

I think the day has come when we must face up to this problem squarely and we must do something to bring it more in line with modern thinking. I think that we must today, Madam, recognize some of the other causes which result in a marriage break-up, and I think too that we should recommend to the Government of Canada that the grounds for divorce in those provinces wishing to enact complementary legislation to that enacted by the Dominion of Canada should be brought into line with the grounds for divorce prevailing in the United Kingdom.

For those reasons therefore, Madam I support this resolution in principle, but I feel that it should be amended to bring the grounds for divorce in line with those prevailing in the United Kingdom. I therefore wish to move, seconded by the Honourable Member for St. George, that the resolution be amended by deleting all words and figures after the word "Canada" as it appears in the second line thereof and substituting therefor the following: The dissolution of marriage may be claimed by either husband or wife on the grounds that the respondent: (1) Has since the celebration of the marriage committed adultery; or (2) Has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition; or (3) Has since the celebration of the marriage treated the petitioner with cruelty; or (4) Is incurably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition; (5) That dissolution of marriage be granted on the petition of a wife on the grounds that her husband has since the celebration thereof been guilty of rape, sodomy or bestiality; and (6) That any married person who alleges that reasonable grounds exist for supposing that the spouse is dead may present a petition to the court to have it presumed that the said spouse is dead and to have the marriage dissolved, for such proceedings the fact that for a period of seven years or upwards the other party to the marriage has been continuously absent from the petitioner and the petitioner has no reason to believe that the other party has been living within that time shall be evidence that he or she is dead until the contrary is proved.

Madam Speaker presented the motion.

Mr. R. O. Lissaman (*Brandon*): Madam Speaker, I would like to move, seconded by the Honourable Member for Morris, that the debate be adjourned.

Madam Speaker presented the motion and after a voice vote declared the motion carried.

The adjourned debate on the proposed motion of the Honourable the Member for Inkster.

Vol. XI No. 23 2:30 p.m. Friday, March 12th, 1965,
4th Session, 27th Legislature, at Page 551.

Madam Speaker: Agreed? The adjourned debate on the proposed resolution of the Honourable the Member for Inkster and the proposed amendment thereto by the Honourable the Member for Selkirk. The Honourable the Member for Brandon.

Mr. R. O. Lissaman (*Brandon*): Madam Speaker, I would like to at the outset of this discussion inform the members that I am expressing my own personal views in this matter, and I'm in no way speaking for the Party. The divorce situation in this country is—as mature people look at it today, is a situation, a condition, which does require the thinking and examining of sensible people. Personally, my own inclination would be, from purely personal experience, to say, well let's leave matters well enough alone. Lately I suppose I doubt very much if my wife could trade me off even if she had the opportunity, and I

can assure the members that I am quite content with my mate in life. However, it is rather unfortunate, but it is a fact that legislation must reflect the will of the people, and I have thought for the past several years, with the creeping—certainly continually—reducing of the standards, lowering the standards of moral behaviour in this country, that this is but one of the many undesirable behaviours of society that we are reaping.

Now, certainly I am at least one generation removed from young people contemplating marriage at this time, but when you compare the atmosphere and environment of two generations, there is not much in common when it comes to the actual formation of moral standards and so on, and right here I would like to say that I have the greatest respect for young people, probably far greater than one of their compatriots, a person of their own age, because I think they face an almost intolerable situation as compared to boys and girls in my youth. I think many of the members here will agree that we—our first reading started off with Horatio Alger, this brave young lad from the country who came to town and worked hard. It helped a bit, of course, to marry the boss's daughter, but he married successfully and ended up living happy ever after; and there was some value to this. I have heard psychologists run down the value of Horatio Alger as reading matter for young people, but it certainly did give inspiration and an uplift. And then, as we of my generation attended movies and plays, the movies and plays were generally of an uplift nature. You came away from them—certainly there was the odd tragedy—but you came away from the entertainment in that day with an uplift, with some inspiration, and a general tendency to feel that the world was all right. Now compared to this, present-day entertainment seems to be a terrible ordeal to go through. It seems that every writer must present you with a psychiatric problem or something. Or if this is not his particular meter, why then he takes you through all the by-ways and alleys of really the gutter-type of living, and it seems that a person, if they want to be assured of having a best seller, why they just need to introduce all the smut that they can.

Now certainly I believe, and I believe other members must feel this way, that a generation of youth today, feeding on this sort of material, formulating their opinions and basing their concepts of how to live on this sort of thinking—true, there are those who will see beyond it, see that these are studies presented to you, and it's wise not to choose this way of life as presented in much of this reading material and entertainment, but there will be many who do not look beyond it, and so I think we can look for a continued reduction of moral standards unless the common sense goodwill of man takes over, and in this manner I would suggest. I myself would be reluctant to agree to any rigid censorship but I do believe that in the type of stuff that is available now on the newstands and in the entertainment world, that there should be at least the restraint of common decency. Material and situations should not be presented which go beyond the bounds of reasonable decency, and I can assure you that much of the literature that is available does exceed these bonds.

Now, coming back to the divorce situation, you might say, "Well what has this all to do with it?" but I think it does have a great deal, because as the old saying: "As the twig is bent, so inclines the tree," and I think there is a real danger in our present trend of society to the family and the marriage state, but at the same time I think all sensibly mature people, and particularly those who enjoy a happy and satisfactory marriage relationship, have a particular sympathy towards those who have not been so fortunate.

As you are aware, Madam Speaker, many of the citizenry at large do not differentiate between federal and provincial matters. They do not realize the jurisdiction of either government, and I have had several people come to me at different times asking me to help them in some matters of obtaining a divorce, a divorce situation, and I have assured them that there was very little that a

provincial member could do, but since people like to unburden themselves I have heard some really disturbing situations described to me and I think all of us would agree that probably nothing could be worse than to be doomed to be living with an individual with whom you had nothing in common, and even beyond this, one possibly irritating the other, so I must come to the conclusion that reasonable and sensible people must agree that there must be more easily available outlets so that these people can be freed of such a situation and be given a new chance.

Now I think that we should certainly look at any degree of relaxation in the divorce laws very seriously, because often even to those seeking divorce, divorce may not necessarily be the answer. If we make it too easily available there will not be the effort to compromise and get along with each other and both parties, once freed, do take along with them some stigma of failure. This applies, of course, in more disastrous ways upon the children, if there are children of such a marriage, and every effort should be made to keep a couple together wherever it is possible, but since this House will not be determining what the laws will be, and in effect even the amendment, supposing the amendment passes by the Member for Selkirk, sent to Ottawa, I am sure this will not be interpreted literally but merely as a request to re-examine and liberalize our divorce laws. And because of this, Madam Speaker, and because of my feelings I have expressed, I find that I will be voting in favour of the motion as amended.

Mr. Schreyer: Madam Speaker, I would like to take a few minutes to speak to this resolution, I believe it's the kind of resolution, the subject matter of which lends itself to extended discussion and debate, and it's not my intention to speak for more than just a few minutes.

The members who have spoken previously have seemed to be of a consensus that divorce laws in this country should be changed, moderated, eased, or liberalized if you like, and I think that in the slow course of events, legislation having to do with social matters, that it is time now to make or to ask for this change. The Member for Brandon, as I understood him, decried or seemed to discern a trend toward lower standards of social conduct and I must agree with him. In my opinion, I seem to detect or discern this also. I don't know if this is common with each passing generation to think that their generation is going to ruination and damnation, but I feel very strongly, after trying to keep up with changing events around me, that there is some trend toward a lowering of standard social conduct, sort of a trend toward licentiousness if you like, etc. etc., but yet at the same time I don't think that this resolution asking for a moderation in the divorce legislation would lend itself, or has anything directly to do with this trend. I think that it is really beastly for the State to prevent by law, prevent people who cannot abide each other, cannot tolerate each other very much in any case, to prevent them from taking their separate ways and trying to find a better life and rearrange it so that they may live more happily.

Now of course a very basic argument is that liberalized divorce will make for a situation of increased divorce and that many innocent children will suffer. There may be something to that, but on the other hand I would submit that children who live in a home where the parents are forever quarrelling or who have no feeling of respect for each other in any case, that the children living in such a home are suffering as much, or at least almost as much as if the parents were separated and remarried and living more happily.

I have here a memorandum that was submitted to the Federal Minister of Justice relative to the question, the problem of divorce, and it is a submission by a group of farm women, and I consider—that is not to say anything about city women—but I consider farm women, the kind of women who are busy in farm organizations, etc., do have the highest sense of social conduct, social standards, moral standards, etc., and they are asking for a change, a liberalization of our

divorce laws. They are asking for it along the lines proposed by the Honourable Member for Inkster and, not exclusive also, the Honourable Member for Selkirk whose amendment by the way recommends itself very highly to this group.

I think, Madam Speaker, that people, legislators, can go along for years, decades, opposing a certain change in the law, in the case of divorce law for example, and then change in society around them catches up and it becomes manifestly clear to them that it is indeed time to change the law, and I would hope that honourable members here will see fit to pass this resolution which would have the effect of making a formal request to the Federal Government to make or to initiate the necessary changes.

And with that, Madam Speaker, I think I have made my contribution to this particular debate. I certainly intend to vote for the resolution even though I am, like the Member for St. Boniface, a member of the Roman Catholic faith. It's not so surprising that Roman Catholics should vote for a resolution such as this inasmuch as, even though we may find divorce something which we would not ourselves as members of that particular faith wish to avail ourselves of, nevertheless, because we do not choose to does not mean that we must cast our vote in the negative in order to deprive other people who think otherwise of a chance to make something of their life when it has come to a sad state because of incompatibility.

Mr. Johnson: Madam Speaker, I won't be long on this matter, but I would like to speak to this amendment which I endorse. That is the Honourable Member for Selkirk's amendment of the matter before us. You know, we hear—ever since I came to understand the nature of things, I have come to feel more and more and I hear it almost monthly in the course of activities in our province, why are our divorce laws so archaic? I don't think we are, contrary to what we hear from time to time, that we are a generation of people going to ruination, where social conduct, certainly our exposures are much greater; but I think we tend sometimes too to go in cycles. I have had occasion recently to read some of the sagas that go back a thousand years and in those days, the old vikings used to meet once a year at the Althing and you came to the Althing and if you thought your partner had been unfaithful, you named her and if proven guilty, or named by a second party, she lost her head.

We've advanced a little bit since those days, but in those days of course, they had this most expeditious method of separating partner and spouse. Recently I have had brought to my attention a very sad case of this nature where desertion—a woman had been deserted for a five year period and for three or four years had been trying to get a divorce, chased the other partner out to another province, and through her father and her fiance, or present fiance she has been trying to initiate divorce proceedings. After five years and \$1200 in trying to find him, trying to find all the kind of evidence they need these days, investigators, lawyers and other jurisdictions, she is becoming somewhat impoverished and at that point came to myself. However, this is I think, not uncommon because when in my small orbit I hear of these actual cases one sees the futility of some of our existing laws. I am most heartened especially by the attitude taken by progressive people like the Member from St. Boniface, and the Member from Brokenhead in this regard. I think regardless of our certain matters of conscience and so on, that in the public interest, in our modern society and in our modern way of thought, some real good can come from the kind of resolution by the Honourable Member from Selkirk.

I think however, that it would concern me, I'm sure that in bringing a resolution like this to the Federal Government's attention, I'm sure that the matter of psychiatric opinion should be one of a panel where you don't want one or an isolated psychiatric opinion standing up. I'm sure the courts would, or some regulations governing the laws could cover that kind of event because much like

having a pony these days a lot of women have their own psychiatrist and we don't want to overdo or get some rather quick judgments in this regard, in certain areas. I do think though that the desertion and the mental cruelty and the bestiality, and these sections as outlined here, are very good, and I just wanted to rise on this debate to support this amendment of the Honourable Member from Selkirk and hope that it is forwarded to Ottawa and that the authorities there see fit to take action in this regard.

Mr. Hillhouse: Madam, I'd simply like to thank all the members in the House who have spoken on behalf of this amendment. I would also like to thank the Honourable Member for Inkster for having—(Interjection)—Yes. Do you want to speak?

Mr. Fred Groves, (*St. Vital*): I'm sorry. I'd like to adjourn the debate, if he is going to close...

Madam Speaker: Is the honourable member closing the debate? The Honourable Member for St. Vital.

Mr. Groves: I apologize to the honourable member. I move then, seconded by the Honourable Member from Winnipeg Centre that the debate be adjourned.

Madam Speaker presented the motion and after a voice vote declared the motion carried.

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Madam Speaker: Agreed. The adjourned debate on the proposed resolution of the Honourable the Member for Inkster and the proposed amendment thereto by the Honourable Member for Selkirk. The Honourable the Member for St. Vital.

Mr. Fred Groves, (*St. Vital*): Madam Speaker, I think a vast majority of Canadians are not satisfied with our antiquated divorce law. These laws are different in some of the provinces, they are difficult to operate, they are embarrassing to comply with in many cases and they are inadequate for many people. However, while the majority might agree that change in these laws are necessary, there is not a substantial agreement amongst these people that what the changes should be. In my view I agree that the grounds for divorce should be widened to include perhaps desertion for a period of at least five years or to finalize a long period of legal separation, but this is the extent to which I would be prepared to agree in any change in the grounds for divorce. Cruelty both mental and physical cannot really be properly defined in my opinion and can be open to too broad an interpretation or to too narrow a one. The elected representatives of the people I think when we're dealing with the matter of divorce would find it impossible to have the courts interpret their intentions accurately at the time any extension was made to include cruelty. It is just such misrepresentation of the term cruelty that has made people cynical and disrespectful of what we call Hollywood style divorces. Laws to protect against physical cruelty should be altered to fit the current needs without tampering with our divorce laws. Cruelty in a sense is a form of a sickness and where it is not a form of sickness I think could be dealt with through our criminal code or some other law without actually changing our law in respect of divorce.

I also submit Madam Speaker, that insanity is no longer an incurable disease and there have been a number of awkward cases where one partner to a marriage has been deemed to be incurably insane, has been divorced from their spouse in some other jurisdiction and later on cured of their so-called incurable insanity and prepared to take up their married life where they left off and shocked into finding that their marriage no longer existed.

Habitual drunkenness Madam Speaker, is also a form of sickness that is not entirely incurable. I think that the resolution that we have before us and the amendment go too far in liberalizing our divorce law. The Honourable Member for Inkster asks for a period of desertion not more than two years. I submit Madam Speaker, though there are grounds for I think extending the grounds for divorce to desertion but certainly not for a period as short as two years. Persistent physical and mental cruelty I have already dealt with. I do not think that the grounds for divorce should be enlarged to include these.

Insanity is not incurable and certainly I am not in agreement with this provision that asks for the enlargement of grounds on the basis of imprisonment for two or more years. Legal separation, I think if a legal separation has gone on for a good many years and there is reason to believe that it is permanent then this may be some grounds for enlarging the grounds for divorce.

The Honourable Member for Selkirk amends the resolution to include other things. Cruelty I have already dealt with, Madam Speaker, and again I ask how does one define cruelty. It is a form of sickness and I maintain that a person, that in many cases where a person is inclined to be cruel this is something that is known prior to the marriage and should be taken into consideration by the parties at that time.

With respect to mental illness we all know I am sure of the near miracles that have taken place in our mental institutions. Many of these people have come out of these institutions cured and I think this should not be grounds for the enlargement of the divorce law.

Madam Speaker, I would like to repeat what I said at the time this resolution was before us, or one similar, and that is, two years ago, or 1964, and that is that I am going to oppose this resolution on the grounds that in my opinion a marriage contract is a contract that is entered into by two persons before God and is a contract for life.

At this time, Madam Speaker, again I would like to say that I think divorce is a federal matter and that the Federal Government has facilities to properly study any changes that might be made in this law. It's time too, Madam Speaker, when we're talking of this subject that we might review the vow that is taken by our young people when they get married. I think that one of our problems today has been this vow is not taken seriously enough. When one gets married one takes the other party to be his lawfully wedded wife or husband, to have and to hold from this day forward, for better or for worse, for richer or for poorer, in sickness and in health, to love and to cherish, until death do us part. According to God's holy ordinance and thereto they pledge each other their troth.

Madam Speaker, I think that this is a vow or an oath that is taken before God and one that should not be taken lightly by the parties concerned and one that they should think over many times during the course of their married life. I'm inclined to agree with some of the remarks that the Honourable Member for Brandon made the other day, about the fact that we are living in an age of moral decay in many instances. And it is difficult with the type of movies, the type of TV programs and the type of books that are available to our young people to retain many of our moral standards, particularly those standards that we have always held high with respect to marriage. This is all the more reason, Madam Speaker, why I think that it is our duty as parents and as counsellors to young people contemplating marriage, that we should be preparing them more for their embarkation on the sea of matrimony and preparing them for the seriousness of the vows which they take at the time they embark on that sea.

So although I am in agreement with a good lot of what has been said about the difficulties that married people find themselves in these days, I find too that we should not tamper with the divorce law lightly, we should remember that

marriage is a contract for life taken before Almighty God and I am therefore not prepared to support either the resolution or the amendment.

Mr. Albert Vielfaure (*La Verendrye*): I do not rise at this moment, Madam Speaker, to say that I am violently opposed to this resolution, or that I don't see its merit. However, being a strong believer in the sanctity of marriage, I do not take this resolution lightly and I understand, I think I understand the intentions of the mover, which are certainly not to liberalize divorce laws but rather to help those who are in trouble. However, Madam Speaker, I wonder if by liberalizing our divorce laws we might not be encouraging many of our young people who are getting married today in thinking in the line, "Well, we don't have to take it too too seriously, there will be an easier way out in the future." And I certainly think that when we look across the line and see how lightly for example the word "cruelty" is used there for applying for divorce, I wonder sometimes if my wife won't divorce me every week for just being away from home all the time. Mind you, I'm not worried to that point yet. However, I think we should take this very seriously, and we should also, although it doesn't concern this resolution directly, I think us legislators should take a very good look at the advertising that is going on in this country and the falsification of marriage. If we look around today, practically every billboard shows a woman more as an instrument of promoting the sales of some product rather than as a future mother as was wanted by God. Now I don't intend to make a sermon here. However, when I see our young generation growing with this advertising literature stands all around, I think they will have to receive very good education at home and in school if we are not asked to liberalize divorce laws again in the future.

Madam Speaker, again I repeat, I understand the ideas of the amendment of the Honourable Member from Selkirk, which is to help those that are in difficulty rather than just liberalizing the divorce laws, I should say that at this time I am not convinced that this will do as well as it is thought it would do in here and in my estimation might cause more people to think more lightly of marriage, and therefore at this time I am not prepared to support this resolution.

Mr. D. M. Stanes (*St. James*): Madam Speaker, rightly or wrongly, I look upon this resolution as a general expression of thought to the Federal Government, and therefore I don't think one should go in to any specific detail. I agree with the philosophy behind it in there should be some relaxation on the grounds for divorce, but one also must be very conscious as I am that by relaxing too much can be worse than the present situation. I'm a little concerned on the question of cruelty—who shall be the judge? It can be a farce like there is in some other areas, and after all as was pointed out by the Honourable Member from St. Vital, in many cases is a sickness. The other item of unsound mind is also a sickness, in which we are making great strides in curing people and bringing them back to society; and the fifth item is also in many cases a mental sickness, and I don't think anyone can say what progress will be made in curing these sicknesses in the next few years. Probably by the time this resolution does get to Ottawa, the matter will have been gone into in very much greater detail with more information at hand.

However, there is one item which I feel is left out, and that is on the amendment, and that is the sixth item which was on the original resolution, legal separation for more than two years. I would therefore like to pose an amendment, Madam Speaker, a sub-amendment, seconded by the Honourable Member for Churchill, that the resolution be amended by adding (7) has been legally separated for at least three years.

Madam Speaker presented the motion.

Madam Speaker: The Honourable the Member for Kildonan.

Mr. James T. Mills, (*Kildonan*): Madam Speaker, also speaking as a Roman Catholic in the House, I feel it my duty to participate in the debate. As other members of my church have stated, I feel somewhat as they do. I feel that in my position as a Catholic I have to turn down the theory of divorce, but that's my own conscience; but I also have to legislate to other constituents in my area which they feel with the divorce laws we have at present, they are very strict. But I feel there should be other alternatives rather than to bring out a resolution as strong and as direct as we have brought up in this House. There must be other alternatives. I was fortunate the other night in picking up a brief which I think could add a bit of solution to this before we carry on the drastic measures we are planning on doing. I would like to read out the foreword of this brief. This brief is based on a Conciliation Court of Los Angeles County. I would like to read one or two paragraphs here. The December 1962 issue of Reader's Digest in an article entitled: "The Walk-in Court that Rescues Rocky Marriages declares, most divorce courts pit troubled husbands and wives against each other as bitter adversaries. Los Angeles has a new approach...a Conciliation Court." In 1956, the Journal of the American Bar Association carried an article on Conciliation Courts of Los Angeles entitled: "An Instrument of Peace." The function of the Court is to render compatible husbands and wives whose marriages are threatened with divorce. Although not restricted to aiding families with children, the disastrous impact upon children of broken homes emphasizes the importance of the work of this Court, and approximately 15,000 children have been restored to their parents through reconciliation effected in courts since 1954." Madam Speaker, I feel as I said before, rather than go ahead, I would like to see a court similar to this inaugurated in the Province of Manitoba.

Madam Speaker: The Honourable Member for St. John's.

Mr. Saul Cherniack, Q.C. (*St. John's*): Madam Speaker, I am bound to tell the Honourable Member from Kildonan that as soon as he has a resolution drafted along the lines that he wishes to see carried out here, I would be honoured if he would allow me to associate myself with it and second it, because the court that he envisages is one which could be of very great benefit to the people in this province. We have very busy courts today. We have a Magistrate's Court which deals with humanity on all occasions and hasn't time really to deal with any particular problem which arises except in a superficial and quick manner. We have the Family Court which takes a very serious view on the entire question of separation and the Wives and Families Maintenance Act. The judges of that court take very great pains to look into the problems that have occurred and are presented to them with the objective to help cure what appears to be a problem and save a marriage. In my opinion, that court is overloaded, and that court does not have sufficient assistance in preparing itself by having case workers look into the problem, investigate the background and follow up in the future when marriages aren't being kept together.

We have the Court of Queen's Bench which deals with divorce, divorce only, and that's a very cut and dried court where the background of the problem is not looked at at all; all that is looked at is the question of proof, in our courts, of adultery, proof of domicile, proof of the various matters, proof of marriage, whatever has to be presented, and it's not unknown that in twenty minutes a divorce may be granted. When I say it's not unknown, I think that's probably the average.

Now, Madam Speaker, if the Honourable Member for Kildonan is serious, and when I say "if", I know he is serious, but if he really means to carry out a progressive measure in this province to see what can be done about saving marriages, then by all means anything that can be done in this Legislature to create or to augment the work that may be done in a court such as he describes

would be a tremendous contribution to this province. I urge him to do it, and I urge him not to hide behind the Cabinet or behind the party which is in power but rather come out in the open and bring out a resolution such as he suggested; and I think that it will obviously receive tremendous support in this House.

I would like to second what has been said by the Honourable Member for St. James in that this resolution does not in itself legislate. It sets out suggested grounds for divorce and it recommends them for consideration to the Parliament of Canada. As such, I think that the principle is more important than the detail; and as such I think that if we agree that our present divorce law is not up to the mark for present-day society, then we should vote in favour of this resolution, or another resolution which is watered down if necessary. It seems to me that if certain members, and two honourable members spoke today, saying that they agree that what we have today is not adequate for our needs, but they think that the suggestions go too far, I suggest to them that they should nevertheless support it, in order to indicate to the Parliament of Canada that we feel that the law as it exists today is not a proper one in dealing with the problem of marital relations.

I want them to mention a third point, which I think should be brought to the attention of the Honourable Members for St. James and St. Vital, both of whom—and I think also it was mentioned by another speaker—and that is the interpretation of the word “cruelty”. I think you do our courts an injustice in suggesting that they are not capable of defining cruelty as this Legislature would want them to do. It is true that there are courts south of us that use the term cruelty for any ridiculous thing in order to be able to dissolve a marriage; but that is done surely with the co-operation and consent of the legislative bodies, because here in this province we have a definition of cruelty. It is one which is found in the Wives and Childrens Maintenance Act and it does speak of persistent cruelty as being a ground for separation. It has been contested time and again in the courts and there are many decisions and precedents defining the term “persistent cruelty” as it is meant by the Legislature under The Wives and Childrens Maintenance Act. And there is sufficient law, both in this province and elsewhere to give us good cause to have a great deal of confidence in our courts, in our judiciary, to be able to interpret the will of this Assembly, so I think that they were unfair in suggesting that the definition would be so vague as to be able to be misused. I can assure you from my experience—and I believe I speak for the vast majority of members of my profession who’ve appeared in the Family Court, that the question of cruelty is one which has clearly defined characteristics which the courts recognize and which they make sure about. Our courts and I think our lawyers are deeply conscious of the responsibility placed on them to always try to keep a marriage together before they do anything in terms of separation or divorce. It is my experience that just about every lawyer, and certainly every court, recognizes this responsibility and does look into the question in the hope that a marriage may be made sound again.

Having said that I must immediately contradict myself, Madam Speaker, by saying that this does not apply in Court of Queen’s Bench when you deal with the question of divorce itself. What I have said applies to the question of separation. When it comes to divorce the ground for adultery is all that is necessary once you have placed yourself within the jurisdiction of the court, and although the court might feel that there is great hope for this marriage in terms of bringing the people together, it is my interpretation that the court, if it finds adultery, must grant a decree nisi. And this alone is an indication that when you have a very hard and fast rule such as we have here, the application of it derogates against the possibility of a marriage being saved by the court itself.

I should also say one other factor and that is that I don’t recall any case in my own experience where adultery was the original cause in a divorce. It seems to me that in all the cases that I can think of the grounds for the separation

preceded any act of adultery. The grounds of the separation were cruelty. The grounds of the separation might have been desertion. The grounds for the separation might be incompatibility, or many, many factors, and after there has been a separation, after the marriage has been broken in all respects except in the concept of the legal aspect, then with the couple separated, with the people living their own lives as if they were single, adultery has taken place and the divorce has come into court. So that I suggest to you that we are no longer being at all realistic in thinking in terms of the present grounds as being the real grounds, and that we would be much more realistic if we washed out all these various reasons here and said there has to be a review. But if we said that we would be behind in our times because we have had—well I think I received it while I was in this Assembly, but in any event I've had for some time a very well documented pamphlet issued by the United Church of England and I've seen it in the hands of many people.—(Interjection)—Pardon? Of Canada, yes, thank you,—The United Church of Canada. I have seen reports of other religious bodies that have looked into the question of divorce and I commend to the attention of those members here who have not read this United Church review on marriage and divorce as being something which commands a great deal of respect because the studies given in that pamphlet or booklet indicate clearly that we must, in order to accept society for what it is and not wear blinkers about it, we must do our best to see to it that we make our society adapt to the requirements that modern technology bring before it. It's a peculiar thing that we read so much and hear so much about common law marriage and about illegitimacy, and all the problems that come as a result of it, and we are just wearing blinkers, we are just blind to the problem if we don't at the same time recognize that by keeping these hard and fast rules we are in part participating in perpetuating the problems that occur in society as a result of broken marriages, that are broken, that cannot be mended but are still tied together by an artificial legal concept.

Madam Speaker: The Honourable the Member for Selkirk.

Mr. T. P. Hillhouse, Q.C. (*Selkirk*): Madam Speaker, I rise to address myself to the amendment to the amendment which reads that—it gives an additional ground for divorce, “has been legally separated for at least three years.” Now I don't know if the honourable member realizes what is involved in this amendment to the amendment, whether he is referring to a judicial separation or whether he is referring to a separation order which was granted under The Wives and Childrens Act by a police magistrate, but I take it that he means a legal separation regardless of the court from which it emanated. Now on that basis Madam you would actually, indirectly, be conferring jurisdiction to grant divorce on a police magistrate, because a police magistrate has jurisdiction to grant a legal separation under the provisions of The Wives and Childrens Maintenance Act simply on the grounds of assault. And “assault” is a legal term which has a very definite legal meaning; and assault doesn't have to mean cruelty, it doesn't have to mean inflicting bodily harm. As long as I reach out with the intention of striking somebody and as long as I strike that person, or if I am prevented from striking that person because that person jumped out of my way, I am guilty of an assault. Now that in effect is what you are asking the Parliament of Canada to add as a ground for divorce, because that is a ground for granting a legal separation.

Now as to the remarks by the Honourable Member for Kildonan, I respect his conscience, I respect the fact that he is a member of a church to which I do not belong, and I give him full credit and the full right to stand up in this House and express his creed and faith; but I do suggest this to the honourable member do not by your action prevent anybody else or another person from taking advantage of a law which is not biding on their conscience; and please keep in mind this, that divorce is only the legal recognition that a marriage has broken

up. The marriage was broken up long before the divorce decree was ever granted.

Mr. Mills: On a point of privilege may I ask one question? You mention that I as a Roman Catholic, state that I am not in favour of divorce but I also want to inflict this on my fellow constituents and other friends in this House. This is not what I said.

Mr. Hillhouse: Then please do not because your conscience doesn't allow you to take advantage of it, to impose your conscience on somebody else.

Mr. Mills: I am not forcing my conscience on someone else, sir.

Mr. Hillhouse: I submit you are if you are taking this attitude. Now the Honourable Member for Kildonan also raises the question that we should have more efforts and more attempts made to bring about conciliations. I would like to point out to this House that in our Wives and Childrens Maintenance Act there is a section which says, "Before a public hearing of any proceedings under this Act the judge or police magistrate shall consider, having regard to the information, whether it will be well to hear the parties in private with a view to settlement by mutual consent of the matters in question; and if he thinks fit he may summon the parties to appear before him, and shall hear them in private with the intent before mentioned and may receive in their presence information from any person whom the judge or magistrate believes to have a knowledge of the relationship of the parties." Now that is a procedure which is fairly generally carried out in our courts at the magisterial level. There's very few police magistrates are prepared to grant an order under The Wives and Childrens Maintenance Act without calling the parties into his private chamber and discussing the matter with them, with a view to seeing whether reconciliation cannot be effected. It's true that in the Queen's Bench, perhaps due to the pressure of business or perhaps due to the fact that the judges there realize that the marriage has broken up that that procedure is not followed. But there is nothing to prevent any Queen's Bench judge if he so desires for calling the parties together in his chamber privately and seeing if a settlement or a reconciliation cannot be effected.

Now the Honourable Member for Kildonan mentions the fact that surely there is some alternative. I don't want to be facetious, Madam, but I say the only alternative to divorce is not to get married, because the number of divorces will never exceed the number of marriages.

Now a great deal has been made here too about legal cruelty. The Honourable Member for St. John's has dealt with that very fully, and as far as our courts are concerned they are not going to place the interpretation of some of the United States courts on what constitutes cruelty. They are not going to consider it cruel because a man has halitosis or a man has dandruff or a man hangs from a chandelier or some of the silly notions that they have in California. Legal cruelty in Canada is that cruelty which must be established according to the laws of England in order to entitle a person to a divorce or a separation on that ground; and that cruelty has been so well defined by so many decisions that our judges in Canada and in Manitoba particularly are bound to follow these decisions. Legal cruelty is one of the hardest things to prove because in a great number of instances you are trying to prove a state of mind. You are trying to prove what the actions of the spouse in default, what effect those actions have had on the other person and in a great number of instances it is and it largely becomes a medical matter. You've got to prove that that cruelty is such that it is endangering or has endangered the health of the other party, and I think any lawyer will agree with me that legal cruelty is one of the hardest things to establish in our courts, because as I said, it is largely a state of mind.

Now I do hope that this House will carry this resolution as amended. I don't think they should vote for the sub-amendment because I think the sub-amendment is going a little too far and I don't think that the Honourable Member for St. James who moved that sub-amendment was fully aware of the legal impact of his so doing.

Mr. Groves: —on a matter of keeping the records straight, I think that the Honourable Member from Selkirk gave the Honourable Member for Kildonan a lecture which he didn't deserve. The Honourable Member from Kildonan stood up and made exactly the same statement that the Honourable Member for St. Boniface made and the Honourable Member from Brokenhead, and that statement was that he being a Roman Catholic did not accept the principle of divorce but that he was not going to try and impose those views on others.

Madam Speaker put the question.

Honourable Gurney Evans, (*Minister of Industry and Commerce*), (*Fort Rouge*): Madam Speaker, I would just like to say a very brief word about my own position. I am in the difficult position of not knowing how to vote on this question except that I am of the opinion that voting for this particular resolution and the amendment and the sub-amendment is less desirable than voting for it. It's a matter of detail. I believe that the situation confronting the divorce courts and those concerned with divorce matters is such that does require the most earnest study and I support the resolution to that extent, that it does bring to the notice of this Legislature and is intended to bring to the notice of the Government of Canada, the views of the members here on this particular resolution. But I think it's in the detail in which I find fault and it is the detail that causes me to vote against all the resolutions that are on the Order Paper.

There is nothing to indicate here that we are asking the Government of Canada to consider the matter on a broad basis. It names specific items which are recommended specifically to the Government of Canada as grounds for divorce. Technical or legal difficulties have been raised about the item in the sub-amendment. Other considerations have entered into those items one to six in the amendment, and equally so with respect to the items in the main motion, and so with these specific details in which the resolution as worded now would recommend to the Government of Canada that dissolution of marriage may be claimed by either husband and or wife on the grounds that the respondent—then we name the six items—and add the further one that has been suggested by the Honourable Member for St. James. There is nothing suggestive about it; it is simply a categorical imperative in that sense that we ask the Government of Canada to consider these as the specific grounds for divorce. I am not in agreement with a number of them and for that reason cannot support either the sub-amendment, the amendment or the main motion.

Mr. Paulley: Madam Speaker, just a word or two. It is rather hard to speak on this resolution directly to the amendment to the amendment because it is dealing with one specific, namely the question of legal separation. However I will try to do so because I reserve my privilege a little later to speak on the whole aspect in the field of divorce.

I would suggest that the Honourable Member for St. James has raised a very interesting point when he suggests the amendment to the amendment which will insert a clause number seven dealing with legal separation for more than three years. You will recall Madam Speaker that the original resolution as proposed by my colleague from Inkster in clause six used the words "Legal separation for more than two years." The Member for St. James has now reinstated this particular clause with the exception that the two is now changed to three.

I listened with a great deal of interest to the arguments as proposed by the Honourable Member for Selkirk and his reference to The Wives and Childrens

Maintenance Act. But I think my honourable friend from Selkirk, in all due respect to his knowledge of the law has omitted the important part or the important contention as contained in the resolution as proposed originally by the Member for Inkster, now the endeavour of the Member for St. James to have it reinstated, is the period of time—from the time that the magistrate under The Wives and Childrens Maintenance Act has declared a legal separation. I would say that my friend from Selkirk might have a point that a legal separation by a magistrate became grounds for divorce immediately on receipt of the legal separation by the magistrate. But such is not the case Madam Speaker insofar as this resolution is concerned, or the amendment, because it imposes a length of time of the legal separation and as my colleague for Inkster implied or meant—and I am sure this is the contention of the Member for St. James—that if a couple after having been legally separated for a period of two or three years have not become reconciled to each other, notwithstanding how that separation came about, then it may be a ground for the consideration of the granting of a divorce. I think this is the point that my honourable friend the Member for Selkirk has overlooked completely for I am sure this is the intention in the resolution, in the original resolution and in the amendment as proposed by the Member for St. James. It's not the question again to recapitulate; it's not the question as to whether a magistrate has granted the legal separation under The Wives and Maintenance Act or any other Act, it's the fact or question that the separation has been for a period of time during which no reconciliation has taken place and to all intents and purposes they are a couple living apart. I think this is the point Madam Speaker that the members of this Assembly should take under consideration in dealing with the amendment to the amendment; not the point as raised by the Honourable Member for Selkirk.

Mr. Hillhouse: Madam, would the honourable member permit a question?

Mr. Paulley: Providing it's not too technical...

Mr. Hillhouse: No, no, no. It's quite factual. Does the honourable member imply in his remarks that a lapse of three years would change the nature of the order made by the magistrate, would it make an order of the Court of Queen's Bench or would it still remain an order of the magistrate?

Mr. Paulley: I suggest, Madam Speaker, in answer to my honourable friend it wouldn't matter whether it was an order of a magistrate or an order of a justice of the Queen's Bench. It's a fact, a fact of being separated for a period of three years that we are contending within this matter, not who made it, but the fact that a couple for a period of three years under a legal separation have not become reconciled in order to live together. That is the fact, notwithstanding Madam Speaker, I respectfully suggest who originated the original legal separation.

Honourable Robert G. Smellie, Q.C., (*Minister of Municipal Affairs*), (*Birtle-Russell*): Madam Speaker, the question of divorce is one that has perplexed all of us from time to time. Those of us who when we were married accepted a vow and who heard the person performing the marriage ceremony in most cases say, "now what God has joined together let no man put asunder," and accepted these words in all seriousness. This is a question that has really bothered many of us, and yet I am sure that those of us who have had the opportunity to carry on the practice of law in this province have been made very clearly aware that this is one of the most serious problems that besets people in our society from time to time.

I am sure that the Honourable Member for Selkirk has had people who have come in to his office and who have in fact had their marriage ruined; who have in fact been living separate and apart from one another, but who have in fact under our present laws no cause for divorce. I must disagree with him when he

suggests that by accepting the amendment proposed by the Honourable Member for St. James that we are in fact letting a police magistrate make an order of divorce. Because when the matter comes before the police magistrate this is the beginning of a procedure which may or may not come to a conclusion, and I am sure that the Honourable Member for Selkirk knows as well as I do and any other members who have had experience in this thing that in many cases where an application is made to a police magistrate or to a county court judge under The Wives and Childrens Maintenance Act, that a reconciliation is effected. But I know of no case where an order has been granted and where the parties have remained separate and apart leading their own separate lives for a period of three years or more, where a reconciliation has subsequently been effected. There may be some. There may be some. But I know of none in my experience. So Madam Speaker, if after that period of three years has elapsed as suggested by this amendment are we still going to insist that these unhappy people have either got to go out and purposely commit adultery in order to provide grounds for divorce, or, as happens infrequently I trust, but occasionally, where perjured evidence is given to our courts in order to obtain divorce on the only grounds that is now available to them.

I suggest Madam, that in my view this is not right. That in such a case where there has been a legal separation that has continued for a period of three years, there is no marriage left. There is a legal bond that unites those two people but there is in effect, no marriage. And that while we are considering or while we are asking the Federal House to consider broadening the grounds upon which divorce can be granted, I think that this is one of the things that should be included.

I cannot agree with the remarks of the Honourable the Minister of Industry and Commerce either, because although we have set out in these resolutions specific terms, although we have set out in these resolutions the things that members or some members of this House believe should be taken into consideration as grounds for the granting of divorce by our courts, we know in passing this resolution that this is not going to be the final decision, that this is only going to be a request made of the House of Commons, the Government of Canada, to consider the advisability of broadening the law and making possible what society in general has accepted, the idea of divorce, but not on the present restrictive grounds that pertain particularly in this province.

And so, Madam Speaker, I intend to vote for the sub-amendment as proposed by the Honourable Member for St. James.

Madam Speaker: The Honourable Member for Carillon.

Mr. Leonard A. Barkman, (*Carillon*): Madam Speaker, I have very little to add to this debate but it seems to be customary in this House that if someone tends to vote against the resolution, to declare himself. Madam Speaker, coming from the area that I do, I guess I do not really have to declare myself as to how I'm going to vote. I am happy though that I can vote as my conscience dictates me, and I'm very happy that I can vote as my conscience dictates me knowing that I will by a large percentage vote the way the people of Carillon would wish me to vote. Possibly some day as Carillon becomes more wicked and more central I will have to change my mind.

Madam Speaker: Are you ready—

Mr. W. G. Martin, (*St. Matthews*): Madam Speaker, dealing with the sub-amendment I am a little bit confused. I have been heartily in support of the amendment because I think the time has come for us to have some relaxation in our marriage laws. But in the amendment—or rather in the sub—rather in the amendment, “has deserted the petitioner without cause for a period of at least three years.” The sub-amendment says “three years after legal separation has

been brought to pass." Now I know out of my own experience that there are many cases where there has been unhappiness in the family circle and going on for some length of time, but before three years have transpired there has been reconciliation. Suppose, hoping all the time that there might be this reconciliation, it doesn't take place, then they proceed along the lines of legal separation which will take three years and so you are going to have those added years of misery, unhappiness and in many cases sort of "hell on earth". So I'm opposed to the sub-amendment but I'm heartily in support of the amendment.

Madam Speaker presented the motion and after a voice vote declared the motion carried.

Mr. Hillhouse: The yeas and nays, Madam.

Madam Speaker: Call in the members. The question before the House the proposed sub-amendment of the Honourable the Member for St. James: (7). Has been legally separated for at least three years.

A standing vote was taken, the result being as follows:

YEAS: Messrs. Alexander, Baizley, Beard, Bilton, Bjornson, Carroll, Cherniack, Cowan, Gray, Harris, McDonald, McGregor, McKellar, Mills, Moeller, Paulley, Peters, Schreyer, Seaborn, Smellie, Stanes, Steinkopf, Strickland, Watt, Witney, Wright and Mrs. Morrison.

NAYS: Messrs. Barkman, Campbell, Desjardins, Evans, Froese, Groves, Guttormson, Harrison, Hillhouse, Hryhorczuk, Jeannotte, Johnson, Johnston, Klym, Lissaman, Lyon, McLean, Martin, Molgat, Patrick, Shewman, Shoemaker, Smerchanski, Tanchak, Vielfaure and Weir.

Mr. Clerk: Yeas, 27; Nays, 26.

Madam Speaker: I declare the motion carried. The proposed amendment as amended by the Honourable the Member for Selkirk.

Mr. Paulley: Madam Speaker, I move, seconded by the Honourable Member for Inkster the debate be adjourned.

Madam Speaker presented the motion and after a voice vote declared the motion carried.

Vol. XI No. 31 2:30 p.m. Friday, March 19th, 1965
4th Session, 27th Legislature, at Page 758

Madam Speaker: Agreed. The adjourned debate on the proposed resolution of the Honourable the Member for Inkster and the proposed amendment as amended by the Honourable Member for Selkirk. The Honourable the Leader of the New Democratic Party.

Mr. Paulley: Madam Speaker, this has been a very interesting debate on the question of divorce and it seems to me that there is considerable opinion that the laws of Canada should be changed respecting the grounds for divorce. I may say Madam Speaker that while I may not agree with all of the grounds that are contained in the amendment to the resolution or indeed so far as the resolution itself is concerned, I am convinced however that the time has come for the Dominion authority who basically controls divorce, to take another look at the situation.

I do however, Madam Speaker, wish to make a comment or two on some of the matters that have been discussed during this debate. I am particularly concerned and intrigued with some of the comments made by some of the members in this debate when they refer to the younger people of today. Some of them have suggested Madam Speaker, that our youth of today are more irresponsible than they were in our time or in our mother's time or in our grandfather's time. Madam Speaker, I want to reject this entirely. I think that the youth

of today are if anything far more responsible, notwithstanding police spokesmen's orations, notwithstanding some criticisms of social workers and the likes regarding the youth of today, I think by and large we should be proud of our young men and our young women today.

We discussed here a few moments ago questions dealing with the possible use of marihuana in the university receiving great and vast headlines and comments in our daily paper, and it is suggested that there was about six or seven of a student population of approaching 2,000 or in excess of it—6,000—6,000, that may be partakers of this. And what is the net result Madam Speaker? Another blot, another blot on the youth of today. And I can't reject this more vigorously Madam Speaker. I think I know what the trouble is with the youth of today. I think they're too open. I think they realize facts and face up to facts and the facts of life as well, far more than we did. I think they are subjected to more close scrutiny than was the case when we were younger. They can't lead the secluded lives that many of us and our ancestors were privileged to lead. So I say I think our youth of today are far more honest than we were; far more open and far more forthright. They'll call a spade a spade. They will have their associations and their groups to consider such things as sex and related subjects. But they'll do it Madam Speaker in the open today, whereas we went behind a high board fence and in a smutty atmosphere to consider the same thing because of the fears that we had. They'll smoke their cigarettes and their pipes and their cigars in the open today, whereas in our day we'd go and peel some bark off the cedar posts that were along the railroad track. This is what we did, and I frankly confess it. But what are we today doing, or many of us, and all too many of us? We're saying that because of the honesty of our young people they're immoral, they're immature. And I say Madam Speaker, that this is not so. We have more young people today going to our universities and our higher schools of learning; we have more young people taking an active part in affairs of state and politics today than we had. And I don't think Madam Speaker that I could use a better example than my colleague for Brokenhead who came into this Assembly at the age of 22.

So I say Madam Speaker, that when we're dealing with the question of divorce let's divorce any consideration or suggestion of immaturity or immorality in regard to this question of the youth of today. I'm satisfied Madam Speaker, that in a considerable number of instances in the field of divorce it's not those who have been married two or three years who are applying for divorce and obtaining the same, but in many cases it is people who have been married for fifteen or twenty years. And I say, let us not stand up in this House and say to those who are following us today, you're immoral, you're immature, you don't know where you're going. Let us reject this and give the youth of today credit for the job that they are doing. And when I say this I realize, I realize as every member of this Assembly will, that there are youngsters who will make mistakes and go down the wrong path. But Madam Speaker, I suggest that their likelihood of being caught is far greater today because we're living in a system of society where we're all exposed at all times in our most innermost lives and our social associations. So I say Madam when we're dealing with this question let's not, let's not deride the youth of today, for if need be these youths that some of us criticize today were called on to protect us in another great conflict they would bear the brunt in order if necessary to preserve the democracy as we know it today. So let's give them credit for what they are and the good job that they are doing and not use this Assembly or any other to deride them and speak ill of them. So I say—

Mr. Fred Groves (*St. Vital*): I'm sorry to interrupt the honourable member but I was wondering if he would tell us who which member castigated the youth of today the way he describes it.

Mr. Paulley: I am saying to my honourable friend if he would take the trouble as I did to read some of the comments that have gone on in this House during this debate he would find the source, the same source as I; and if he's not keeping up to his homework then let him get cracking and do a little reading or a little listening while the debates are taking place. If my honourable friend had been in the Assembly at the same time and all of the time like I have in this debate, he would know. I'm not naming any member but I'm saying that this has been said in this debate.

Now Madam Speaker, others have said and touched on the necessity for premarital education. I heartily endorse this. This is something that should be done, something that is necessary. Many of us have attempted this in our own homes with our offspring and I'm sure the majority may have done this. Many of us before we were married attended seminars within our respective churches or with our ministers on the problems of marriage. But I say Madam Speaker, that more emphasis is necessary in this field. Others during this debate Madam Speaker, have taken a stand because of the fact of their particular religious affiliation and I respect them for it. I want to say Madam Speaker, I too am a Catholic, although not a member of the Roman Catholic fraternity I am a Catholic, I am an Anglican and I am proud of it.

But I want to place on the record Madam Speaker the position of my church, which church I have the honour of being a warden for my rector in Transcona for fifteen years. I want to place on record the official position of our synod here in the Diocese of Rupertsland on this question, and state what the Archbishop of Rupertsland, who incidentally is the Primate of all Canada, had to say to the recent synod meeting held in Winnipeg in June of last year. And I think Madam Speaker, that if members listen to me they will gather from my remarks of a changing attitude within the church itself, because it wasn't too long ago that the Anglican church had the same approach and the same outlook as the other churches who call themselves Catholic had. But there is a change within the Anglican fraternity of the approach—not insofar as the adherents themselves are concerned but the approach and the recognition of the situation as it affects all of us in this province in this Dominion.

I quote now Madam Speaker from page 11 of the Archbishop of Rupertsland's charge to the diocesan synod in June of 1964 here in the City of Winnipeg. And I quote from His Grace's text: "Now we turn to another question, marriage and divorce. In a secular society we have no hope of imposing Christian teaching about divorce on the whole Canadian community, and indeed it is doubtful if we should ever try to impose it. To convince the Canadian people that our Lord's teaching is the only right teaching is one thing; to impose it is another. I believe that the divorce laws of Canada will have to be changed because they no longer reflect the Canadian conscience. But I also believe that as Christians we should do all in our power to protect the family stability and to protect the children who are the chief victims in a divorce. Divorce should never be easy. In the Christian community we shall order our practice so that those who believe in Jesus Christ may really follow Him. For one thing we must surely ask that those who are married in church should mean the solemn promises that they make. They should really intend a lifelong union. I do not believe," His Grace continues to say, "that people should get married in church only because it is a more attractive social event than a civil marriage. There is good hope that at our next general synod our Canon Law will be amended, so that we can support more surely those who seek Christian marriage and also deal in pastoral concern and consistent principles with those who, despite their Christian hopes, come to a time when divorce and remarriage seems to them the only solution. A truly Christian rule about divorce will always be stern. What Christian morality is not. But a truly Christian discipline for church members will be one in which mercy and truth are met together."

I think Madam Speaker that this is the approach in this very important matter that we in this Assembly should take. We may not agree entirely with the grounds that are suggested for the changing of the basis under which divorce may be made possible in Canada, but let us realize that notwithstanding what we may think of the other, whether we as individuals attempt to live a true Christian life or not, there are those who may need the changes that are suggested in this in order that they may unshackle themselves from situations which are at the present time preventing them from leading a full life which might as His Grace suggests lead to a full Christian life.

Mr. R. O. Lissaman (*Brandon*): Madam Speaker...the Honourable the Leader of the NDP has made rather a blanket allegation that speakers in this debate downgraded the youth of this country. I fail to catch any of this reflection in any of the debate so far, and I would ask him to identify who he thinks has downgraded the youth.

Mr. Paulley: Madam Speaker, I refuse to do that. I'm not privileged to do it, but I will point out to my honourable friend if he would meet me, the passage that I was referring to. And I did not state that all members of this House took that attitude. I said "some".

Mr. Hillhouse: That is the point, Madam Speaker. He has said "some". Now, I spoke on this debate. I would like to know from the honourable member whether I'm classified among those "some".

Mr. Paulley: I assure my honourable friend for Selkirk he was not.

Mr. Hillhouse: Okay that's all I wanted...

Mr. Paulley: And the Member for Brandon was not.

Mr. Vielfaure: Madam Speaker, I'd like to ask the same question.

Mr. Paulley: It was—if the member asked it, I ask him, the member who has just asked the question, to read his speech when he speaks of the lack of morality among our young people today. And if I have taken him out of concept then I apologize to him, but my impression was it was the Honourable Member from La Verendrye who spoke of a lack of morality among some of our youth today.

Mr. Albert Vielfaure (*La Verendrye*): I must confess that I don't speak as often as my honourable friend and I haven't read my speech that much, but I certainly had no allegations of that kind. I spoke of immorality of the advertising, the billboards that we saw around, but certainly not the youth.

Mr. Paulley: Madam Speaker, then in order to clear the record, I accept the contention and the position taken by my honourable friend. I apologize that if I misunderstood his remarks, I mean him no ill will, and if unfortunately I've attributed this to any member of the House I sincerely apologize and I hope my apologies will be accepted. But I think that I can say in saying this, that this has been said on numerous occasions, so may I change my text. That many people have this approach and if I've offended anybody in this House, Madam Speaker, I ask your apology and the apologies of the member. I mean no ill will when I say what I said here this afternoon.

Madam Speaker: The Honourable Member for Wellington.

Mr. Richard Seaborn (*Wellington*): Madam Speaker, I'll be very brief, for the other day I supported the sub-amendment submitted by the Honourable Member for St. James, and in doing so I think that I voted rather unwisely. I must confess that this is one subject that places me on the horns of a dilemma for I have seen the consequences of marriage failures manifested in many many ways, and if I think of this matter from a purely human standpoint, then I am inclined to agree that some leniency or relaxation of our divorce law should be considered. However, I do feel that these tragic failures are not a cause in

themselves but are the result in part of a general moral and spiritual decline in our national life. And reference to the one book that reveals the Christian precepts that we should follow has persuaded me that marriage is indeed a very solemn thing and should not be dismissed lightly. I do feel therefore that a relaxation as considered in this resolution and in the main amendment would be wrong and consequently I'll be voting against them.

Madam Speaker: Put the question.

Mr. Gray: Madam Speaker, I'm sorry, I waited for somebody else that wishes to speak.

Mr. John P. Tanchak (*Emerson*): Are you—is the honourable gentleman—

Madam Speaker: The Honourable Member for Inkster.

Mr. Gray: I'm not closing the debate.

Mr. Tanchak: Oh, I'm sorry. I thought the honourable member was closing the debate.

Mr. Gray: No, I'm not. Do you want to go ahead?

Mr. Tanchak: No, I'll wait. I'll wait. I was going to adjourn it.

Madam Speaker: The Honourable Member for Inkster.

Mr. Tanchak: Madam Speaker, I thought that the honourable member was closing the debate. I was going to adjourn it.

Madam Speaker: Put the question.

Mr. Tanchak: Madam Speaker, I move seconded by the Honourable Member from Carillon that the debate be adjourned.

Madam Speaker presented the motion and after a voice vote declared the motion carried.

Vol XI No. 40 2:30 p.m. Friday, March 26, 1965
4th Session, 27th Legislature, at Page 998

Madam Speaker: The proposed resolution standing in the name of the Honourable the Member for Inkster and the proposed amendment in amendment thereto by the Honourable the Member for Selkirk. The Honourable the Member for Emerson.

Mr. Tanchak: Madam Speaker, in his absence I adjourned the debate on behalf of the Honourable Member for Portage la Prairie.

Madam Speaker: The Honourable the Member for Portage la Prairie.

Mr. Gordon E. Johnston (*Portage la Prairie*): Madam Speaker, I am generally in agreement with the resolution. However, on reading it over more carefully I felt further amendment was in order, in order to more sharply define and clarify certain sections of the amendment. So, I beg to move, seconded by the Honourable Member for Assiniboia, that the resolution as amended be further amended by: 1. Placing the letter (a) before the words "That dissolution of marriage may be claimed by either husband or wife on the grounds that the respondent:" 2. By changing the numbering of the present paragraphs (1) to (4), both inclusive, and substituting therefor the letters (i) (ii) (iii) and (iv): 3. By deleting the present paragraph (5) and substituting therefor but numbering same (v) the following: "(v) has where the wife is the petitioner been guilty since the celebration of the marriage, of rape, sodomy or bestiality or:" 4. By deleting the present paragraph (7) and substituting therefor but renumbering same as (vi) namely: "(vi) has been legally separated from the petitioner for at least three years by virtue of a judgment of a court of superior jurisdiction on grounds on which an order of separation can be made under The Matrimonial Causes Act, 1857 (Imperial) and amendments thereto," and 5. By deleting the

present paragraph (6), renumbering same as (b) and substituting therefor the following: "(b) That any married person who alleges that reasonable grounds exist for supposing that his or her spouse is dead, may present a petition to the court to have it presumed that the said spouse is dead and to have the marriage dissolved, and that by such proceedings the fact that for a period of seven years or upwards the other party to the marriage has been continuously absent from the petitioner and the petitioner has no reason to believe that the other party has been living within that time, shall be admissible in evidence as prima facie proof that the other party is dead."

Madam Speaker presented the motion.

Mr. T. P. Hillhouse, Q.C. (*Selkirk*): Madam Speaker, I would like to address myself to this amendment and to further explain to the House that one of the main reasons for bringing it in is, firstly, to correct what was considered an error in grammar and an error in syntax. If the honourable members will take a look at the resolution as amended on the Orders for the Day, they will find that it reads, "that dissolution of marriage may be claimed by either husband or wife on the grounds that the respondent:" Then it goes on to list (1) (2) (3) and (4). Now number (5) is completely dissociated from the others because it's only on the petition of the wife. Number (6) is one which is available to both husband and wife and invokes the seven-year rule. Now if you read on, you have No. (7) which is completely dissociated from the first portion of the resolution, and in its present location it doesn't make sense, so for that reason it was felt that dissolution of the marriage may be claimed—that would be sub-paragraph (a). Then (1) (2) (3) and (4) would be (i) (ii) (iii) and (iv). Then we move number 7 up and make it sub-paragraph (b), but in order to get away from collusion and connivance which would result if this sub-paragraph (7) were left in its present form, we have inserted therein a separation granted by a superior court on grounds available to a petitioner under The Matrimonial Causes Act. Now the reason why we have done that is because we have felt that the members of this House did not want to make available grounds for divorce in this province which are grounds for divorce in some of the states in the Union, particularly Nevada, and by putting this in and qualifying the separation as being a separation granted by a superior court under The Matrimonial Causes Act, we are making it necessary, in order to get that separation, for the respondent to have been guilty of offences under The Matrimonial Causes Act which would give rise to a legal separation.

Now going back to the original amendment as it was made, simply a legal separation, I pointed out to the Court that this in effect would give to a police magistrate under The Wives and Children's Maintenance Act jurisdiction in divorce.

A Member: You pointed out to the House.

Mr. Hillhouse: Yes, to the House—I'm sorry. It's all the legal minds in here—they get me confused. I pointed out to the House that if we left it in its present form it in effect would be giving divorce jurisdiction to a police magistrate. Now one of the cardinal principles of matrimonial offences is that there must be no connivance or no collusion, and when an Information is laid before a police magistrate for a breach of The Wives and Children's Maintenance Act by a lawyer there need be no evidence as to whether or not there was collusion or connivance there at all. As a matter of fact, the wife could lay a charge against her husband of assault; the husband could appear in court and he could plead guilty to that charge—no evidence taken at all. A week later, the wife could go back to the same court and by virtue of the assault ask the magistrate to grant her an Order of Separation under the provisions of The Wives and Children's Maintenance Act. The husband could appear and he could agree to the order being granted. Now, if we leave this in, this resolution in its present form, we

creating that situation, and I suggest that we're making a mockery out of our matrimonial laws. And I feel, Madam, that this amendment as moved by the Honourable Member for Portage la Prairie should be accepted by this House, because I think it puts this resolution back into the place where it rightfully belongs as a serious resolution, and does not grant divorces for petty reasons.

Now, I know my learned friend—I know that the Honourable Leader of the NDP raised the point that it was the separation for three years. But I take the different view. I take the view that the separation in respect of the judicial separation must be for some legal ground, and I take the view too that the best legal grounds are those grounds set out in The Matrimonial Causes Act, because if we allow separations to be recognized as grounds for divorce, which were granted by a police magistrate, I think we're making a mockery out of the whole situation. And I therefore, Madam, Commend it most highly to this House to pass this resolution as amended by the Honourable Member for Portage.

Mr. D. M. Stanes (*St. James*): Madam, I rise on a point of order. I didn't want to interrupt the Honourable Member from Selkirk, but I wonder whether it is in order for this House to amend a motion which has been passed, and then re-introduce it having been amended?

Mr. Hillhouse: ...Madam Speaker...spoken on it.

Mr. Gray: Madam Speaker, at the outset I wish to thank the honourable members of this House for the friendly discussion on this subject. I'm going to support the amendment to the amendment. I'm supporting the amendment and I'm supporting the original motion, because it is an improvement. In the last—what they say 170 years—it's definite improvement. And if you can't get a whole loaf of bread now, we'll be satisfied with a half a loaf. The very fact, however, that the honourable members here have shown such a friendly attitude and sympathy to those who suffer of the lack of law as to getting a divorce, in my opinion it's a very encouragement, and it will be well received by the people and particularly by those who are badly in need of some improvement of the divorce laws.

I have received many letters, very pathetic, tragic letters, but I have thrown them out because none of them wanted to have their names known, and I realize that a letter read must be tabled, and I had to respect their wishes. But I have taken the liberty of a case, just one case out of the many, which perhaps will indicate—it's not a letter—which perhaps will indicate one of the tragic situations. It will only take me a minute or two to present it to you, and I shall not occupy the time of the Legislature because I think that the situation is well known and well understood by everybody. But just a typical case.

This lady told me that she married a Canadian airman in England during the last war. She was 20 years of age, with a daughter who was then three months old. She and the child came to Canada in 1945 and were reunited with her husband. Her husband took her to his sister's house and there they stayed for three years. During all this time her husband never worked, and she was the bread-winner for the family, being a registered nurse. She worked very hard and her husband never provided for the family at any time. Their son was born in 1947 and she worked all during her pregnancy. Her husband got gratuity money, but drank every cent of it. He would take off for days at a time on a drinking spree along with his kind of women. After this gratuity money ran out, and if she didn't give him money for his drinks, he beat the children until she was forced to give the money. Finally, the break came for her out of this nightmare life when an uncle of hers and his wife came to visit her. They realized the predicament she was in and so offered to take her and the children to their home in Western Canada. She got a legal separation from her husband and he was to maintain the children. That was 17 years ago, and she has never received one penny from him. She always worked hard to maintain her children

and while she worked and—for them, she finally saved what she thought was a lot of money, to pay a lawyer \$750.00 which he in turn paid to a detective in Ontario to track her husband down. But it was to no avail; they could not locate him. For the past four years she has been living common law. She met this man seven years ago, and after going steady for a few years they had no alternative but to live together as man and wife. They were happy, but they both knew that their so-called marriage was not the ideal marriage that they would both like. They have their own home, free of debt. She says he is a wonderful husband to her and an excellent father to the children. At present they are expecting a baby in July. She can't help but feel sorry that this baby, as it was now, it will be illegitimate.

And similar letters I've received which I said I am not going to read. I think that the attitude taken by the Legislature is a marvellous one, a wonderful one, and a human one. And something should be done. One of the amendments or the original motion I respectfully urge should be carried and save thousands of tragedies similar to those that I have just presented to you now. So again, I pray that any of the amendments—I'm going to vote for the amendments and the amendments and the motion—should be carried in this House.

Madam Speaker: Are you ready for the question?

Mrs. Carolynne Morrison (*Pembina*): I wish to move, seconded by the Honourable Member for Winnipeg Centre, that the debate be adjourned.

Madam Speaker presented the motion and after a voice vote declared the motion carried.

Vol. XI 2:30 p.m. Friday, April 9th, 1965,
4th Session 27th Legislature at Page 1414.

Madam Speaker: The adjourned debate on the proposed resolution of the Honourable the Member for Inkster, and the proposed amendment in amendment thereto by the Honourable Member for Selkirk and the proposed sub-amendment of the Honourable the Member for Portage la Prairie. The Honourable the Member for Pembina.

Mrs. Morrison: At the outset of my remarks, Madam Speaker, I want to make it clear to the members of this House that the views I will be expressing on the subject of divorce are my own personal views; and I want also to assure the members that the statements I make are the result of much thought and consideration, much soul-searching on my part, because we are dealing with a very serious topic.

I consider this subject of divorce to be the most serious problem we have debated in this Legislature because we are dealing with family life which is the foundation of our nation. I realize there are many people who cannot conscientiously accept what divorce stands for. They believe there should be no such privilege of divorce. I sympathize with them in their views because I too find there are occasions when I cannot conscientiously agree with some of the views which are considered by many people to be quite acceptable in our present day society. Each of us has to live with our own conscience and so I believe we each have to govern ourselves accordingly.

And so Madam Speaker, there are those who feel that marriage vows should never be cast aside, that what God has joined together should never be torn asunder. What a wonderful world it would be if this were possible, if such perfection could be realized. But since the world is made up of human beings we do not get perfection. I want to say again, Madam Speaker, the statements I make on this subject are the result of I might say, years of observation and serious thought. I am sure we all know cases of marriage where one member in

the partnership turned out to be, and I can think of no better description than to say, they turned out to be a "rotter" and for this type of marriage to try to hang together was a tragedy, especially when children were victims in such situations. Eventually the marriage broke up, a divorce was obtained and the innocent partner of the tragedy sooner or later married again and found complete happiness for themselves and their children; was able to take their rightful place in society and live the kind of life which I believe our Creator intended them to live. This is the type of situation, Madam Speaker, that makes me feel that there very definitely is a place for divorce in our society.

And now we come to the question of what is wrong with our present divorce laws. The answer to the question I believe is this: Our divorce laws are too rigid. In trying to keep people married we are promoting perjury. We are promoting sham adultery. We are promoting common-law relationships. We are promoting an immoral society. And I would ask us is this something we should be proud of? I don't think so.

And now Madam Speaker, I would like to consider another view in our society. We all know persons of very fine character who, because of mistaken choice, find they are completely incompatible and that life together is completely intolerable. These people have had to go through the most degrading experiences in order that they eventually can start a new life for themselves. Should we as lawmakers not show some concern for these people? Especially the children, innocent children, who should be growing up in a normal, healthy, happy family life but who through no fault of their own are being deprived of what is their God-given right. Only within the past month, Madam Speaker, I have talked with school teachers who have in their classes children with very high intelligence ratings but because they are growing up in what we call "broken homes", because they are deprived of the loving guidance of two interested parents, they are so pitifully frustrated that they are well on the way to becoming delinquents. Is this the life we want for these children? Or should we make some attempt to improve this situation? Surely if our present day divorce laws are in any way responsible for this type of misery, the time is long overdue when these laws should be revised. Again I must emphasize, Madam Speaker, that this is a serious situation. I want to make it very clear that I never wish to see our divorce laws in Canada as frivolous and ridiculous as those in the land to the south of us but I do feel there is need for a more realistic attitude.

My purpose in adjourning this debate was to take time to study the amendment proposed by the Honourable Member for Portage la Prairie. I find this amendment acceptable, Madam Speaker, and I will be giving it my support.

Mr. Gray: Madam Speaker, I think I have still an opportunity to speak under the amendment to the amendment. Every time the Clerk checks me off the. . .

Madam Speaker: The Clerk informs me that the Honourable Member from Inkster spoke on the 26th of March to the subamendment; so he has no right to speak.

Mr. Gray: So have no right to speak. Well it's too bad. You missed a lot.

Madam Speaker put the question and after a voice vote declare the motion carried.

Mr. Gray: . . .carried. I'm not calling for the yeas and nays. It's carried that settles it.

Madam Speaker: The proposed motion as amended in amendment. The proposed motion as amended in amendment. . .

Madam Speaker put the question and after a voice vote declared the motion carried.

Madam Speaker: The proposed motion of the Honourable the Member for Inkster as amended.

Madam Speaker put the question and after a voice vote declared the motion carried.

Mr. J. M. Froese (*Rhineland*): Yeas and Nays, Madam Speaker.

Madam Speaker: Call in the members on the main motion.

Hon. Gurney Evans (*Minister of Industry and Commerce*) (*Fort Rouge*): Members say so, how many members ask?

Madam Speaker: Call in the members. The question before the House. The proposed resolution of the Honourable the Member for Inkster, as amended.

A standing vote was taken, the result being as follows:

YEAS: Messrs. Alexander, Baizley, Beard, Bilton, Bjornson, Campbell, Cherniack, Cowan, Desjardins, Gray, Guttormson, Hamilton, Harris, Harrison, Hillhouse, Johnson, Johnston, Klym, Lissaman, Lyon, McDonald, McGregor, McKellar, Martin, Mills, Moeller, Patrick, Paulley, Peters, Roblin, Schreyer, Shewman, Schoemaker, Smellie, Stanes, Steinkopf, Strickland, Tanchak, Watt, Weir, Witney, Wright and Mrs. Morrison.

NAYS: Messrs. Barkman, Evans, Froese, Jeannotte, McLean, Molgat, Seaborn, Smerchanski and Vielfaure.

Mr. Clerk: Yeas, 43; Nays, 9.

Madam Speaker: I declare the motion carried.

Vol XI 2:30 p.m. Tuesday, March 9, 1965
4th Session, 27th Legislature, at Page 408.

Madam Speaker: Agreed? The adjourned debate on the proposed motion of the Honourable the Member for Inkster and the proposed amendment thereto by the Honourable the Member for Selkirk. The Honourable the Member for Brandon.

Mr. R. O. Lissaman (*Brandon*): Madam Speaker, if anyone wishes to speak in the meantime I have no objection, but I wonder if the House would allow me to have this matter stand.

Madam Speaker: Agreed?

Mr. Laurent Desjardins (*St. Boniface*): Madam Speaker, I'd like to say a few words on this resolution.

Madam Speaker: The Honourable Member for St. Boniface.

Mr. Desjardins: Madam Speaker, I think that all the members of this house are aware that I am a member of the Roman Catholic Church. I think also that all, or most of the members anyway, also know that the church that I belong to, the Roman Catholic Church, do not recognize divorce; that is, does not recognize divorce for the people of their faith. Now, after having said this, I certainly do not wish to give you the information that I will oppose this resolution. I would like to make it clear that I'm speaking for myself only, that I might be criticized but this is my feelings on this, and I would like to go on record as being in favour of the amendment. As I say, I can only let my conscience guide me on this question, and I feel—I cannot see how I can, in this House, fight and suggest that we should have freedom for certain groups, for certain people, and also advocate that the government should not bring any restrictive legislation unless it is absolutely necessary, I can't see how I could see my way clear to oppose this.

I think that I should be honest and fair, and this, first of all, will not affect those who do not believe in divorce because of religious convictions. It is not going to affect them at all, and I consider that I am one of the lawmakers of this

province, and that, while we are studying laws, I think that we should have all the people of Manitoba in mind.

Right now, the way this is, I think that we are only encouraging adultery and more perjury. I feel that at times, in my mind anyway, they're certainly not suggesting that adultery should be permitted, but I think that there might be other points that might even be in certain occasions more important than that. It might be that a person commits adultery once—might be that a couple is very happy and they could be happy—they could forget this mistake—and then you can go ahead and have the divorce. In another case where the man will beat up his wife, she cannot have a divorce. I think that this should be permitted for those that do recognize, do accept divorce. I think that will help in certain financial arrangements when some people will leave either husband or wife.

There is one—as I say I'll vote for this resolution; I want to go in favour of this principle—in the amendment there is something that I would hope that my colleague would make sure—I'm not quite sure of Number (4), where we're speaking of incurable disease, mental disease. It seems to me that we're finding something new in this field every day and I'd want to make sure that somebody comes back, that this is a sickness after all and I think that we're committed to—I think that everybody when they get married feels that they have to stick by their partner in sickness. I can understand if there's positively proof that this person will never recover fully—but I think we should be very careful on this.

I would prefer the amendment instead of the resolution. I could not support the resolution, especially because of Number (6) where legal separation for more than two years—I can't see that at all; somebody could again make a mistake. None of us are perfect and I don't think that because you make a mistake and you have to serve two years this should be grounds for divorce.

So again, Madam Speaker, I would say that I'm definitely speaking only for myself, I'm not speaking—representing or even speaking for any religious group or any other group, and I feel that here in Manitoba anyway—if I was to try to prepare legislation for people of my own church, of course, I wouldn't take the same attitude—but for the people of Manitoba here I will go along with this amendment.

Madam Speaker: Agreed to have it stand?

APPENDIX C

Excerpts from the Queen's Bench Act, R.S.M. 1954 c. 52.

JURISDICTION

Jurisdiction of Court

49. The court is and shall continue to be a court of record of original jurisdiction, and shall possess and exercise all such powers and authorities as by the laws of England are incident to a superior court of record of civil and criminal jurisdiction in all matters civil and criminal whatsoever, and shall have, use, enjoy, and exercise, all the rights, incidents, and privileges, of said courts as fully to all intents and purposes as the same were, on the fifteenth of July in the year 1870, possessed, used, exercised, and enjoyed, by any of Her late Majesty's superior courts of common law at Westminster, or by the Court of Chancery at Lincoln's Inn, or by the Court of Probate, or by any other court in England having cognizance of property and civil rights, and of crimes and offences. R.S.M., c. 44, s. 49.

Of What Court May Hold Plea.

50. The court shall hold plea in all and all manner of actions, suits, and proceedings, cause and causes of action, matters, suits, and proceedings, whether

at law, in equity or probate, or howsoever otherwise, as well criminal as civil, real, personal, and mixed or otherwise howsoever; and may and shall proceed in all such actions, suits, proceedings, and causes by such process and course of proceedings as are provided by law, and as shall tend with justice and dispatch to determine the same, and the said court may and shall hear, decide, and determine, all issues of law or of fact when the issue of fact is submitted to it by law, and the court may and shall, with or without a jury, as provided by law, decide and determine all matters of controversy relative to property and civil rights both legal and equitable, according to the laws existing or established and being in England, as such were, existed, and stood, on the fifteenth day of July in the year 1870, so far as the same can be made applicable to matters relating to property and civil rights in this province; and all matters relative to testimony and legal proof in the investigations of fact and the forms thereof, and the practice and procedure in the court, may and shall be regulated and governed by the rules of evidence, and the modes of practice and procedure as they were, existed, and stood, in England on the day and year aforesaid, except as the said laws and the said rules of evidence and the said practice and procedure and the forms thereof may have been already changed or altered or shall hereafter be changed or altered by any Act or Acts of this Legislature or of the Parliament of Canada, or by any Act or Acts of the Parliament of the United Kingdom affecting the province, already passed or that shall hereafter be passed within their respective powers, or by any rule or rules, order or orders, of the court lawfully made or that shall hereafter be made, or by this Act;

Proviso as to Rights Acquired Under Laws of Assiniboia

Provided, always, that nothing herein contained shall affect any civil rights lawfully acquired or existing under the laws of Assiniboia on the day and in the year aforesaid. R.S.M., c. 44, s. 50.

Note: As to laws in force in province subject to jurisdiction of Parliament of Canada—See s. 4, c. 124, R.S.C. 1927.

Alimony

51. The court shall have jurisdiction to grant alimony to any wife who would be entitled to alimony by the law of England, or to any wife who would be entitled by the law of England to a divorce, and to alimony as incident thereto, or to any wife whose husband lives separate from her without any sufficient cause and under circumstances which would entitle her by the law of England to a decree for the restitution of conjugal rights; and alimony, when granted, shall continue until the further order of the court. R.S.M., c. 44, s. 51.

Note: As to registration of alimony judgments, see The Judgments Act.

Criminal Conversation

52. The court shall have jurisdiction to entertain an action for criminal conversation. The law applicable to such actions shall be as the same was in England prior to the abolition of such action in England; and the practice shall be the same as in the other actions in the court, as far as it is applicable. R.S.M., c. 44, s. 52

ALIMONY AND MAINTENANCE

Enforcement of Orders, etc. for Alimony or Maintenance

90A. (1) A decree, order, or judgment for alimony or maintenance may be enforced in the same or the like manner as any other decree, order, or judgment of the court may be now enforced.

Appointment of Receivers

(2) The court may appoint a receiver of any moneys due, owing, or payable or to become due, owing or payable to, or earned or to be earned by, the person

against whom a decree, order, or judgment for alimony or maintenance has been made to the extent of the default and, in addition, to the extent of instalments due or to become due under the decree, order, or judgment.

Court's Discretionary Powers Not Diminished

(3) Nothing in this section shall interfere with the court's discretionary control over arrears of alimony or maintenance or the power of the court to alter, vary, and rescind a decree, order, or judgment for alimony or maintenance or to deprive the person in whose favour such decree, order, or judgment has been made of arrears in whole or in part or to determine the extent to which payment of arrears of alimony or maintenance shall be enforced. S.M. 1963 c. 16, s. 4.

APPENDIX D

R.S.M. 1954

C. 294

An Act respecting the Maintenance and Protection
of Wives and Children

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:

Short Title

1. This Act may be cited as: "The Wives' and Children's Maintenance Act." R.S.M., c. 235, s. 1.

INTERPRETATION

Definition of "Habitual Drunkard"

2. In this Act, "habitual drunkard" means a person who by reason of frequent drinking of intoxicated liquor is incapable at times of managing himself and his affairs, or is an unfit and improper person to have the custody and control of his infant children, R.S.M., c. 235, s. 2.

FATHER'S LIABILITY TO SUPPORT CHILDREN

Liability of Father to Maintain Children

3. (1) Notwithstanding any other Act or subsection (2), a man is legally liable to support, maintain, and educate, his children or the children of his wife, up to the age of sixteen years. Am.

Liability of Mother to Maintain Children

(2) A married woman or widow is subject to the same liability for the support, maintenance, and education, of her children as that to which a man is subject for the support, maintenance, and education, of his children. Am. R.S.M., c. 235, s 3; R. & S., S.M. 1945 (1st Sess.), c. 69, s. 1; am.

PROCEEDINGS TO ENFORCE LIABILITY

*Application to County Court Judge or Magistrate
in case of assault, desertion, etc.*

4. Where a married man

- (a) has been convicted of an assault upon his wife;
- (b) has deserted her without lawful excuse;

- (c) has been guilty of persistent cruelty to her;
- (d) is an habitual drunkard; or
- (e) has neglected or refused without reasonable excuse to provide reasonable maintenance and support for her or her children;

the wife or any person on her behalf may, from time to time, make an application to either a County Court judge or a police magistrate for an order. R.S.M., c. 235, s. 4.

*Application to County Court Judge or magistrate
in case of desertion of Child*

5. Where any person who has the control of, or who is the guardian or parent of, or is charged with or liable for the support and maintenance of any child under the age of sixteen years

- (a) has neglected or refused without reasonable excuse to provide reasonable maintenance and support for the child; or
- (b) has deserted the child;

any person on behalf of the child may, from time to time, make an application to either a County Court judge or a police magistrate for an order. R.S.M., c. 235, s. 5.

Application by Woman Who Has Lived With a Man for a Year

6. Where

- (a) a woman has lived and cohabited with a man for a period of one year or more; and
- (b) he is the father of any child born to her;

she, or any person on her behalf, may, within one year from her ceasing to live and cohabit with him, make an application under sections 4 and 5 in respect to herself and her child for an order under sections 13 and 17, and this Act, *mutatis mutandis*, applies in such a case. R.S.M., c. 235, s. 6; am.

Where Wife is Habitual Drunkard

7. Where the wife of a married man is an habitual drunkard, the married man may make an application either to a County Court judge or a police magistrate for an order under section 18, and this Act, *mutatis mutandis*, applies in such a case. R.S.M., c. 235, s. 7; am.

Form of Application

8. (1) Application to a County Court judge under this Act shall be made on affidavit setting forth the cause or causes of complaint, and the judge shall in writing appoint a time and place for the hearing of the matter, which may be before the judge making the appointment or some other judge having jurisdiction within the judicial district.

Service

(2) Service of a copy of the appointment may be made upon the person complained against either in the manner provided for the service of writs by The County Courts Act or by any person on behalf of the complainant.

Witnesses

(3) Witnesses may be subpoenaed in the same manner as in a County Court action. R.S.M., c. 235, s. 8.

Note: As to Powers of Judge—See sec. 31 The Interpretation Act.

Information

9. Applications made to a police magistrate shall be made by laying an information upon oath. R.S.M., c. 235, s. 9.

Note: Procedure—See The Summary Convictions Act.

Grounds in affidavit

10. An affidavit or information made or laid under this Act may contain one or more grounds of the complaint set forth in sections 4 and 5. R.S.M., c. 235, s. 10.

One Information for Two Complaints

11. Where a married woman is entitled to make an application under section 4 against her husband, and also under section 5 in respect of her or their child, the application may be made by her or some one on her behalf by making one affidavit or laying one information, and in such a case an order may be made under both sections 13 and 17. R.S.M., c. 235, s. 11; am.

Hearing

12. Proceedings under this Act shall be heard and determined by a County Court judge or police magistrate within the judicial district in which the cause of complaint wholly or partially arose. R.S.M., c. 235, s. 12

CONTENTS OF ORDERS

Scope of Order

13. The judge or police magistrate, if he finds the complaint made under section 4 proven, may make an order or orders containing any or all of the following provisions:

Cohabitation

(a) That the wife be no longer bound to cohabit with her husband.

Custody of children

(b) That the legal custody of any child of the marriage between the wife and the husband, while under the age of twenty-one years be committed to the wife.

Access to child

(b1) That the husband have access, at such times and subject to such conditions as the judge or magistrate thinks convenient and just, for the purpose of visiting the child. S.M. 1955 c. 83, s. 1.

Note: Adopted Child Included—See Part VIII of The Child Welfare Act.

Weekly or Monthly Payments

(c) That the husband pay to the wife personally, or for her use to any third person on her behalf, such weekly, bi-weekly, semi-monthly or monthly sum as the judge or magistrate may, having regard to the means of both the husband and wife, consider reasonable.

Costs

(d) That in addition to the ordinary costs reasonable solicitor's costs be paid.

Forbidding Interference

(e) That the husband shall not enter upon any premises where the wife is living apart from her husband. R.S.M., c. 235, s. 13.

Husband Prohibited Entry

14. (1) Where the order made contains a provision under clause (e) of section 13, the husband shall not thereafter enter upon the premises. Am.

Penalty

(2) A husband who violates this section is guilty of an offence and liable, on summary conviction, to a fine of not more than one hundred dollars. Am. S.M. 1945 (1st Sess.), c. 69, s. 2: am R.S.M., c. 235, s. 14: am.

No Order to be Made When Guilty of Adultery or Desertion

15. Where it is proved that the wife has

(a) committed adultery which the husband has not condoned or connived at, or by his wilful misconduct condoned to; or

(b) deserted her husband without lawful excuse;

no order shall be made under section 13 for the support and maintenance of the wife. R.S.M., c. 235, s. 15; am.

No Order When Separation Agreement in Certain Cases

16. (1) Where the husband and wife have separated by mutual agreement, and the wife has agreed in writing to release her husband from liability for her support and maintenance, no order shall be made under this Act for her support and maintenance.

Limit of Application of Section

(2) This section does not apply

(a) where in a separation agreement, the husband has agreed to contribute to the support and maintenance of his wife and is in default therein under the agreement;

(b) where, in a separation agreement, the husband has not provided suitably therein according to his circumstances for the support and maintenance;

(c) where the wife has become, or is likely to become a public charge or in need of public assistance. Am. R.S.M., c. 235, s. 16; am.

Court May Order

17. The judge or police magistrate if he finds the complaint made under section 5 proven, may make an order or orders containing any or all of the following provisions:

Weekly or Other Payments

(a) That the man pay to a person appointed by the judge or magistrate such weekly, bi-weekly, semi-monthly or monthly sum for the maintenance and support of the child as the judge or magistrate having regard to the means of the man considers reasonable.

Payment of Costs

(b) That in addition to the ordinary costs reasonable solicitor's costs be paid. R.S.M., c. 235, s. 17; am.

Scope of order:

18. The judge or police magistrate, if he finds the complaint made under section 7 proven, may make an order or orders containing any or all of the following provisions:

Cohabitation

(a) That the husband be no longer bound to cohabit with his wife.

Custody of Children

(b) That the legal custody of any child of the marriage between the husband and the wife, while under the age of twenty-one years, be committed to the husband.

Payments to Wife

(c) That the husband pay to the wife personally, or for her use to any third person on her behalf, such weekly, bi-weekly, semi-monthly or monthly sum as the judge or magistrate may, having regard to the means of both the husband and wife, consider reasonable.

Forbidding Interference

(d) That the wife shall not enter upon any premises where the husband is living apart from his wife. R.S.M. c. 235, s. 18.

Wife Prohibited Entry

19. (1) Where the order made contains a provision under clause (d) of section 18, the wife shall not thereafter enter upon the premises. Am.

Penalty

(2) A wife who violates this section is guilty of an offence and liable, on summary conviction, to a fine of not more than one hundred dollars. Am. R.S.M., c. 235, s. 19; am.

HEARINGS

Hearing in Private

Matrimonial Causes (Amended Procedure)

(H. L.) 25 Geo. 5, 2 (ii).

20. (1) Before a public hearing of any proceedings under this Act, the judge or police magistrate shall consider, having regard to the information, whether it will be well to hear the parties in private with a view to settlement by mutual consent of the matters in question; and if he thinks fit he may summon the parties to appear before him and shall hear them in private with the intent before mentioned, and may receive in their presence information from any person whom the judge or magistrate believes to have knowledge of the relationship of the parties. Am.

Order Where no Settlement Made.

(2) Where, upon the hearing no settlement is arrived at but the parties consent, the judge or magistrate may make an order authorized under this Act, or in case there is no settlement or consent he may adjourn the hearing of the complaint upon such terms as to the intervening period as are within his jurisdiction to order upon the determination of the complaint. Am. R.S.M., C. 235, s. 20; am.

Interim Payments to Wife.

(3) The judge or police magistrate may include in the terms of adjournment an order that the husband pay to the wife personally, or for her use to any third person on her behalf, such weekly, bi-weekly, semi-monthly, or monthly sum, as the judge or police magistrate may, having regard to the means of both the husband and wife, consider reasonable. S.M. 1955 c. 83, s. 5.

Hearing May be Private.

21. Notwithstanding anything contained in this or any other Act upon the hearing the judge or magistrate may direct that it be held in private, and in that case no person other than the parties and their professional representatives and witnesses shall be present. R.S.M., c. 235, s. 21.

EVIDENCE

Wife a Compellable Witness.

22. In proceedings under this Act the parties are competent and compellable witnesses against one another. R.S.M., c. 235, S. 22; am.

Onus of Proof.

23. In proceedings under this Act the onus of proof of lawful excuse or reasonable excuse is upon the person alleging it. R.S.M., c. 235, s. 23; am.

VARYING ORDER

Judge or Magistrate May Vary or Discharge Order on Fresh Evidence.

24. On the application of the wife or husband or other person and upon cause being shown upon fresh evidence to his satisfaction, any judge or magistrate sitting in the judicial district in which any order under this Act was made may at any time

(a) alter, vary, or discharge any order; and

(b) increase or diminish the amount of any weekly, bi-weekly, semi-monthly or monthly payment ordered to be made. R.S.M., c. 235, s. 24; am.

Discharge of Order on Cohabitation or Adultery.

25. Where a married woman against whose husband an order is made for the payment to her or on her behalf of a weekly, bi-weekly, semi-monthly or monthly sum for her maintenance and support,

(a) voluntarily resumes cohabitation with her husband; or

(b) commits adultery;

the husband may apply to a judge or police magistrate sitting in the judicial district in which the order was made, who, upon proof of such fact may discharge wholly or in part the order. R.S.M., c. 235, s. 25; am.

ENFORCEMENT OR ORDER

Bond or Deposit.

26. (1) Where an order is made by a judge or magistrate, he may require the person against whom it is made to enter into a bond in a sum not exceeding five hundred dollars, with or without sureties, who shall severally justify and be approved by the judge or magistrate, conditioned for the fulfilment of the order, or he may require the person to make a deposit not exceeding two hundred and fifty dollars to secure the fulfilment of the order.

Committal in Default.

(2) Where the person does not furnish the bond or make the deposit as required, the judge or magistrate may commit the person to the common gaol of the judicial district for such period as he directs, there to remain unless the bond is sooner given or cash deposit made. Am. R.S.M., c. 235, s. 26; am.

Comimttal in Default of Payment

27. (1) Where a person against whom an order is made refuses or neglects, from time to time, to fulfil it, any judge or police magistrate in the judicial district in which the order was made, upon an application in that behalf, may commit the person to the common gaol for a period not exceeding forty days unless the order is sooner obeyed. Am.

Proof of Service

(2) In proceedings under this section it is not necessary for the applicant to prove that the person against whom the order was made was served with a copy of the order or orders or a minute thereof. Am. R.S.M., c. 235, s. 27; am.

Orders in duplicate

28. (1) Every order made under this Act shall be made and signed by the judge or police magistrate in duplicate.

Filing of Order in County Court

(1A) Where an order is made under this Act the party in whose favour it is made, shall, before an application may be received under subsection (1) of

section 27, file one of the duplicate originals of the order in the County Court of the district in which the cause of complaint wholly or in part arose, or in which the party against whom the order is made resides, or in any case coming within section 31, in the County Court of the district where the complaint is heard. S.M. 1955 c. 83, s. 8.

Subsequent Order

(2) Where an order has been filed, any subsequent order whether by way of variation, appeal, or otherwise, including an order made under subsection (6), shall be filed by the party in whose favour the order is made in the same County Court, and shall operate as an amendment or discharge, as the case may be, of the original order so filed.

Order a Court Judgment

(3) Every order made under this Act, if it is filed in a County Court as herein provided, shall, subject to subsection (3A), be conclusively deemed to be, for all purposes, a judgment of the County Court and enforceable as such.

Form and Effect of Certificate of Judgment

(3A) Where a certificate of judgment, based on an order for maintenance filed in a County Court as herein provided, is issued from that court, it shall include, in addition to the matters set out in the form in Schedule A to The Judgments Act, a certificate that the judgment is an order for maintenance made under this Act; and if it is registered in a land titles office it is a judgment for maintenance to which section 9 of The Judgments Act applies. S.M. 1958, c. 74, s. 1.

Fee

(4) A fee of fifty cents shall be paid upon every order filed. R.S.M., c. 235, s. 28; am.

Filing of Orders in Land Titles Office

(5) Every order made under this Act, may, without being filed in the County Court, be registered in any land titles office in the province and, if so registered, is an order to which section 9 of The Judgments Act applies.

Order Discharging or Postponing Order Registered in L.T.O.

(6) Where an order made under this Act or a certificate of judgment based on such an order filed in the County Court has been registered in a land titles office under The Judgments Act,

(a) if the order was made by a judge of a County Court, a judge of that County Court; or

(b) if the order was made by a police magistrate, a police magistrate in the judicial district in which the order was made;

upon application of any person interested, and after the party in whose favour the order was made has been given notice in such manner, including service by mail or by public advertisement, as the judge or police magistrate may require, if he is satisfied that in the circumstances it is reasonable and proper to do so, may make an order

(c) discharging or partially discharging the judgment or the original order in so far as it affects certain lands described in the order; or

(d) postponing the judgment or the original order in so far as it affects certain lands described in the order to allow registration of a mortgage, lease, or encumbrance specified in the order with priority over the certificate of judgment or original order, as the case may be. S.M. 1963, c. 96, s. 2.

Execution Under Order

29. (1) A distress warrant issued by a police magistrate or an execution issued out of a County Court for the recovery of any sums ordered to be paid under this Act may be executed against the personal estate of the person indebted, and the exemptions provided by The Executions Act do not apply thereto. Am.

Note: Respecting Distress—See The Summary Convictions Act.

No Exemption Under Registered Certificate or Judgment

(2) The exemptions provided in The Judgments Act do not apply to the enforcement of a certificate of judgment issued upon a judgment obtained under section 28. Am. R.S.M., c. 235, s. 29; am.

Appointment of Receiver

30. (1) Where an order made under this Act has become a County Court judgment, an application may be made to the court by or on behalf of the person in whose favour the order is made for the appointment of a receiver; and the court may appoint a receiver of any moneys due, owing, or payable, or to become due, owing, or payable to, or earned or to be earned by, the person against whom the order was made to the extent of the default and in addition to the extent of instalments due or to become due under the order. Am.

Reduction of Exemption

(2) A judge has the same power to reduce the amount of exemption in a case coming under subsection (1) as he would have under The Garishment Act. Am.

Application of Sec. 8

(3) Section I of this Act does not apply to applications under this section. Am. R.S.M., c. 235, s. 30; am.

SERVICE OUTSIDE PROVINCE

Service Outside Province

31. (1) Where it is made to appear to the judge or police magistrate that the married man or other person against whom the complaint is made under section 4, 5 or 6 is outside the province, the judge or magistrate may order the summons to be served upon the defendant wherever he may be found, and he may also direct the manner of proving the service. Am.

Place of Application

(2) In any case mentioned in subsection (1) the application may be made to a judge or a police magistrate within the judicial district in which the applicant resides; and, upon filing of the proof of service, the judge or police magistrate may proceed to hear and determine the complaint in the same manner as though a summons had been served upon the defendant in the province. R.S.M., c. 235, s. 31; am.

Note: See *Gagen v. Gagen* (1934), 3 W.W.R. 84.

LIMITATION

Limitation

32. No limitation contained in any statute or law operates to bar or affect the right to take proceedings under this Act or to enforce any order made hereunder. R.S.M., c. 235, s. 32; am.

APPEALS

Appeals

33. (1) In the case of proceedings taken before a County Court judge, an appeal lies therefrom in the same manner as an appeal from a judgment of the County Court.

Idem

(2) Subject to subsection (4) in the case of proceedings taken before a police magistrate, an appeal lies therefrom in the manner provided in The Summary Convictions Act as amended from time to time heretofore or hereafter.

Effect of Appeal

(3) Where an appeal is taken from an order made under section 13 and section 17, or either of them, the appeal shall not operate as a stay of proceedings, but the order may be enforced as though no appeal were pending unless the judge or magistrate who made the order otherwise orders. Am. R.S.M., c. 235, s. 33; am.

Exception as to Security in Transcript of Evidence

(4) Where a person appeals against an order made by a magistrate under section 4, 5, or 7, unless the appeal court otherwise orders, he shall not be required

(a) to deposit any money or other security for the costs of the appeal;
or

(b) to furnish a transcript of the evidence taken in the proceedings before the magistrate;

and where the appeal court orders him to deposit money as security for costs, the amount to be so deposited shall be in the discretion of the appeal court. S.M. 1964, c. 59, s. 1.

SAVING CLAUSE

Rights to be Additional

34. The rights given under this Act are in addition to and not in substitution for any rights that may be given under any other law. R.S.M., c. 235, s. 34; am.

REGULATIONS

Regulations

35. Notwithstanding anything in this Act the Lieutenant-Governor-in-Council may make regulations,

(a) requiring proceedings under this Act in any part or parts of the province to be heard and determined before a specified magistrate or magistrates;

(b) requiring proceedings under this Act to be heard and determined at sittings of the magistrate specially fixed and apart from the general business of the magistrate. R.S.M., c. 235, s. 35.

APPENDIX "85"

STATEMENT
OF THE
CANADIAN CATHOLIC CONFERENCE
TO
THE SPECIAL JOINT COMMITTEE
OF THE SENATE AND HOUSE OF COMMONS
ON
DIVORCE

April 6, 1967

The Canadian Catholic Conference is pleased to accept the invitation to present a statement to the Special Joint Committee of the Senate and the House of Commons on Divorce. We offer the following considerations and recommendations regarding proposed changes in Canadian divorce laws.

The Canadian Catholic Conference, the national organization of the Catholic Bishops of Canada, carries on its activities through an administrative board and various elected commissions and committees. The general secretariate of the Conference is in Ottawa.

We have already submitted a statement to the House of Commons Standing Committee on Health and Welfare concerning the changing of federal legislation relative to contraception (September 9, 1966). The principles embodied in that submission are equally essential to a precise understanding of the present submission. For this reason, we include the earlier statement as an appendix.

I

THE ROMAN* CATHOLIC CHURCH AND THE
INDISSOLUBILITY OF MARRIAGE

The Roman Catholic Church maintains that valid marriage is indissoluble. All her members, whatever be the laws of their country, are therefore committed to remain faithful to this sacred law on marriage. When two baptized persons marry, they are united until death by a bond that is both natural and sacramental.

Marriage in Christ is a sacrament of salvation, and the Church received from her Founder the responsibility of providing her members with the means necessary to live their Christian faith. Therefore, in this area the Church must make her own distinctive laws.

It is helpful to recall some of the reasons underlying the Church's position on the indissolubility of the marriage bond. They are rooted in the natural law, namely, the basic obligations which the Creator Himself has placed on His handiwork. But these reasons transcend the natural law and arise also from the new meaning which Jesus Christ has given to marriage.

The voluntary, permanent and exclusive union of husband and wife becomes, through the grace of the sacrament, the symbol and witness of God's redemptive plan. This is true at several levels.

* Roman Catholic Church signifies all Catholics in communion with the Holy See.

1. First, as regards conjugal love: this love, ever faithful and ready to forgive and meet changing circumstances, ever generous, striving to overcome egoism and self-seeking, ever trusting and reverential, sharing joys and sorrows, is both the manifestation and extension of the love that God offers to all men in Jesus Christ.

2. Moreover, through the procreation and education of the children, to which marriage is ordained by its very nature, the couple shares intimately in God's work of creation and salvation.

3. Finally, the Christian home, built on fidelity and the irrevocable gift of husband and wife to each other and to their children, is likewise witness to that profound unity which the Church is called to foster among all men. Herein lies a dignity which makes sacred the bond that unites them.

In this new dimension given by Christian marriage to the union of man and wife, human love finds its true maturity. Conjugal love, when inspired by the Gospel, is able in a special way to foster and develop the potentialities of each spouse, as well as the spiritual riches that they bring to their mutual lives.

Although many married couples may never attain this high ideal of conjugal love and fidelity, nevertheless the Church wishes to encourage and maintain it by her doctrine and laws. In the eyes of the Catholic Church, this ideal corresponds to the deepest longing of mankind, and represents a standard that serves well in times of difficulty.

Nevertheless, in serious and exceptional cases, it can happen that after a number of years a validly married couple may feel obliged to discontinue their common life. This decision may involve the good of the spouses themselves for whom life together may have become unbearable. The decision may concern also the good of the children whose human and religious stability is gravely endangered by the atmosphere of constant disagreement in the home. In these cases, the Church, having seriously examined the facts, permits what is known as "separation". In our view, there should be a civil procedure for a judicial separation upon certain limited grounds which, while not permitting the parties to remarry, would protect the rights of the children and the civil rights of the parties.

When the judicial separation does not provide sufficient safeguards for the rights of the partners and their children, Catholic couples are permitted to seek a civil divorce. They are then freed, before civil law, of all legal responsibility binding them to each other, and are juridically separated. Nevertheless, the Church, while tolerating such a recourse to civil divorce, continues to consider the married couple bound to each other. According to the mind and law of the Church, they remain mutually pledged to each other until one of them dies. Thus they are not free to remarry.

II

THE ROMAN CATHOLIC CHURCH AND PROPOSED CHANGES IN DIVORCE LEGISLATION

So far, we have discussed the teaching of the Church in regard to her own members. The Catholic Church maintains that civil authority has no power whatsoever to dissolve the marriage bond, and many non-Catholics restrict that power to divorce on grounds of adultery. It is possible however even for these, out of respect for freedom of conscience, to tolerate a revision of existing divorce legislation, with a view to obviating present abuses.

The Church, when asked for her opinion by civil legislators, must look beyond her own legislation to see what best serves the common good of civil society. With this in mind, and given the fact that a divorce law already exists in Canada, we offer the following considerations:

1. It is alleged that present divorce laws encourage perjury and collusion, if not adultery itself. To this is added the fact that the party considered innocent in the eyes of the law may be the more responsible for the marital discord; or, responsibility may be mutual. It is also true that judicial procedure, when carried on in a hurried and superficial manner, leads to further scandal and even injustice.

This situation, aggravated by the sincere conviction of many citizens that present legislation is defective, contributes to a widespread disrespect for law in general. In view of these considerations, the question arises whether the present law is conducive to the good of society.

2. Canada is a country of many religious beliefs. Since other citizens, desiring as do we the promotion of the common good, believe that it is less injurious to the individual and to society that divorce be permitted in certain circumstances, we would not object to some revision of Canadian divorce laws that is truly directed to advancing the common good of civil society.

It is not for us to go into detail about grounds for divorce which would be acceptable or not; this, we believe, should be left to the well-informed conscience of our legislators. However, we cannot overemphasize that an indiscriminate broadening of the grounds for divorce is not the solution to the problem of unhappy marriages. Such legislation undoubtedly would contribute to destruction of the essential values on which our society is built. In working out any changes that they think should be made in the present law, legislators must never lose sight of the sacred value of the family, the primary and basic cell of society. Their aim should be to avoid anything that might seriously endanger peace, love, frankness, stability and trust that make the home the base and centre of the well-being of the state.

III

PROPOSED PROGRAMS TO STRENGTHEN FAMILY LIFE

Divorce may cause problems more serious than those it seeks to control. Once a family has been disrupted, there arise special difficulties regarding the material, psychological and spiritual welfare of both parents and children. This is particularly true for children of adolescent age.

The best solution is to be found in an extensive rethinking of the entire body of legislation dealing with marriage and the family. An eventual revision of the divorce law makes sense only if it is part of a wide, positive policy for strengthening family values, and particularly for ensuring the serious motivation and proper preparation of couples intending marriage.

Social science confirms that the majority of family problems that end in divorce have their roots in the levity and lack of forethought with which many, especially younger people, approach marriage. The subsequent bitter disenchantment and crises should surprise no one.

It is the responsibility of civil authority to seek by appropriate laws to prevent such situations. To this end, we present the following considerations:

1. We urge your committee to consider how governments can best encourage public support for much more extensive research into all questions concerning marriage and the family.

Adequate research into marriage, its successes and its difficulties, is required for any proper revision of legislation, for realistic educational programs to prepare our citizens for lasting marriages, as well as for counselling and reconciliation services for marriages that are experiencing difficulties. Your committee appropriately urge legislators and public authorities at all levels to give serious consideration to opportunities for supporting research into family questions.

2. We also urge your committee to study seriously ways in which public authorities at all levels, in dialogue and co-operation with religious groups and interested private organizations, may give effective support to programs of education for marriage. Many other groups and Churches appearing before you have made similar proposals. The experience of the Catholic Church in this area lends strength to our conviction concerning the need of these courses.

3. There is also need for a broad common policy to strengthen family values in existing homes that require help in their difficulties. The basic causes of marital conflicts are often found in the inadequate family training that the partners received, and in the insecurity and discord of the homes in which they were reared. If the young do not learn from the counsel and example of their elders that love must build itself on self-denial and generosity, they are not likely to learn it at all.

4. Moreover, we earnestly ask that, as a service to couples in difficulty, the civil authority establish agencies to study each case carefully, and to seek positive remedies, taking account of the religious convictions of each couple. The experience of psychologists, sociologists, social workers and spiritual advisers whom we consulted shows that couples very often can be fully reconciled through the attentive and devoted work of these agencies. Those seeking divorce should first be directed to them. Civil society, and not just the Churches, should take an active lead in such attempts at reconciliation.

This calls for important changes in the procedures of divorce courts, where they exist. It is important that these courts include specialists in the social and pastoral sciences as well as in civil law. In this way, each case would be studied thoroughly while taking into account all the human dimensions of the problem.

We are grateful for the opportunity to present our views on this important matter which involves so intimately the future welfare of our country.

Schedule I
STATEMENT
OF THE CANADIAN CATHOLIC CONFERENCE
TO THE HOUSE OF COMMONS
STANDING COMMITTEE ON HEALTH AND WELFARE

* * * *

*(Not for publication
Until After Presentation
to the House Committee)*

The Canadian Catholic Conference thanks the House of Commons' Standing Committee on Health and Welfare for the invitation to testify on the subject matter of Bills C-22, C-40, C-64, and C-71.

The C.C.C. is the national organization of the Catholic Bishops of Canada. At present there are 101 episcopal members of the C.C.C., which carries on its activities through an administrative board and various elected commissions and committees. The general secretariate of the C.C.C. with its offices in Ottawa carries out the national policy of the C.C.C. through various departments, e.g., ecumenism, liturgy, lay apostolate, social action.

The invitation to give evidence before this committee is welcome for two reasons in particular.

First of all, it presents an opportunity for the C.C.C. to make its views known on proposed legislation affecting marriage and the family, an area of great concern to the Church as well as to society at large.

Secondly, it provides an opportunity for the C.C.C. to situate its particular observations on the above-mentioned bills in the broader perspectives of pertinent teachings of the 2nd Vatican Council.

Our comments are now being asked on proposed changes in Article 150 of the Criminal Code which would make it no longer a crime punishable at law to give information about or to distribute the means of preventing conception.

Because of the lively interest evoked by the hearings before this Committee, legislators in general and Catholic legislators in particular want to know our position.

The questions may arise. First, how should one conceive the role of a Christian legislator faced with any controversial moral issue? Second, what are our views on the proposed changes in the Criminal Code?

The first and more general question might be put in this way. Are legislators who are loyal to their Church bound to vote for laws prohibiting what the Church declares to be wrong? Are they obliged by their allegiance to the Church to work for the repeal of laws which allow what the Church holds to be wrong?

These questions could touch the legislative attitudes of a number of men in public life. We think therefore that they are quite properly presented before this committee, which is necessarily concerned with anything that might be an obstacle or aid to the legislative process in the question of the proposed changes of Article 150 of the Criminal Code.

To put our remarks on the role of the legislator into proper perspective, to avoid in so far as possible all misunderstanding, we will refer at some length to the teachings of the 2nd Vatican Council. The Council has given all of us deeper insights into the nature of the Church, the relationship of her official teaching authorities to her other members and of all of them to the political community. In particular we have in mind the council document that treats of the Church and politics and of the role of the Christian in the political community. Since it has special relevance to our appearance here, we include as an appendix to our present statement Part II, chapter 4 of the *Pastoral Constitution on the Church in the Modern World*, which is titled "The Life of the Political Community."

A simple and evident truth is proposed by this Constitution. The same persons are members of the religious community which is the Church and of the political community which is the State. The two institutions "serve the personal and social vocation of the same human beings" (*Church in the Modern World*, No. 76). The obvious ideal, then should be "wholesome mutual co-operation" for the benefit of human persons (*loc. cit.*).

The political community, the Constitution says,

"exists for that common good in which the community finds its full justification and meaning, and from which it derives its pristine and proper right. Now the common good embraces the sum of those conditions of social life by which individuals, families, and groups can achieve their own fulfilment in a relatively thorough and ready way" (*ibid.*, No. 74).

The Church for its part

"has also the right to pass moral judgments, even on matters touching on the political order, whenever basic personal rights or the salvation of souls make such judgments necessary. In so doing, she may use only those helps which accord with the gospel and with the general welfare as it changes according the time and circumstance" (*ibid.*, No. 76).

The Church recognizes that her role and competence are not to be confused with the role and competence of the political community. Thus "the faithful will be able to make a clear distinction between what a Christian conscience leads them to do in their own name as citizens, whether as individuals or in association, and what they do in the name of the Church and in union with her shepherds" (*loc. cit.*).

It is significant for our present purpose to note the Council teaching that within the political community Christians act "in their own name as citizens" (*loc. cit.*). Their actions, to be sure, should be guided by a well-formed Christian conscience, "for even in secular affairs there is no human activity which can be withdrawn from God's dominion" (2nd Vatican Council, *Dogmatic Constitution on the Church*, No. 36). But the fact remains that their decisions and actions in the political sphere must be their own. Their rights and duties as citizens do not flow from the fact that they belong to the Church.

Thus in the solemn *Dogmatic Constitution on the Church*, which is held by many to be the most basic document emanating from the Council, we read:

"Because the very plan of salvation requires it, the faithful should learn to distinguish carefully between those rights and duties which are theirs as members of the Church, and those which they have as members of society. Let them strive to harmonize the two, remembering that in every temporal affair they must be guided by a Christian conscience—In our time it is most urgent that this distinction and also this harmony should shine forth as radiantly as possible in the practice of the faithful, so that the mission of the Church may correspond more adequately to the special conditions of the world today" (No. 36).

The same truth is explicitly taught again by the Council in its *Decree on the Apostolate of the Laity*. The layman is told that he must take on the renewal of the temporal order as his own special obligation. He must be guided by the light of the gospel, the mind of the Church and Christian love, yet in the temporal sphere he is exhorted to act on his own responsibility:

"As citizens they must co-operate with other citizens, using their own particular skills and acting on their own responsibility" (No. 7).

The Christian legislator then has a Christian conscience and if it is truly formed it will be thoroughly imbued with Christian principles. But it remains his conscience. The Church may play a major role in the formation of that conscience through her teachings on the social order and the moral aspects of the political order. But these teachings do not properly extend to the technical areas of social or political questions. It will be up to the legislator to apply his principles to the concrete and often complicated realities of social and political life and to find a way to make these principles operative for the common good. He should not stand idly by waiting for the Church to tell him what to do in the political order. The ultimate responsible conclusions are his own as he fulfils the task he has along with all other legislators. That task is the promotion of the common good through the provision of wise and just laws.

At this point we are now able to return to the questions asked earlier, the answers to which we said were important in view of the legislative proposals before this committee.

Are Christian legislators bound to vote for laws which forbid what the Church forbids? Are they bound to oppose laws which permit what the Church forbids?

Perhaps we can see now that the questions answer themselves in the light of the principles of the 2nd Vatican Council which we have just cited.

The Christian legislator must make his own decision. The norm of his action as a legislator is not primarily the good of any religious group but the good of all

of society. Religious and moral values are certainly of great importance for good government. But these values enter into political decisions only in so far as they affect the common good. Members of Parliament are charged with a temporal task. They may and, in fact, often will vote in line with what the Church forbids or approves because what the Church forbids or approves may be closely connected with the common good. Their standard always lies in this question: Is it for or against the common good?

A willingness to honour this truth stressed by the Council and to trust the Christian legislator to fulfil his function in the light of his Christian conscience and his technical competence is the surest pledge of our desire to join with all men of good will in the building of a truly human world open to supernatural and Christian values.

And now, applying the foregoing arguments, we may approach more directly matter of Article 150 of the Criminal Code.

In our minds it is of the utmost importance to make it clear that our not opposing a change in the present law would not imply approval of contraception or of all methods of regulation of births. This is an entirely different question and we are not dealing with it in this statement.

Civil law (we use the term in the broad sense which includes criminal law) and morality are different in important respects; yet they have areas in common too. Civil law and moral law are neither completely distinct nor completely one. Not every evil deed calls for a civil law to forbid it. Those wrong deeds that can do notable harm to the common good constitute, in certain circumstances to be described below, proper subject-matter for criminal laws of the political community. Other wrong deeds are in truth forbidden by God's law and the wrongdoer will have to answer to God for his transgressions. It could be alleged that any genuinely immoral act is at least indirectly and remotely prejudicial to and morality are different in important respects; yet they have areas in common the common good. Yet there has to be a reasonable proportion between wrongdoing and the means taken to suppress it. The comparatively slight harm to the common good that might be caused by certain types of private or hidden delinquency has to be weighed against a much greater potential damage. Clearly, common good would not be served by a hopeless attempt of public authority to supervise the smallest details of moral behaviour through a vast and oppressive network of criminal laws and punishments.

The first condition, then, for making a moral offence into a legal or criminal offence is that it be notably contrary to the common good. But that is only the first condition. Certain other conditions must also be fulfilled before a law should be passed turning a wrongful act into a statutory crime punishable at law:

1. It should first of all be clear, as indicated already, that the wrongful act notably injures the common good;
2. The law forbidding the wrongful act should be capable of enforcement, because it is not in the interest of the common good to pass a law which cannot be enforced;
3. The law should be equitable in its incidence—i.e., its burden should not fall on one group in society alone;
4. It should not give rise to evils greater than those it was designed to suppress.

In the light of these conditions we consider Article 150, which forbids giving information about contraception as well as the sale or distribution of contraceptives, an inadequate law today. We consider it so quite independently of the morality or immorality of various methods of birth prevention. We believe it a deficient law because it does not meet all the conditions outlined above.

The law is not in fact enforced, and the good of public peace might well be lost by attempts to enforce it. A large number of our fellow citizens believe that this law violates their rights to be informed and helped towards responsible parenthood in accordance with their personal beliefs.

It is our clear understanding, of course, that the modification of the law in question is not to extend to that part of it which has to do with abortion. For our conclusions would be quite different were there question of such direct destruction of human life.

We have noted with satisfaction the number of witnesses before this committee who have called for safeguards to protect juveniles and the public in general from the dangers inherent in uncontrolled advertising and uninhibited display or sale of contraceptives. It is admittedly difficult to frame protective laws. But since it is possible to have a law that is at least partially effective against irresponsible advertising or sale of contraceptives, such safeguards should somehow be built into law.

If it seems likely that such safeguards would not be immediately operative but might have to wait for new legislation even in provincial jurisdictions, then it would seem to us to be unwise to remove the existing protection provided by Article 150 of the Criminal Code until such safeguards are by one means or another assured.

Although the proposed legislation makes no provision for governmental programs in regulation of births, it would, if passed, remove a legal barrier to them. We feel bound to express grave concern for the privacy and effective freedom of the individual within such possible programs. The fields of financial help to the needy and of information on regulation of births should be so separated that acceptance of contraceptive devices or information is never in reality made a condition or necessary concomitant of welfare assistance.

While the state has a legitimate interest in health, education and poverty as social problem areas, it would be intolerable that the state should enter into the business of dictating to married couples how many children they may or should have, or what methods of regulation of births they should adopt. That should be the free decision of parents. Psychological pressures or persuasions that violate their rights and their freedom would, if permitted, be a grave abuse. Any governmental program would be strictly bound to protect the freedom and the human rights of family and conscience.

We are not suggesting that such abuse would necessarily be the official policy of any major governmental agency. But it does not take too much imagination to see how such subtle violence to individual rights could creep into actual practice.

Protection to prevent coercive tactics can and should be provided. We do not question the capacity of men of good will working together to provide such safeguards, perhaps through the provision of a board of review and control, or in some other effective way. What is necessary is to take positive steps at the outset by studying the potential dangers of governmental involvement in regulation of births. Otherwise the changing of Article 150 of the Criminal Code could result in unnecessary moral damage and social discord.

Provided, then, that safeguards against irresponsible sales and advertising are built into the law and that protection of personal freedom is ensured, we do not conceive it as our duty to oppose appropriate changes in Article 150 of the Criminal Code. Indeed, we could easily envisage an active co-operation and even leadership on the part of lay Catholics to change a law which under present conditions they might well judge to be harmful to public order and the common good.

At the same time we would urge continuing research into and public review of the effects that any changes in the law would have on individuals, families, and the common good of Canadian society as a whole.

cf. text of Part II, ch. 4, of the *Pastoral Constitution on the Church in the Modern World*, titled "The Life of the Political Community."

Schedule II

The Church in the Modern World

Part II Chapter 4

THE LIFE OF THE POLITICAL COMMUNITY

Modern Politics

Our times have witnessed profound changes too in the institutions of peoples and in the ways that peoples are joined together. These changes are resulting from the cultural, economic, and social evolution of these same peoples. The changes are having a great impact on the life of the political community, especially with regard to universal rights and duties both in the exercise of civil liberty and in the attainment of the common good, and with regard to the regulation of the relations of citizens among themselves, and with public authority.

From a keener awareness of human dignity there arises in many parts of the world a desire to establish a political-juridical order in which personal rights can gain better protection. These include the rights of free assembly, of common action, of expressing personal opinions, and of professing a religion both privately and publicly. For the protection of personal rights is a necessary condition for the active participation of citizens, whether as individuals or collectively, in the life and government of the state.

Among numerous people, cultural, economic, and social progress has been accompanied by the desire to assume a larger role in organizing the life of the political community. In many consciences there is a growing intent that the rights of national minorities be honored while at the same time these minorities honor their duties toward the political community. In addition men are learning more every day to respect the opinions and religious beliefs of others. At the same time a broader spirit of co-operation is taking hold. Thus all citizens, and not just a privileged few, are actually able to enjoy personal rights.

Men are voicing disapproval of any kind of government which blocks civil or religious liberty, multiplies the victims of ambition and political crimes, and wrenches the exercise of authority from pursuing the common good to serving the advantage of a certain faction or of the rulers themselves. There are some such governments holding power in the world.

No better way exists for attaining a truly human political life than by fostering an inner sense of justice, benevolence, and service for the common good, and by strengthening basic beliefs about the true nature of the political community, and about the proper exercise and limits of public authority.

Nature and Goal of Politics

Individuals, families, and various groups which compose the civic community are aware of their own insufficiency in the matter of establishing a fully human condition of life. They see the need for that wider community in which each would daily contribute his energies toward the ever better attainment of the common good. It is for this reason that they set up the political community in its manifold expressions.

Hence the political community exists for that common good in which the community finds its full justification and meaning, and from which it derives its pristine and proper right. Now, the common good embraces the sum of those conditions of social life by which individuals, families, and groups can achieve their own fulfillment in a relatively thorough and ready way.

Many different people go to make up the political community, and these can lawfully incline toward diverse ways of doing things. Now, if the political community is not to be torn to pieces as each man follows his own viewpoint, authority is needed. This authority must dispose the energies of the whole citizenry toward the common good, not mechanically or despotically, but primarily as a moral force which depends on freedom and the conscientious discharge of the burdens of any office which has been undertaken.

It is therefore obvious that the political community and public authority are based on human nature and hence belong to an order of things divinely foreordained. At the same time the choice of government and the method of selecting leaders is left to the free will of citizens.

It also follows that political authority, whether in the community as such or in institutions representing the state, must always be exercised within the limits of morality and on behalf of the dynamically conceived common good, according to a juridical order enjoying legal status. When such is the case citizens are conscience-bound to obey. This fact clearly reveals the responsibility, dignity, and importance of those who govern.

Where public authority oversteps its competence and oppresses the people, these people should nevertheless obey to the extent that the objective common good demands. Still it is lawful for them to defend their own rights and those of their fellow citizens against any abuse of this authority, provided that in so doing they observe the limits imposed by natural law and the gospel.

The practical ways in which the political community structures itself and regulates public authority can vary according to the particular character of a people and its historical development. But these methods should always serve to mold men who are civilized, peace-loving, and well disposed toward all—to the advantage of the whole human family.

Political Participation

It is in full accord with human nature that juridical-political structures should, with ever better success and without any discrimination, afford all their citizens the chance to participate freely and actively in establishing the constitutional bases of a political community, governing the state, determining the scope of a political community, governing the state, determining the scope and purpose of various institutions, and choosing leaders. Hence let all citizens be mindful of their simultaneous right and duty to vote freely in the interest of advancing the common good. The Church regards as worthy of praise and consideration the work of those who, as a service to others, dedicate themselves to the welfare of the state and undertake the burdens of this task.

If conscientious co-operation between citizens is to achieve its happy effect in the normal course of public affairs, a positive system of law is required. In it should be established a division of governmental roles and institutions and, at the same time, an effective and independent system for the protection of rights. Let the rights of all persons, families, and associations, along with the exercise of those rights, be recognized, honoured, and fostered. The same holds for those duties which bind all citizens. Among the latter should be remembered that of furnishing the commonwealth with the material and spiritual services required for the common good.

Authorities must beware of hindering family, social, or cultural groups, as well as intermediate bodies and institutions. They must not deprive them of their

own lawful and effective activity, but should rather strive to promote them willingly and in an orderly fashion. For their part, citizens both as individuals and in association should be on guard against granting government too much authority and inappropriately seeking from it excessive conveniences and advantages, with a consequent weakening of the sense of responsibility on the part of individuals, families, and social groups.

Because of the increased complexity of modern circumstances, government is more often required to intervene in social and economic affairs, by way of bringing about conditions more likely to help citizens and groups freely attain to complete human fulfillment with greater effect. The proper relationship between socialization on the one hand and personal independence and development on the other can be variously interpreted according to the locales in question and the degree of progress achieved by a given people.

When the exercise of rights is temporarily curtailed on behalf of the common good, it should be restored as quickly as possible after the emergency passes. In any case it harms humanity when government takes on totalitarian or dictatorial forms injurious to the rights of persons or social groups.

Citizens should develop a generous and loyal devotion to their country, but without any narrowing of mind. In other words, they must always look simultaneously to the welfare of the whole human family, which is tied together by the manifold bonds linking races, peoples, and nations.

Let all Christians appreciate their special and personal vocation in the political community. This vocation requires that they give conspicuous example of devotion to the sense of duty and of service to the advancement of the common good. Thus they can also show in practice how authority is to be harmonized with freedom, personal initiative with consideration for the bonds uniting the whole social body, and necessary unity with beneficial diversity.

Christians should recognize that various legitimate though conflicting views can be held concerning the regulation of temporal affairs. They should respect their fellow citizens when they promote such views honorably even by group action. Political parties should foster whatever they judge necessary for the common good. But they should never prefer their own advantage over this same common good.

Civic and political education is today supremely necessary for the people, especially young people. Such education should be painstakingly provided, so that all citizens can make their contribution to the political community. Let those who are suited for it, or can become so, prepare themselves for the difficult but most honorable art of politics. Let them work to exercise this art without thought of personal convenience and without benefit of bribery. Prudently and honorably let them fight against injustice and oppression, the arbitrary rule of one man or one party, and lack of tolerance. Let them devote themselves to the welfare of all sincerely and fairly, indeed with charity and political courage.

Politics and the Church

It is highly important, especially in pluralistic societies, that a proper view exist of the relation between the political community and the Church. Thus the faithful will be able to make a clear distinction between what a Christian conscience leads them to do in their own name as citizens, whether as individuals or in association, and what they do in the name of the Church and in union with her shepherds.

The role and competence of the Church being what it is, she must in no way be confused with the political community, nor bound to any political system. For she is at once a sign and a safeguard of the transcendence of the human person.

In their proper spheres, the political community and the Church are mutually independent and self-governing. Yet, by a different title, each serves the

personal and social vocation of the same human beings. This service can be more effectively rendered for the good of all, if each works better for wholesome mutual co-operation, depending on the circumstances of time and place. For man is not restricted to the temporal sphere. While living in history he fully maintains his eternal vocation.

The Church, founded on the Redeemer's love, contributes to the wider application of justice and charity within and between nations. By preaching the truth of the gospel and shedding light on all areas of human activity through her teaching and the example of the faithful, she shows respect for the political freedom and responsibility of citizens and fosters these values.

The apostles, their successors, and those who assist these successors have been sent to announce to men Christ, the Savior of the world. Hence in the exercise of their apostolate they must depend on the power of God, who very often reveals the might of the gospel through the weakness of its witnesses. For those who dedicate themselves to the ministry of God's Word should use means and helps proper to the gospel. In many respects these differ from the supports of the earthly city.

There are, indeed, close links between earthly affairs and those aspects of man's condition which transcend this world. The Church herself employs the things of time to the degree that her own proper mission demands. Still she does not lodge her hope in privileges conferred by civil authority. Indeed, she stands ready to renounce the exercise of certain legitimately acquired rights if it becomes clear that their use raises doubt about the sincerity of her witness or that new conditions of life demand some other arrangement.

But it is always and everywhere legitimate for her to preach the faith with true freedom, to teach her social doctrine, and to discharge her duty among men without hindrance. She also has the right to pass moral judgments, even on matters touching the political order, whenever basic personal rights or the salvation of souls make such judgments necessary. In so doing, she may use only those helps which accord with the gospel and with the general welfare as it changes according to time and circumstance.

Holding faithfully to the gospel and exercising her mission in the world, the Church consolidates peace among men, to God's glory. For it is her task to uncover, cherish, and ennoble all that is true, good, and beautiful in the human community.

APPENDIX "86"

BRIEF TO THE SPECIAL JOINT COMMITTEE
OF THE SENATE AND HOUSE OF COMMONS ON
DIVORCE

by
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March 29, 1967.

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I. INTRODUCTION

The function of the legal order is basically to reconcile or harmonize conflicting or overlapping human claims or demands or desires.¹ Recognizing that the family unit has a fundamental role to play in society and that every effort must be made to preserve it, each nation has sought to regulate the formation, incidents and termination of the marital status. As was said in *Cook v. Cook*:

"This status not only involves the well being of the parties thus united, but the good of society and the State. It is, therefore, a proper subject of legislation. It may, from public considerations, be fixed, regulated, and controlled by law."²

The increase in the divorce rate in the last century has led to a closer scrutiny of matrimonial law. The question facing every legislature is how can the law promote the stability of marriage?

The first error made by many is to look at the divorce rates and then to restrict their endeavours to promote marital stability by reforming only that part of the law that is directly related to divorce. The common result is failure. To achieve success attention must first be focused on the cause of the high divorce rates—the higher rates of marriage breakdown. Reform of the matrimonial law in order to prevent the breakdown of marriage will reduce the desire and need to resort to divorce.

The next obvious question is whether the law can prevent the breakdown of marriage? Every Christian nation has originally attempted to do so by the law that marriage is indissoluble. Again they have been unsuccessful due to the concentration on the dissolution of marriage. It is only recently that attention has begun to be focused on the breakdown of marriage. This is evident in the text of the recent Report of the Law Commission: Reform of the Grounds of Divorce. The Field of Choice³ where it is recognized that:

"...divorce is merely one of the possible outcomes, and not necessarily the most common one, of a marriage that has broken down...Today in England divorce has become one course which, normally, is readily available to the parties when a marriage has broken down. It is, however, but one course among many. Instead the parties may merely part, or they may enter into a formal separation agreement, or they may obtain a judicial separation, or a maintenance or separation order from a magistrates' court."⁴

Attention is directed to divorces because they are the sores that break out on the surface. Preventative medicine must cure the bad blood underneath.

It has been estimated that in the United States there is one divorce for every four marriages⁵; that the number of spouses who are deserted annually equals or exceeds the number of divorces granted⁶; and that the number of broken families outnumber the total of divorces by about five to three.⁷ Studies show that marital discord increases the incidence of illegitimacy and juvenile delinquency and affects mental and physical health. Its impact upon the members of the family and the community results in enormous social and economic cost to a

¹ Roscoe Pound, *Interpretations of Legal History*, 1923, p. 117.

² (1882), 56 Wisc. 195, at p. 207.

³ Report of the Law Commission: Reform of the Grounds of Divorce. The Field of Choice, 1966, Cmnd. 3123 [hereinafter referred to as the "Scarman Commission"].

⁴ *Ibid.*, para. 6.

⁵ Allan N. Zacher, *The Professional Responsibility of the Lawyer in Divorce* (1962), 27 Mo. L. Rev. 466, at p. 467.

⁶ *Id.*

⁷ Paul W. Alexander, *The Lawyer in the Family Court* (1959), 5 N.P.P.A. 172, at p. 173.

nation.⁸ To promote the nation's well being, a legislature is under an obligation to enact laws which will prevent the breakdown of marriages.

What laws can a legislature pass to effect this purpose? Laws providing for the education of young people, the raising of the minimum age for capacity to marry and premarriage counseling may reduce the chances of serious marital discord occurring. But what can the law do in a situation where two persons are married and marital discord does occur? What can the law do then to prevent a breakdown of that marriage? Laws can be enacted to encourage a reconciliation of the couple. Following the above quoted extract, the Scarman Commission continues:

"In all of such cases the marriage may have broken down just as irretrievably as if there had been a divorce. If a divorce is obtained, it follows and is caused by the breakdown—not vice versa."⁹

It is suggested by the Scarman Commission that if a spouse applies for, for example, a judicial separation, the marriage may not be irretrievably broken down but if a divorce is sought, there has been an irretrievable breakdown. This is inaccurate. A marriage may be irretrievably broken down when only a judicial separation is sought. A divorce may not be desired for many reasons—one being religious affiliation. On the other hand, a divorce may be sought when there has not been an irretrievable breakdown of the marriage. It is impossible to categorize marital disputes because they are so personal. Some discord is conciliable, some is not. A breakdown that is irretrievable may occur before the spouses even separate but, in some cases, there may be a possibility of a reconciliation until the marriage is dissolved. Admittedly, the possibility of a reconciliation decreases as each progressive step is reached. Nevertheless, the law has a role to play from the time that marital discord occurs to the time that the final decree of dissolution is granted. Only then is the breakdown recognized by law to be absolute—the dead marriage is buried.

Historically, the role played by the law in its efforts to prevent the breakdown of marriage may be described as follows:

"—there have been two opposing forces throughout the development of matrimonial law: i. attempts by the State to stabilize marriage by restricting the right to terminate one marital relationship in order to enter into another; ii. the desire of individuals to terminate one union which has become unbearable and to acquire the right to form another.

In attempting to reconcile these particular interests, States in the common law systems have experimented with various institutions for dealing with marital disputes, ranging from Legislature to Family Court, and have also attempted to control personal conduct of citizens by different degrees of substantive rule, ranging from complete indissolubility of marriage to divorce for incompatibility of temperament."¹⁰

Besides these two aspects of matrimonial regulation—control by the institutions of decision and substantive control, there is a third device—regulation of the procedure which must be followed in order to go before an "institution of decision".

An attempt is made to examine the role that the law in Canada plays in preventing the breakdown of marriage by encouraging reconciliation; to evaluate its success in this role; and to determine if it can play a more successful role in the future. In order to effect this, the law which affects reconciliation will be

⁸ Henry H. Foster, Jr., *Conciliation and Counseling in the Courts in Family Law Cases* (1966), 41 N.Y. U.L. Rev. 353.

⁹ Scarman Commission, para. 6.

¹⁰ John M. Biggs, *Stability of Marriage—A Family Court?* (1961), 34 Aust. L. J. 343, p. 346.

surveyed from the three aspects of matrimonial regulation—substantive control, procedural control and control by the institutions by which the law is administered. The corresponding law in several other nations is also set out to illustrate in what aspects the law in Canada can be improved.

I. THE COMMON BASIS

1. *The law.*

The matrimonial law of the majority of nations surveyed has been derived from the ecclesiastical law in England before 1857. Many principles of the ecclesiastical law were given statutory effect in the Matrimonial Causes Act, 1857.¹¹ Thus, the principles affecting reconciliation in the Act of 1857 form a common basis upon which the laws affecting reconciliation in the existing matrimonial law of many nations have developed.

The history of attempts to prevent the breakdown of marriage by the medium of substantive law reveals that the law is involved in a circular pattern and has made little progress. There are two main reasons for this—concentration on means to prevent the dissolution rather than the breakdown of marriage, and the adoption of the matrimonial offence theory.

Marriage was indissoluble under the canon law in England. This failed because no attempt was made to prevent the breakdown of marriage and, therefore, estranged spouses resorted to the law of nullity and private acts of Parliament. Recognizing the need for reforms, Parliament passed the Act of 1857. For the first time marriage could be dissolved in England. However, in order not to contradict the teachings of the church any more than necessary, a divorce could only be obtained if one spouse committed an offence against the vows of matrimony. The offence chosen was adultery. Since that time the substantive law on the grounds for divorce has been amended and extended to no avail because the majority of the reforms are still based on the matrimonial offence theory.

The implementation of the matrimonial offence theory does not prevent the breakdown of marriage; but, far worse, it causes the ultimate breakdown of some marriages. The substantive law which is based on the matrimonial offence theory sets up a series of obstacles in the path of possible reconciliation. Judge Alexander points out that:

“—[It is] anomalous for the law and the judges of reviewing courts to proclaim their allegiance to the institution of the family, then to turn around and place every conceivable obstacle in the way of those called upon to discharge these difficult and delicate duties involved in salvaging floundering families [?]. Yet that is exactly what legislatures and courts have done. They have set up an obstacle race—

[The] traditional obstacles—are found in both the substantive and adjective law of divorce. Among these are the concept that divorce must be predicated upon fault or guilt; the accusatory approach; the adversary procedures from the caption of the original pleading, through the evidence and final decree; the doctrine of condonation; the doctrine of collusion as so frequently misapplied; and in places where the family court is not yet recognized, the denial of necessary jurisdiction and implementation.”¹²

All these obstacles are, either directly or indirectly, consequences of the acceptance of the matrimonial offence theory.

The substantive laws which govern when a spouse may apply for a legal remedy, such as maintenance, judicial separation or divorce, require the appli-

¹¹ Matrimonial Causes Act, 1857, Stats. U. K. 1857, c. 85.

¹² Paul W. Alexander, *The Family Court—An Obstacle Race?* (1958), 19 U. Pitt. L. Rev. 602, at pp. 610-11.

cant spouse to claim that she has been wronged by her spouse and that he is completely at fault. This is usually quite untrue. The husband may have started to drink or gamble and stay out late or either spouse may be temporarily infatuated with a third person. Marital discord is caused by a conflict in the expectations that each spouse has of the other. The role of the legal order is to reconcile conflicting interests, is it not? The substantive law does not even *try* to do so. When a spouse turns to the law for help, it forces the couple to become antagonists. Commencing with the initial pleading, the applicant spouse must attack the other by giving the specific details of the alleged offence. This must also be done in an open court and is subject to widespread publicity. She is a wronged woman in the eyes of the world, therefore, she really begins to believe this herself. What began as a misunderstanding or disillusionment is encouraged by the law to develop into real hostility. It is for this reason that both social workers and jurists agree that once the spouses appear before a court the gong is rung and there is little chance of reconciliation.¹³

A far more obvious obstacle to reconciliation is the doctrine of condonation.¹⁴ Condonation is the forgiveness of a matrimonial offence followed by a reinstatement of the offending spouse to his former position.¹⁵ Condonation was a bar to a decree 'a mensa et thoro' under ecclesiastical law and was made an absolute bar to a decree of judicial separation by the Act of 1857.¹⁶ A spouse who turns to the law for help may not be positive that she wants a divorce. She may want to "give it another chance" but she will soon be advised by a lawyer that if she does, she will not be able to obtain a legal remedy. Then what can she do if the attempt at reconciliation fails? Is it not better to be safe than sorry? To be safe the couple must be kept at arm's length. This is not only required by the law on condonation, but also by the law of collusion which treats any relations between the parties with suspicion. Thus, the law actually encourages a spouse to avoid any attempt to effect a reconciliation!

These laws are illustrative of the negative role played by the law as regards reconciliation. There are very few laws which, either directly or indirectly, encourage reconciliation. A direct attempt to encourage reconciliation is the legal remedy of restitution of conjugal rights. Section two of the Act of 1857 gave a court the power to grant a decree that the spouses shall live together unless there is a sufficient justification in law for the refusal to do so.¹⁷ The decree is based upon the principle that it is the duty of a married couple to live together. This is a crude form of compulsory reconciliation which disregards the psychological elements involved. For this reason it has little effect upon reconciliation and is only rarely resorted to—usually when evidence of desertion is sought. It has been recommended that it be abolished.¹⁸

The only instance where a judge is specifically directed to consider the possibility of a reconciliation is when a petitioner for divorce has himself committed adultery during the marriage. Section 31 of the Act of 1857 gives the judge a discretionary power to grant the divorce decree or not.¹⁹ The circumstances which warrant the exercise of the discretionary power in the petitioner's favour are set out in *Blunt v. Blunt*.²⁰ One of these is that there is a prospect of

¹³ Ralph P. Bridgman, *Counselling Matrimonial Clients in Family Court* (1959), 5 N.P.P.A. 187, at pp. 187-89.

¹⁴ Scarman Commission, para. 25(e).

¹⁵ Power, *The Law and Practice Relating to Divorce and other Matrimonial Causes in Canada* (2nd ed., 1964) edited by Julien D. Payne, p. 51.

¹⁶ See *Henderson v. Henderson and Crellin*, [1944] A.C. 49 (H.L.).

¹⁷ The courts in Nova Scotia possess a similar power. See the Divorce Act, R.S.N.S. 1864 (Third Series), c. 126 as amended by Stats. N.S. 1866, c. 13; *King v. King* (1904), 37 N.S.R. 204 (N.S. Sup. Ct. *in banco*).

¹⁸ Putting Asunder, *A Divorce Law for Contemporary Society*. London S.P.C.K., 1966, Appendix C, para. 29 [hereinafter referred to as "Putting Asunder"].

¹⁹ This is also the law in Nova Scotia. See the Divorce Act, *supra*, footnote 17, s. 10; *Hawbolt v. Hawbolt*, [1934] 2 D.L.R. 703 (N.S. Sup. Ct. *in banco*).

²⁰ [1943] A.C. 517 (H.L.).

a reconciliation between the spouses. This is the most powerful weapon that the law gives to encourage a reconciliation. It has been recently estimated that in England the discretion is asked for and some acts of adultery are disclosed in about 30 per cent of divorce cases.²¹ However, it appears that the judges do not take this opportunity. Only rarely is a divorce refused because the petitioner has also committed a matrimonial offence.²²

Other laws may encourage reconciliation in a more indirect way. The Act of 1857 provided more grounds for a judicial separation. Section 16 provides that a judicial separation could be obtained for adultery, cruelty or desertion without cause for two years or upwards. Consequently, when marital discord did occur a spouse could more readily obtain the legal remedy of a judicial separation which "in intent looked to a reconciliation of the parties"²³ and, upon this occurring, became 'functus'. On the other hand, a divorce dissolves the marriage and also the possibility of a reconciliation. However, this provision is probably largely ineffective as it does nothing positive to prevent the breakdown of marriage. Furthermore, the grounds for a divorce have been extended to equal those for a judicial separation in many nations and, even where they have not been, it is generally accepted that a divorce is not difficult to acquire. More recent laws such as those requiring the maintenance of a wife and children²⁴ probably do more to encourage reconciliation due to economic necessity.

The procedural laws under the Act of 1857 are also based on the matrimonial offence theory. The adversary procedures, from the filing of the petition to the granting of the decree absolute, as discussed above, have the effect of multiplying the misunderstandings and of widening the gap between the parties. It has been suggested that the interlocutory decree is a procedural device to encourage a reconciliation.

"The reasons behind the requirement of the interlocutory judgments in matrimonial actions are twofold. One theory is that the desire to remarry is the motivating force behind most divorce actions; a forced waiting period would therefore lead to further reflection on the part of petitioning spouse. Another theory is that the waiting period is a path to the spontaneous reconciliation of the parties."²⁵

If these are the sole reasons for the waiting period between the decree nisi and the decree absolute, it is a waste of time. Once the parties have entered the court, there is almost no hope for reconciliation.²⁶ The historical reason for the waiting period is for the intervention of the Queen's Proctor if it is suspected that the court is being deceived. However, such intervention is very rare.

Before 1857 the only institution in England which had the power to grant a decree dissolving a marriage was Parliament. It was eventually realized that not only was the use of Parliament for this purpose inequitable, as it favoured the wealthy, but also that Parliament was ill-suited for the hearing of divorce petitions. One hundred and sixty years from the time that the British Parliament passed its first bill expressly dissolving a marriage,²⁷ it passed the Act of 1857 in which it transferred jurisdiction to grant a divorce to the Court for Divorce and

²¹ Scarman Commission, para. 21.

²² *Id.*

²³ *Gracie v. Gracie*, [1943] 4 D.L.R. 145 (Can. Sup. Ct.), per Rand J. at p. 154.

²⁴ i.e. Wives and Children's Maintenance Act, R.S.N.S. 1954, c. 316 as amended by Stats. N.S. 1956, c. 48; 1962, c. 55; 1963, c. 51; 1965, c. 57.

²⁵ Stephen Lang, A "Cooling-Off" Period in Divorce Actions (1958), 24 Brooklyn L. Rev. 313, at p. 317.

²⁶ Julius H. Miner, Conciliation rather than Reconciliation (1948-9), 43 Ill. L. Rev. 464.

²⁷ An Act was passed in 1697 dissolving the marriage bond of the Countess of Macclesfield. See, *supra*, footnote 10, at p. 345.

Matrimonial Causes (s.6). The divorce courts in the Commonwealth nations and in many of the States in America have been modelled on this Court. These courts are "superior" courts. They use the same procedure as followed when hearing any other case before it. This is natural as the matrimonial offence theory dictates that there must be a triable issue of right and wrong. The adversary procedures must be appropriate!

In his article, *The Place of the Family Court in the Judicial System*, Dean Pound illustrates why they are not appropriate as follows:

"One difficulty in judicial treatment of family problems is that while marriage is sometimes spoken of as a contract, it is radically distinguishable from contracts which create duties of debtor and creditor in commercial relations. A legal procedure designed to deal with breach of such contracts, having to do with an economic relation capable of being reckoned in money, is not equal to treatment of the more complicated task of unraveling the complicated threads of the marriage bond and adjusting the respective relations so that each party may continue to live a useful life. Marriage creates a status. Dissolution of a status calls for a procedure different from the one that suffices for recovery of damages for breach of a commercial contract or reparation for forcible aggression upon person or property. The former affects both the social and the economic order; the latter affects the economic order only."²⁸

Many arguments can be advanced to support Dean Pound's statement. For example, as noted above, the adversary procedure is followed due to the substantive law on divorce which is based on the matrimonial offence theory. Under this theory, one spouse is attacking the other for committing a matrimonial offence and, supposedly, the accused spouse will defend the action if this is false. During the hearing of this contentious litigation, all the relevant facts will be brought out by one side or the other and the judge will be able to decide whether to grant a decree on the merits of the case. It is a shame that so many intelligent and educated men have been forced to "look the other way" by such archaic laws. In fact, in 1965, 93 per cent of all divorce proceedings in England were undefended.²⁹ There is no element in an uncontested divorce case to bring out all the relevant facts. The only way to have all the facts before the court in such a case is to employ the inquisitorial procedure. The inquisitorial approach would not discourage reconciliation by creating real hostility where none existed beforehand as does the present procedure. It would encourage a reconciliation by bringing out the real reasons for the marital discord for both spouses to face. However, the inquisitorial procedure could not be employed by superior courts (where the hearing of a divorce often takes about as long as the hearing of a defendant traffic charge³⁰) due to the pressure of time.

In many areas, the judges of the divorce courts move about on assizes. As Dean Pound points out, divorce is a specialized matter. To be able to recognize whether there is a possibility of a reconciliation, a judge must be experienced in handling matrimonial cases and have an understanding of human nature. Judges on assizes hear every class of action that comes before a superior court so they do not have the opportunity to become specialists. Moreover, they will have a full schedule and are unlikely to adjourn the proceedings for further inquiries or marriage counseling.

²⁸ Roscoe Pound, *The Place of the Family Court in the Judicial System* (1959), 5 N.P.P.A. 161, at p. 168.

²⁹ Scarman Commission, para. 20.

³⁰ *Supra*, footnote 10, at p. 347; Peter J. T. O. Hearn, *Marriage and Divorce. A Submission to the Special Joint Committee of the Senate and House of Commons on Divorce*, 1966, p. 3.

It is obvious that superior courts are ill-suited to hearing divorces. Jurisdiction over divorce was transferred to the superior courts 110 years ago. Will we have to wait another 50 years before Parliament realizes that the superior courts are also ill-suited to handle the divorce law? A far more suitable court for hearing divorces, the family court, has been established in many of the states in America and will be discussed later.

The alleged justification for the implementation of the matrimonial offence theory is that it makes marital remedies difficult to obtain and, therefore, the spouses are under an inducement to make a success of their marriage. Surveys have shown that: "The most important factor in divorce is the decision by both spouses that divorce is desirable". Once that is achieved, "the vast body of substantive and procedural law is no bar".³¹ Many legislatures have spent the last century devising laws in order that divorces will be difficult to obtain only to have them circumvented repeatedly. Some legislatures have realized that the imposition of legal rules as a norm of behaviour is futile. Developments in the social sciences have led to the recognition that both spouses may be at fault in marital disputes and that the breakdown of marriage theory is a more realistic basis for matrimonial law.³² It focuses attention on the breakdown of the marriage and, consequently, on methods to prevent it. It is now almost generally accepted that:

"... a good divorce law should seek to achieve the following objectives:

- (i) To buttress, rather than to undermine, the stability of marriage; and
- (ii) When, regrettably, a marriage has irretrievably broken down, to enable the empty shell to be destroyed with the maximum fairness, and the minimum bitterness, distress and humiliation."³³

The object of this paper is to determine to what extent and by what media the first objective has been achieved by the law in nations which have the common legal basis described above. Before commencing this survey, the safeguards which are relied upon by the law under the Act of 1857 to prevent the breakdown of marriage should be discussed.

2. *The safeguards*

The history of nations which have attempted to prevent the breakdown of marriage by the sole medium of the common legal basis evidences that they have not been successful.³⁴ In fact, they did not realize the role that the law could play in this field. It was not until the twentieth century (and then mainly in the last two decades) that any legal order undertook a positive role in the reconciliation of spouses. Thus, couples experiencing marital distress turned to lawyers, doctors, the clergy and social workers for help. The two groups of most importance to the law are the lawyers and the voluntary organizations which engage in marriage guidance counseling.

The lawyer, as an officer of the court, is really part of the legal order. The legal profession is afforded one of the greatest opportunities to attempt to reconcile estranged spouses as a spouse seeking a legal remedy will normally consult a lawyer. However, opinions as to the role of a lawyer as a marriage counselor vary. Some writers point to the fact that ethically a lawyer is under a duty to act in the best interests of his client—including counseling a spouse and refusing to commence a divorce before an attempt at reconciliation through proper marriage counseling has been made.³⁵ In the United States,

³¹ Quintin Johnstone, *Divorce: The Place of the Legal System in Dealing with Marital-Discord Cases* (1952), 31 Ore. L. Rev. 299, at pp. 302 and 303.

³² Putting Asunder, paras. 25-26.

³³ Scarman Commission, para. 15.

³⁴ *Supra*, footnote 10.

³⁵ See Charlton S. Smith, *A Lawyers Guide to Marriage Counseling* (1964), 50 A.B.A.J. 719.

"...he has a professional obligation to recommend use of available conciliation services to divorce clients unless he honestly believes that the best interests of such clients would be prejudiced by reconciliation."³⁶

Many are of the opinion that marital counseling is the same as any other form of legal counseling and that a lawyer is not only capable but also obligated to attempt to counsel the spouses concerning their marriage difficulties.³⁷

However, the majority of the writers are of the opinion that most lawyers will not only not perform any such counseling service but are also incapable of doing so.³⁸ In the first place, many good lawyers will not handle marital discord cases. It has been estimated that about 8 per cent of the lawyers handle about 80 per cent of the divorce business in some cities.³⁹ The lawyers who do handle divorce cases are under a number of handicaps. In his article, *The Lawyer and the Family Court*,⁴⁰ Judge Alexander takes a realistic look at these handicaps and their effect on any attempt at counseling. For example, a lawyer is obligated to have a partisan approach and to concentrate on the facts, especially those relative to guilt. There is some question as to whether it is ethical to counsel both parties. Furthermore, a divorce means dollars.

"When it comes to cases on domestic quarrels the average lawyer's rule-of-thumb is quick processing, for after all, . . . he seldom gets paid for his services."⁴¹

And if he does effect a reconciliation, his chances of being paid for his services are even fewer. Most important of all, a lawyer is trained in the law and the law and counseling therapy are incompatible.⁴² This problem could be alleviated to a degree by more emphasis on social problems in the law schools and the organization of joint committees of lawyers and social workers.⁴³

There is general agreement that:

"The safest course would appear to be to probe into the family difficulties for enough to determine whether the case is hopeless, whether reference to a clinic or a private counsellor is indicated, or whether the situation is so trivial that sympathy and common sense may be sufficient to deal with the difficulty."⁴⁴

Thus, a lawyer can perform an important task in the conciliation process. He can attempt minor counseling himself but, most important, he can and should refer all clients requiring professional counseling to a marriage counselor. The problem is to get lawyers to perform this function. Many do not feel that this forms any part of a lawyer's work.

The need for marital counseling, which the law failed to satisfy, resulted in the growth of non-legal, voluntary organizations. The system evolved in each

³⁶ Paul Larsen, *Trends and Developments in Oregon Family Law: Court, Counsel and Conciliation* (1964), 43 Ore. L. Rev. 97, at p. 99. As authority for this statement, the author cites the American Bar association Ethics Committee, Opinion No. 82 (1932), published in Opinion of the Committee on Professional Ethics and Grievances 191 (1957). The Canadian Bar Association's Code of Legal Ethics does not contain a similar statement.

³⁷ *Supra*, footnote 5; Harry M. Fain, *The Role and Relationship of Psychiatry to Divorce Law and the Lawyer* (1966), 41 Calif. S.B.J. 46; Marie W. Kargman, *The Lawyer as Divorce Counsellor* (1960), 46 A.B.A.J. 399; Marie W. Kargman, *Is Divorce Reconciliation the Lawyer's Problem?* (1960), 46 Women L.J. 7 (where both negative and positive propositions are set forth).

³⁸ *Supra*, footnote 7; *supra*, footnote 13; Nester C. Kohut, *The Lawyer in Domestic Relations* (1959), 31 Man. B. News 7.

³⁹ *Supra*, footnote 12, at p. 609.

⁴⁰ *Ibid.*

⁴¹ Kohut, *op. cit.*, footnote 37, at p. 8.

⁴² *Supra*, footnote 13.

⁴³ See J. D. Cook and L. M. Cook, *The Lawyer and the Social Worker—Compatible Conflict* (1962-3), 12 Buffalo L. Rev. 410.

⁴⁴ Harper and Harper, *Lawyers and Marriage Counselling* (1961), 1 J. Family Law 73 (as reproduced in Ploscowe and Freed, *Cases and Materials in Family Law*, 1963, p. 631).

nation is unique in many respects. However, in the majority, the spouse must come to the agency voluntarily; counseling is provided whether litigation is contemplated or not; counseling is carried on on a long term basis if required by a professional marriage counselor; and the fee charged is based on the spouse's income.

The first problem is how to get a spouse involved in marital difficulties to come to the voluntary organization. The most common method is referrals from lawyers, judges, doctors and social workers. However, many people will not go to a voluntary organization even when referred there, especially those in the higher income level. This is evidenced by an experiment carried out by a family service bureau in San Bernardino, California. In one year a letter was written offering its counseling services to all the divorce litigants with children; one out of eight responded to their offer of counseling; and 15 per cent were reconciled.⁴⁵ It is submitted that the law has a role to play in the reconciliation of spouses even where voluntary organizations provide marriage counseling services.

However, even in nations where the law has entered the field of reconciliation, voluntary organizations are a necessary part of any counseling system. Such organizations only charge a fee based on the spouse's income, therefore, public financing is required. Furthermore there is a lack of professional marriage counselors to carry out this work. The law must not only encourage reconciliation, it must also establish and support other groups and organizations which will supplement its work.

All nations have, to varying degrees, utilized the law in an effort to prevent the breakdown of marriage. For discussion purposes, these nations are grouped according to which legal aspect has been mainly relied upon—substantive law or the institutions by which the law is administered.

III. SYSTEMS WHICH RELY MAINLY ON SUBSTANTIVE CONTROL

1. *Canada*

"Divorce in Canada is dealt with by the wrong courts, by the wrong judicial techniques and is granted on the wrong grounds."⁴⁶ Furthermore, the law does almost nothing to prevent the breakdown of marriage. That is, it does nothing more to effect this end than did the law under the Act of 1857 because that is still, in effect, the matrimonial law in Canada. Adultery remains the sole ground for divorce in seven provinces⁴⁷ and Quebec and Newfoundland have not progressed from the stage that the divorce law was in England in 1697 when only Parliament could dissolve a marriage. The institutions by which divorce law is administered are the provincial superior courts or divorce courts with the same judicial personnel as the superior courts.⁴⁸

One reason why Canada, more than any other nation, has failed to utilize the law to prevent the breakdown of marriage by encouraging reconciliation, is probably the division of jurisdiction between Parliament and the provincial legislatures over matters relating to matrimonial law under the British North America Act, 1867. Under section 91 (26), Parliament has jurisdiction over "Marriage and Divorce" but the provincial legislatures have jurisdiction over the "Solemnization of Marriage" (s. 92 (12)) and over "the administration of justice in the province, including the constitution, maintenance and organization

⁴⁵ *Supra*, footnote 13, at p. 191.

⁴⁶ Hearn, *op. cit.*, footnote 30, p. 1.

⁴⁷ Cruelty is a ground for divorce in Nova Scotia under a pre-Confederation statute—Stats. N.S. 1758, c. 17 as amended by Stats. N.S. 1761, c. 7.

⁴⁸ There appears to be some ambiguity as to whether the pre-Confederation divorce courts are superior courts under s. 96 of the B.N.A. Act. See O. Hearn, *op. cit.*, footnote 30, Note No. 3, p. 26.

of provincial courts, both of civil and criminal jurisdiction, and including procedure in civil matters in these courts" (s. 92 (14)). However, the authorities are in general agreement that Parliament has the jurisdiction, as regards matrimonial law, to enact not only substantive laws but also to prescribe judicial procedure and to confer jurisdiction on such courts as it deems best suited to handle matrimonial law.⁴⁹ Unfortunately, Parliament has never exercised this power to enact laws to prevent the breakdown of marriage by encouraging reconciliation.

A few provinces have taken the initiative in this field by establishing family courts. Although their jurisdiction is usually limited to juvenile delinquents and marital matters such as assault and maintenance, some family courts provide marriage counseling services. For example, when the Halifax County Family Court was recently established, there were no plans for it to undertake any marriage counseling activities. Within a few weeks the need for such a service was so obvious that an experienced social worker was employed largely to provide this service.⁵⁰ Under the present practice, if a woman goes to the Halifax County Family Court to file a complaint for maintenance, before laying the charge she will be interviewed by a social worker who will determine if there is any hope for a reconciliation of the couple. If there is, the social worker will request the complainant to defer laying the charge and to accept her counseling services. If the social worker's offer is accepted, she will attempt to counsel both spouses on a long term basis, if necessary.⁵¹ This is, at least, a start. However, there is only one social worker connected with the Court⁵²; only those spouses who wish to lay a charge in the Court are being reached⁵³; and, although it is generally recognized that a social worker connected with a court should only do short term counseling, long term counseling must be undertaken.

Experience in the United States has shown that the most successful family courts only undertake short term counseling and refer spouses requiring more counseling to a voluntary organization.⁵⁴ The personnel at the Halifax Family Court and the Halifax Family Service Bureau recognize that this is the most effective practice. Unfortunately, it cannot be followed in many areas due to the lack of voluntary organizations to refer spouses to.

As noted above, in a system such as that in Canada, the only positive medium provided to check the breakdown of a marriage while there is still something to salvage, is the voluntary organizations which have been established to provide marriage counseling. Ironically enough, this one last effort to save a marriage before it breaks down is not even being made in every province. For example, the only voluntary organization in Halifax (and the only organization outside of the Halifax County Family Court to provide marriage counseling) is the Halifax Family Service Bureau. It employs three social workers. These social

⁴⁹ See E. A. Driedger, Submission to the Special Committee of the Senate and the House of Commons on Divorce, October, 1966, p. 146 ff.; Power, *supra*, footnote 15, p. 1 ff.; O Hearn, *op. cit.*, footnote 30, pp. 2-6.

⁵⁰ Mr. Taylor, Co-ordinator of the Halifax County Family Court.

⁵¹ This is the present practice in the Halifax County Court as described by Mrs. Margaret Halozan who is the social worker employed by the Court. The Court has only been established for about five weeks and Mrs. Halozan has only been connected with it for two weeks. Consequently, the practice is not settled. The Juvenile and Family Court of Metropolitan Toronto also provides a marriage counseling service. However, the practice followed by that court, as described by Anna Bacon Stevenson in the Working Paper on the Juvenile and Family Court of Metropolitan Toronto, March 23, 1966, pp. 17-18 for the Family Law Project of the Ontario Law Reform Commission is ambiguous.

⁵² A second social worker is to be employed as soon as possible.

⁵³ This excludes spouses seeking a judicial separation or a divorce. However, both Mr. Taylor and Mrs. Halozan stated that a counseling service would be provided for spouses referred to the court by a lawyer, judge, social worker, etc. Mr. Taylor doubted that the same would be true for a spouse who comes in off the street and asks for help in her marital difficulties.

⁵⁴ See the discussion on the practice in the family courts that have been established in the United States, *infra*.

workers have to counsel their clients in dark and gloomy surroundings in an old building—which is certainly not the atmosphere conducive to looking on the brighter side. Nevertheless, the Bureau has more clients than it can handle.

One would think that it would naturally follow that the government, service organizations, charities and other similar groups would either provide the Bureau with more funds to enable it to extend its unique service to those requiring it or establish other similar voluntary organizations. Although this is the only logical solution, it is not what is happening. The Halifax Family Service Bureau is in such financial straits that there are doubts as to whether it will be able to continue to exist at all. Like the majority of other similar voluntary organizations, the Bureau charges its clients a fee based on the client's income. In Halifax, only 7 per cent are fee paying clients.⁵⁵ Consequently, the Bureau has to rely on outside groups for financial assistance. The same is true of the majority of other such voluntary organizations. However, the Halifax Family Service Bureau is only principally assisted financially by the United Appeal Fund and the city of Halifax. This financial assistance is not enough. Halifax is not unique. The same is true in many areas in Canada. The system of family courts with jurisdiction over matrimonial law is not the remedy for this situation. Every legal order which undertakes reconciliation relies on a system of voluntary organizations. The work of each must be coordinated in order to provide an effective deterrent to the breakdown of marriage.

The conclusion must be reached that the role played by the law in Canada is the negative one of the burial of some dead marriages. It has undertaken no positive role to prevent a marriage from breaking down irretrievably aside from the personal efforts of a few lawyers and judges and the establishment of family courts which provide a limited amount of marriage counseling in some of the provinces. Instead, it has set up obstacles to reconciliation through the substantive law on condonation, collusion and the grounds for divorce, the procedural law and the institutions by which this law is administered—all of which are based on the matrimonial offence theory. Furthermore, it is standing by and allowing the only safeguard against the unnecessary breakdown of many marriages, the voluntary organizations, to be buried along with the dead marriages.

No one could be accused of being overly dramatic for arriving at the conclusion that it is long past time for the Parliament of Canada to do something positive in this field. The Special Joint Committee of the Senate and the House of Commons on Divorce is a start. However, it is obvious from reading the minutes of its meetings that the only reform that is likely is an extension of the grounds for divorce that will put us in a similar position to that in England 30 years ago—a position that has been improved upon many times since. Positive reforms to prevent the breakdown of the marriage itself are not even being seriously considered by the Committee.

WHY? That is what is not understandable. A brief survey of the positive role played by the law in other nations reveals not only what can but also what should be accomplished by the law in Canada.

2. *England*

Although reforms have been made in the law under the Act of 1857 in order to remove some of the obstacles to a reconciliation, the prevailing attitude in England is that the law has no positive role to play in the reconciliation of spouses. The only role for the law is to support non-legal organizations whose function is to prevent the breakdown of marriage through the use of conciliation techniques. Thus, the British Parliament has been content to utilize indirect means to encourage reconciliation.

⁵⁵ Mr. MacDougall, Director of the Family Service Bureau of Halifax.

The grounds for divorce have been extended. However, with the exception of the ground of insanity, they are all based on the matrimonial offence theory. In *Putting Asunder* it was recommended that the breakdown of a marriage be the sole ground for a divorce.⁵⁶ This proposal was rejected by the Scarman commission but they agreed that it should be one ground for divorce.⁵⁷ The latter position would appear to be most acceptable in Britain and a bill has been presented to the House of Commons to allow a divorce to be granted if the parties have been separated for five years.⁵⁸ Such reforms do not appear to have been considered as a means of encouraging reconciliation by diminishing the hostility which the legal procedure promotes when a legal remedy is sought. In fact, as we shall see, the British have a complete aversion to change in their judicial system.

Two reforms in the law are directly aimed at encouraging reconciliation. First, no petition for divorce can be presented before the expiration of three years from the date of the marriage.⁵⁹ A judge may grant special leave to present a petition in the case of exceptional hardship but, in determining whether to give leave, he must have regard to the interests of any relevant child and to whether there is a reasonable probability of a reconciliation between the parties during the three year period.⁶⁰ This provision appears to be both useful and an acceptable one to the public. Its retention has been advocated by all the British committees on the divorce law⁶¹ and in the Report of the Scarman Commission it was concluded that:

“...it is a useful safeguard against irresponsible or trial marriages and a valuable external buttress to the stability of marriage during the difficult early years.”⁶²

Unfortunately, there are no available statistics on the number of applicants for special leave and the number refused.

A far more conscious attempt to encourage reconciliation was made by the British Parliament in the passage of the Matrimonial Causes Act 1963.⁶³ It provided that resumption of cohabitation only raises a rebuttable presumption of condonation. Furthermore, adultery and cruelty shall not be presumed to have been condoned nor shall a period of desertion be deemed ended by the resumption or continuation of cohabitation for a period of three months provided the cohabitation was resumed or continued with a view to effecting a reconciliation.⁶⁴ The Bill, as introduced into the House of Commons, was entitled the “Matrimonial Causes and Reconciliation Bill”. Although the words “and Reconciliation” were deleted from the title in its passage in the House of Lords, the following comments of Lord Shackleton make it clear that the British Parliament is becoming more and more aware of the need to prevent a breakdown of marriage rather than to prevent divorces. He said:

“...this is a reconciliation Bill. It was intended as a reconciliation Bill, and although it ‘mopped up’ certain other matters on the way, it has even been known popularly in the press as the ‘Kiss and make up Bill’...”

⁵⁶ *Putting Asunder*, paras. 25-26.

⁵⁷ Scarman Commission, para. 52 ff.

⁵⁸ H. C. Debates, October 25, 1966, p. 835.

⁵⁹ Matrimonial Causes Act 1965, Stats. U.K. 1965, c. 72, s. 2 (1).

⁶⁰ *Ibid.*, s. 2 (2).

⁶¹ See The Report of the Royal Commission on Marriage and Divorce, 1951-55, Cmnd. 9678, 1956, Ch. 5 [hereinafter referred to as the Morton Commission]; *Putting Asunder* para. 78; Scarman Commission, para. 19.

⁶² Scarman Commission, para. 19.

⁶³ Matrimonial Causes Act 1963, Stats. U.K. 1963, c. 45. In enacting this, Parliament implemented an extended version of a recommendation of the Morton Commission; see para. 149.

⁶⁴ Now embodied in the Matrimonial Causes Act 1965, Stats. U.K. 1965, c. 72. See O. M. Stone, *The Matrimonial Causes and Reconciliation Bill 1963* (1963), 3 J. Family Law 87; O. M. Stone, *Matrimonial Causes Act 1963* (1963), 26 Modern L. Rev. 675.

...there is one thing on which I am sure we agree, and that is the desirability of achieving reconciliation as a means of strengthening the institution of marriage...

...it may be the first of a line Bills which will be deliberately and consciously dealing with reconciliation."⁶⁵

The intention of Parliament is clear.

Unfortunately it was the first Act of this kind and it was poorly drafted. Consequently, the courts, in their interpretation of it, have gone a long way to defeat the intention of Parliament. It has been held that the provision does not apply if there is cohabitation in furtherance of a reconciliation that has been effected. It only applies if the cohabitation is continued or resumed "with a view to effecting a reconciliation".⁶⁶ Thus, while Parliament attempted to remedy the obstacle to reconciliation imposed by the doctrine of condonation, the courts have, in effect, replaced the obstacle by interpreting the provision so as to give the courts the power to say when a reconciliation has been effected and there has been a condonation. Spouses may avoid any attempts at a reconciliation for fear that the courts will say that a reconciliation has been effected. A commentator on these decisions points out that:

"Permanent reconciliations are not encouraged by making *any* reconciliation irrevocable. A wife with a vested right to divorce, who lacks confidence in her husband's capacity to settle down permanently, will surely shun a reconciliation she suspects will not last and knows will deprive her of her remedy. Nor will the atmosphere be propitious if such a spouse does resume cohabitation, but studiously refrains from uttering any words of forgiveness so as to be sure of retaining the benefit of the section. Thus, reconciliations are likely to be positively avoided, or sought in unfavourable circumstances. But any reconciliations that are effected, yet do not last, are to be decisive—in the name of preserving the *effect* of reconciliations!"⁶⁷

One wonders if the "reconciliation Bill" will, in fact, encourage reconciliation.

The British have continually insisted on retaining an illogical approach as regards reconciliation by the institutions by which the law is administered. On the one hand, they have accepted the fact that domestic matters require a different technique and that a special officer should be attached to the court who could use the techniques of investigation and conciliation. In 1936 a Departmental Committee⁶⁸ recommended the official use of probation officers for this purpose.

"The recommendations led to the Summary Procedure (Domestic Proceedings) Act, 1937. It was recognized that the ordinary rules for the hearing of cases are not entirely appropriate for matrimonial cases and the Act laid down certain special rules for the trial of domestic proceedings. With regard to conciliation in matrimonial cases, the effect of the Act was to give statutory recognition to the work carried out by probation officers (since their first appointment in 1907) as conciliators and in making inquiries in matrimonial cases. The Act authorised their employment to undertake conciliation and to make investigations into the means of the parties in any proceedings involving maintenance. This resulted in extended use of the probation officers in conciliation work. It is now the

⁶⁵ H. L. Debates July 17, 1963, pp. 422-23.

⁶⁶ See *Brown v. Brown*, [1964] 2 All E. R. 828 (Div. Ct.); *Herridge v. Herridge*, [1966] 1 All E. R. 93 (C.A.).

⁶⁷ Alexander A. M. Irvine, *The Concept of "Reconciliation" and the Matrimonial Causes Act 1963* (1966), 82 L.Q. Rev. 525, at p. 526.

⁶⁸ Departmental Committee on Social Services in Courts of Summary Jurisdiction, 1936, Cmnd. 5122.

general practice for magistrates to ask probation officers to try to bring husband and wife together again in all suitable cases coming before the court."⁶⁹

Of all the statutory services, the probation officers do the greatest amount of formal conciliation work. In 1963, 41,815 cases were brought to its attention and it was successful in over half of these cases. It is interesting to note that only one-seventh of these were referred by the courts while over one-half applied for the service themselves."⁷⁰

These figures prove that many people prefer to have an officer of the court settle their marital disputes. Again and again the British have ignored this fact and have insisted on limiting the use of conciliation techniques to the matrimonial cases of maintenance and judicial separation in the magistrates courts. Each commission has not only recommended that similar officers should not be attached to the High Court which has jurisdiction over divorce but, furthermore, that jurisdiction over divorce should not be transferred to a family court which would use the techniques of investigation and conciliation. The same Commission which gave the dissertation, quoted above, on how matrimonial cases are different and require different techniques went on to state what techniques were most effective in divorce cases as follows:

"The principle which has hitherto prevailed is clearly stated in the extract from the Report of the Gorell Commission:

'—the gravity of divorce and other matrimonial cases, affecting as they do the family life, the status of the parties, the interests of their children, and the interest of the state in the moral and social well-being of its citizens, makes it desirable to provide, if possible, that, even for the poorest persons, these cases should be determined by the superior courts of the country assisted by the attendance of the Bar, which we regard as of high importance in divorce and matrimonial cases, both in the interests of the parties and in the public interest.'

We accept this principle as sound, and as being just as applicable today as in 1912."⁷¹

But it had just finished stating that matrimonial cases required a different procedure! Nevertheless, it must have thought that a divorce was not a matrimonial case because it recommended that the High Court continue to retain sole jurisdiction over it—which it has.

Instead of involving the courts in any way in reconciliation in divorce cases, Parliament has taken measures to support the voluntary organizations involved in providing counseling services. Such organizations as the National Marriage Guidance Council, the Family Discussion Bureau and the Catholic Advisory Council are eligible for direct Exchequer grants and in the three year period from 1963 to 1966 these three alone received a total of £42,000.⁷² Local authorities are also encouraged to make grants to such organizations.⁷³ This has led to the organization of Citizens Advice Bureaus which will refer spouses to such organizations.⁷⁴

⁶⁹ Morton Commission, para. 1066. These provisions are now found in the Magistrates' Courts Act, 1952, Stats. U.K. 1952, c. 55, ss. 59, 60 and 62.

⁷⁰ Putting Asunder, Appendix B, paras. 5-6.

⁷¹ Morton Commission, paras. 749-50. See also Scarman Commission, paras. 29-32. Only Putting Asunder has recommended that the High Court use a more inquisitorial approach, see para. 84 ff.

⁷² Putting Asunder, Appendix B, para. 7.

⁷³ For further discussion on this scheme see Final Report of the Committee on Procedure in Matrimonial Causes, 1948, Cmnd. 7024; Report of the Departmental Committee on Grants for the Development of Marriage Guidance, 1948, Cmnd. 7566; Morton Commission, part IV; Putting Asunder, Appendix E; Scarman Commission, paras. 29-32.

⁷⁴ See Anna Bacon Stevenson, Working Paper on Citizens Advice Bureau, Family Law Project, Ontario Law Reform Commission, June 2, 1966.

The decision to leave the jurisdiction over divorce with the High Court meant that a divorce remained too expensive for many people. This fact coupled with the increased emphasis on advice rather than litigation prompted Parliament to give effect to the part of Legal Aid and Advice Act, 1949 which provides a scheme of free legal advice to the indigent, including those in matrimonial difficulties.⁷⁵ It is ironical that this further reforms has served to prove that the British scheme for preventing the breakdown of marriage through reconciliation is not an effective one. During 1963, 30,303 legal aid certificates were filed by petitioners in matrimonial cases and £3,484 million was paid to their solicitors.⁷⁶ The government soon realized that it is not economically feasible to leave jurisdiction over divorce solely with the High Court and it has announced its intention to give jurisdiction over uncontested divorce cases to the county courts. It expects to save £400,000 annually by doing so.⁷⁷

Financial difficulties are finally making the British aware that jurisdiction over divorce should be transferred to another court. Money may be the source of all evil but it may be the thing that will make the British transfer the jurisdiction over divorce to the magistrates' courts or even a family court! They had previously rejected any such suggestion on three grounds. The first is that to have a lower court handle divorce would not be dignified. In fact there is a

“—very strong and wide body of opinion throughout the country that, if the most solemn contract of a person's life is to be ended, it should be done with great solemnity and that, it is far too grave a matter to be sandwiched between the collection of a couple of bad debts.”⁷⁸

The first error is to consider a marriage as a mere contract. Furthermore, a family court is not open to the criticism that a divorce action would be “sandwiched between the collection of a couple of bad debts”; that is one of its greatest attributes. Any criticism on the attitude that dignity must be maintained at all costs is almost too obvious for comment. It is submitted that any government which places a higher value on dignity than on the welfare of society is subject to the maxim ‘pride cometh before a fall’. Moreover, it would appear to be much more ‘dignified’ to rationally discuss a problem with a caseworker than to hurl accusations in an open court. The other reason for the rejection of transferring jurisdiction to a court which would use the techniques of investigation and conciliation is the expense.⁷⁹ The British are now finding out that it may be more expensive not to. The experience in the United States has been that the state actually saves money due to the decrease in welfare payments, etc.⁸⁰ The third reason is that the Commissions all claim to have examined similar systems in other countries and they have all proved unsuccessful.⁸¹ One must doubt these statements for two reasons. In the first place, they appear to be under the impression that all court systems require compulsory conciliation proceedings; and, in the second place, many systems have proved to be successful.

In summary, the English law has been reformed in an effort to prevent the breakdown of marriage by encouraging a reconciliation but it leaves a great deal to be desired. In the words of the Scarman Commission,

⁷⁵ Legal Aid and Advice Act, 1949, Stats. U.K. 1949, c. 51, s. 7. See L. Neville Brown, *English Family Law since the Royal Commission (1961-62)*, 14 U. Toronto L. J. 52, at p. 65.

⁷⁶ H. C. Debates, March 23, 1964, p. 2 (Written Answers).

⁷⁷ H. C. Debates, December 15, 1965, pp. 1261-63.

⁷⁸ H. C. Debates, March 16, 1964, p. 984. See also Morton Commission, para. 749.

⁷⁹ Scarman Commission, para. 61 ff.

⁸⁰ See *supra*, footnote 10, at p. 352; Roger Alton Pfaff, *The Role of the Social Worker in the Judicial Process* (1964), 50 A.B.A.J. 565, at p. 567.

⁸¹ See Morton Commission, para. 340; Putting Asunder, Appendix E, para. 3; Scarman Commission para. 30.

"It does not do all it might to aid the stability of marriage, but tends rather to discourage attempts at reconciliation. It does not enable all dead marriages to be buried, and those that it buries are not always interred with the minimum of distress and humiliation. It does not achieve the maximum possible fairness to all concerned, for a spouse may be branded as guilty in law though not blameworthy in fact. The insistence on guilt and innocence tends to embitter relationships, with particularly damaging results to the children rather than to promote future harmony. Its principles are widely regarded as hypocritical. In particular, it has failed to solve four major problems with which a reformed divorce law must grapple."⁸²

The first major problem with which it has failed to grapple is that of reconciliation!

3. Australia

In the reform of its matrimonial law, Australia has made a more deliberate attempt to prevent the breakdown of marriage by encouraging a reconciliation than has any other Commonwealth nation. Its law is of particular interest to Canada as it is also a federal state. In the Matrimonial Causes Act, 1959⁸³ the federal government enacted a comprehensive law dealing with matrimonial causes which the Parliament of Canada would do well to consider.

Part II of the Act provides that marriage guidance organizations which have been approved by the Attorney-General may receive financial assistance.⁸⁴ The Attorney-General is given an almost complete discretionary power on whether to approve an agency or not and he may grant his approval subject to conditions. Thus, an organization must meet certain standards as regards facilities, staff and service by consultants. An approved organization must furnish the Attorney-General with its financial reports.⁸⁵ A marriage guidance counselor must take an oath of secrecy and is neither competent nor compellable to disclose before a court any communication made to him in his capacity as a marriage guidance counsellor.⁸⁶ In 1966, there were 16 approved marriage guidance organizations receiving substantial sums of money.⁸⁷ One effect of these provisions has been to enhance the status of the organizations and to increase the interest of the community in the services they offer. More people are seeking help when they encounter marital difficulty, and they are seeking it earlier.⁸⁸

The Matrimonial Causes Rules contain provisions to ensure that all spouses are aware of such organizations before they enter into litigation. Rule 15 requires a solicitor involved in a matrimonial action to advise his client of the provisions in the Act relating to reconciliation and the existence of marriage guidance organizations and to discuss the possibility of a reconciliation. The solicitor must endorse a certificate to this effect on the petition when made. In the year ending June, 1964, 7 per cent of all cases dealt with by approved marriage guidance organizations were referred by lawyers.⁸⁹

⁸² Scarman Commission, para. 28.

⁸³ Matrimonial Causes Act, 1959, No. 104. See Appendix A for the exact wording of the provisions discussed.

⁸⁴ *Ibid.*, ss. 9-10.

⁸⁵ *Ibid.*, s. 11.

⁸⁶ *Ibid.*, s. 12.

⁸⁷ D. M. Selby, *The Development of the Divorce Law in Australia* (1966), 29 *Modern LRev.* 473, at p. 486; L. V. Harvey, *Marriage Counseling and the Federal Divorce Law in Australia* (1964), 26 *J. Marriage and Family* 83. In the latter article, it is reported at page 84 that there were 19 approved agencies in 1963 and that they received £52,000.

⁸⁸ Harvey, *op. cit.*, *ibid.*, at p. 85.

⁸⁹ Scarman Commission, para. 31. It recommended that this requirement be adopted in England.

In case all these attempts fail, the law has placed one further safeguard in the court itself. Under Part III a judge is under a duty, in appropriate cases, to consider the possibility of a reconciliation. If he thinks that there is a possibility of a reconciliation, he may adjourn the proceedings and attempt to reconcile the parties himself or appoint someone else to do so. Admissions made by the parties are privileged and, after 14 days, either party may request that the proceedings be continued.⁹⁰ However, by the time that the legal procedure required in matrimonial cases has been fulfilled and the parties are before a court, there is little hope for a reconciliation. An Australian judge has concluded that:

"Experience suggests that the provisions of Part III remain in the realm of pious hope. By the time a matrimonial cause reaches a hearing the parties are too far apart, one of them, at least, is too anxious for a final determination of the suit and too much bitterness has been engendered to allow any reasonable prospect of reconciliation. It is only on the rarest occasions that attempts are made, pursuant to Part III, to effect a reconciliation after the hearing has begun, and it is doubtful if any such attempt has been successful."⁹¹

As noted above, many spouses will not go to voluntary organizations, even when referred by their lawyers. It also appears that there is little likelihood of a reconciliation once parties are before the court. This is the reason why many jurisdictions in the United States have placed social workers in the courts themselves—to insure that all prospective litigants have been counseled before going into court. These systems will be discussed later.

Other reforms have also been made in the substantive and procedural law of Australia. The grounds for divorce have been extended to include 5 year's separation with no reasonable likelihood of a reconciliation.⁹² The English provision as regards condonation has also been adopted.⁹³ Similarly, section 43 provides that no legal proceedings for a divorce or judicial separation may be commenced within three years of the date of marriage. In an attempt to slow down the tempo of a divorce and to make a petitioner face the consequences of a divorce, section 68 and rule 198 require all applications for ancillary relief to be instituted with the same petition as that by which the proceedings for principal relief are instituted. Thus, the parties are encouraged to get together to settle ancillary matters and to 'think things over'. So that the law on collusion would not deter parties from doing so, in section 40 collusion is made an absolute bar only if it is "collusion with intent to cause a perversion of justice".

It is still too soon to know what effect these provisions, which did not come into effect until 1961, have had on the breakdown of marriage in Australia. As regards the divorce rate, the most that can be said is,

"On the one hand, the reconciliation and slowing-down provisions have not led to a significant fall in the divorce rate. On the other hand, the availability of more liberal grounds for divorce has not led to a spectacular rise in that rate."⁹⁴

The Act has been criticized for giving federal jurisdiction to the existing state superior courts instead of establishing family courts with jurisdiction over matrimonial law.⁹⁵

The matrimonial law of New Zealand has been reformed in similar aspects but to a lesser extent. The grounds for divorce include separation and there is a

⁹⁰ *Supra*, footnote 83, ss. 14-16. The Scarman Commission also recommended that a judge in Britain should be empowered to adjourn the proceedings, see para. 32.

⁹¹ Selby, *op. cit.*, footnote 87, at p. 487.

⁹² *Supra*, footnote 83, s. 28.

⁹³ Matrimonial Causes Amendment Act, 1965 which adds s. 41A to the Act of 1959.

⁹⁴ Selby, *op. cit.*, footnote 87, at pp. 488-89.

⁹⁵ See *supra*, footnote 10.

provision regarding condonation which is similar to the English one except that the trial period is limited to two months.⁹⁶ It has also adopted the Australian provision which places a duty on the judge to consider the possibility of a reconciliation. If there is a possibility, the judge may adjourn the proceedings and nominate a conciliator.⁹⁷

The reforms discussed above evidence an attempt by the legislatures in Britain, Australia and New Zealand to prevent the breakdown of marriage by encouraging a reconciliation. The criticism of the matrimonial law in these countries has been that,

“...in attempting to maintain stability of marriage in the past, the State has tried to stop the water boiling by holding the lid of the kettle on instead of removing the heat which caused the water to boil in the first place. The emphasis has been on effect rather than the cause.”⁹⁸

Only Canada could still be accused of not making any effort to “remove the heat”. However, all the Commonwealth nations have insisted that jurisdiction over divorce should remain in the superior courts and have rejected the establishment of family courts. Australia and New Zealand have empowered the judge to adjourn the proceedings and attempt a reconciliation. Similar provisions are found in the matrimonial law of Belgium,⁹⁹ Hungary,¹⁰⁰ Germany,¹⁰¹ and Japan.¹⁰² One must turn to the United States to examine the established methods of treating the “cause” by having marriage counselors attached to the court.

IV. SYSTEMS WHICH RELY MAINLY ON THE INSTITUTIONS BY WHICH THE LAW IS ADMINISTERED

Conciliation proceedings are not the invention of any jurisdiction in the United States. When matrimonial law was the exclusive jurisdiction of religious organizations, the laws of some required the spouses to attempt to conciliate before a formal separation could be obtained. The practice was adopted by civil authorities. As early as 1886, the French law made it mandatory that parties seeking a divorce must first be interviewed by a judge who was under a duty to attempt to reconcile them. The practice was first adopted in the United States by Michigan in 1919.^{102A}

Many jurisdictions in the United States have, since 1919, focused their attention on the problem of the breakdown of marriage and the importance of conciliation practices as a means to prevent it. Realizing that many spouses will not go to voluntary organizations but will go straight to a lawyer or a court for a remedy, they have placed the conciliation services where the spouse must go if he desires a legal remedy—in the court. This basic premise is expressed by Judge Alexander as follows:

“Somehow we wonder if trying to keep social work out of the court isn’t like trying to keep the Salvation Army out of the Bowery or keeping Traveller’s Aid out of all passenger stations.

Why not take the needed service where the people are who need it?...The merchant with goods to sell doesn’t hide them on a side street,

⁹⁶ Matrimonial Proceedings Act, 1963, N.Z.S. 1963, No. 71, ss. 26, 27 and 29 (4) (5).

⁹⁷ *Ibid.*, s. 4. For further discussion see Sir Wilfred Sim, *The Matrimonial Proceedings Act 1963*, 1065 N.C.L. Rev. 102; B. D. Inglis, 43 Can Bar Rev. 519, at p. 521.

⁹⁸ *Supra*, footnote 10, at p. 349.

⁹⁹ See Putting Asunder, Appendix B, paras. 2-6.

¹⁰⁰ *Ibid.*, paras. 24-29.

¹⁰¹ Anna Bacon Stevenson, Working Paper on The Legal Means to Promote the Stability of the Family, Family Law Project, Ontario Law Reform Commission, June 3, 1966, pp. 2-5.

¹⁰² *Ibid.*, pp. 7-9.

^{102A} Roger Alton Pfaff, *The Conciliation Court of Los Angeles County* (4th ed.), 1964, p. 1.

but pays high rent to display them on the busy thoroughfare. . . . And the State which honestly wants to pay more than lip service to the stability of family life will not sit silently in the side street and wait for the victims of marital malaise to find their way to the clinic; it will place its help where it will not be by-passed or side-stepped, to wit, right in the middle of that harrowing highway down which these unhappy victims are lugging their sick and moribund marriages for legal interment by the divorce court. Right in that court—where the people are—that is where the state will set up and offer its ameliorative services. Perhaps some day the people will learn to turn first to churches and private agencies for help. Until that happy day arrives it looks as if the State were stuck with this obligation, and presented with this opportunity.”¹⁰³

This practice has been accomplished by the use of two different approaches—family courts and conciliation courts.

The approach which encounters the least amount of initial opposition is the establishment of a family court with jurisdiction over matrimonial law. Family courts are an attempt to remedy the defects of the existing system of courts in three ways: (1) by granting jurisdiction over all matters concerning the family to one court in recognition of the fact that the family is a unit and that such matters as juvenile delinquency and divorce are merely separate manifestations of the same problem of family disintegration; (2) by providing specialized facilities such as investigators and full time judges with the requisite capabilities and (3) by attempting conciliation procedures before the spouses enter a courtroom.¹⁰⁴ In his article, *Conciliation and Counseling in the Courts in Family Law Cases*, Henry H. Foster, Jr. states that,

“The ideal family court, which has not as yet been established in this country, would have comprehensive and integrated jurisdiction over all or most family problems, employ a professional staff of psychiatrists, psychologists, case workers, marriage counselors, and probation officers, and be committed to the philosophy that its function was to act in the best interests of the family and society.”¹⁰⁵

The procedure in a family court is more informal than in a superior court and the technique of investigation is used in preference to contentious litigation. The techniques of conciliation vary and will be discussed under the various systems which employ them.

A second approach is the establishment of conciliation courts as departments of the superior courts. Conciliation proceedings are made the subject-matter of a separate department. Social workers are employed to provide counseling services to spouses involved in marital difficulties. The theory is that the authority of the court is effective in encouraging reconciliation and all proceedings are conducted under the direction of a presiding judge.¹⁰⁶

Whichever approach is implemented, counseling at the court as an adjunct to judicial procedure is said to be performed with four guiding purposes:

“1. To secure and provide to bench and attorneys professionally screened information and opinion regarding the history and the current state of interpersonal relationships in the families of clients, especially the

¹⁰³ *Supra*, footnote 10, at p. 349.

¹⁰⁴ See Charles L. Chute, *Divorce and the Family Court* (1953), 18 *Law & Contemp. Prob.* 49; Maxine B. Virtue *What is a Family Court?* (1958), 37 *Mich. S.B.J.* 14; *supra*, footnote 10, at p. 349.

¹⁰⁵ *Supra*, footnote 8, at p. 354.

¹⁰⁶ See Pfaff, *op. cit.*, footnote 80; Frank B. Blum, *Conciliation Courts: Instrument of Peace* (1966), 41 *Calif. S.B.J.* 33.

conditions and prospects for the children. [Some jurisdictions have made communications to a marriage counselor privileged.]

2. To provide, for those clients who want it, a limited amount of guidance and support, and in some cases re-educative psychotherapeutic counseling, throughout the period of pending litigation.

3. To soften and counteract the destructive impact of adversary procedure (assuming that divorce law reform is many years in the future), but not to supplant or modify legal processes.

4. To refer those clients who need and want more counseling to community family service agencies or mental hygiene clinics, or to pastors or private practitioners."¹⁰⁷

Of course, the ultimate objective in performing these tasks is to effect a permanent reconciliation. The Subcommittee of the American Bar Association has summarized the practices and procedures which have been found to best effect this objective.¹⁰⁸ Some of the practices and procedures utilized in a few representative systems follows.

1. *Family Court System—Ohio*

The most celebrated example of a family court in the United States is the Family Court in Toledo, Ohio which is presided over by the leading exponent of family courts, Judge Paul W. Alexander. In 1937 Judge Alexander was appointed to the Court of Common Pleas, Division of Domestic Relations. He and his colleagues often resorted to the records kept by probation officers on juvenile delinquents when a divorce action involving the same family was tried. Then, in 1938, Ohio passed a law authorizing the courts, in all divorce cases, to investigate the character, family relations and past conduct of the parties. In 1951, Ohio enacted a law making the investigation mandatory in all divorce cases involving a child under 14 years of age. Neither statute expressly authorized marriage counseling in the court but the practice of counseling prospective litigants evolved from the investigative functions and soon marriage guidance counselors were employed by the court. In the words of Judge Alexander:

"This department lifted bodily the main features of the philosophy, methodology and procedure of the juvenile court and adapted them as far as possible to matrimonial actions."¹⁰⁹

These services are not limited to families involved in litigation and the court, whose staff approaches 150, has become a center for family problems.

In divorce proceedings six weeks must elapse between the filing of a divorce suit and the date on which it may be heard. Immediately after filing, a copy of the divorce petition must be sent to the court administrator. The parties are invited to apply for free marriage counseling. The court employs five trained marriage guidance counselors to perform this service. Whether the parties apply or not an investigation of the family is made. They are admissible at the trial provided they are made available to the parties and their lawyers five days in advance.

In 1965,¹¹⁰ the Court had 2,804 pending divorce actions and 2,466 cases active in counseling. In divorce suits, 868 accepted the offer of counseling and 744 refused it. Of the counseling cases closed in 1965, apparent reconciliation was achieved in 464 families and assistance was given in settling matters for the

¹⁰⁷ *Supra*, footnote 13, at p. 193.

¹⁰⁸ See Appendix B.

¹⁰⁹ *Supra*, footnote 12, at p. 606.

¹¹⁰ The 1965 Annual Report of the Family Court of Lucas County, esp. pp. 12-15.

future in other cases. It is interesting to note that pre-litigation counseling has decreased over the last few years. This is due in large part to the requirements of the 1951 statute. In 1965, 63 per cent of the petitions filed were assigned to counseling and/or investigations as required by the statute. One would think that the court would engage in only short term counseling due to the volume of cases with which it has to deal but the Toledo Family Court is one of the few courts which provides long term counseling. A more practical gauge of the success of this Family Court in preventing the breakdown of marriages, is that in 1965 approximately 45 per cent of the divorce and annulment petitions were abandoned as compared with a national average of 30 per cent.¹¹¹ Seventeen other counties in Ohio have established similar family courts.

2. Family Court for Divorce—Wisconsin

The second oldest family court in the United States is the Milwaukee County Family Court. Its jurisdiction is limited to husband-wife disputes. The Act of 1933 which created this court also provided for the appointment of Family Court Commissioners and the creation of a Family Conciliation Department. There are now five full time Family Court Commissioners and eleven marriage guidance counselors in the Family Conciliation Department. The 1960 Wisconsin Family Code applied the Milwaukee family court concept to the entire state.¹¹²

In any action affecting marriage, the plaintiff and defendant must serve a copy of the pleadings upon the family court commissioner of the county in which the action is begun within 20 days after making service on the other party or before filing such pleading in a court.¹¹³ If a complaint is required, it can only contain the statutory ground upon which the action is commenced and not specific details of the alleged misconduct. This is an attempt to prevent the proceedings from becoming contentious before conciliation proceedings are invoked.

The family court commissioner "shall cause an effort to be made to effect a reconciliation between the parties". Where a family court conciliation department has been established, the spouses will be sent for an interview with a marriage guidance counselor employed by the department. The legal purpose of a "screening" interview is to determine whether or not a reconciliation is possible.¹¹⁴ If there is any long term counseling required, the parties will be referred to a voluntary organization. An action for judicial separation or divorce cannot be commenced until the court has received the report of a family court commissioner or until the expiration of 60 days from the service of the summons. Communications to the counselor are privileged. A judgment of divorce does not effect the marital status of the parties for one year. The statute also requires the family court conciliation department to provide its services to spouses who ask for it or are referred to it even if legal proceedings have not been initiated.

Before 1960, counseling was provided on a voluntary basis in Milwaukee County. From 1956 to 1960, 39 per cent of the petitions were abandoned by the parties. Since the enactment of the Wisconsin Family Code in 1960 and its provisions making conciliation proceedings mandatory, 48 per cent are abandoned. This provides some evidence that compulsory conciliation is useful. Many spouses who show the greatest hostility prove to be the ones who resolve their

¹¹¹ *Supra*, footnote 12, at p. 608; 1965 Annual Report, Table No. 6, p. 14. For a further discussion on the Toledo Family Court see *supra*, footnote 8, at pp. 355-58; Chute, *op. cit.*, footnote 104, at pp. 53-54; *supra*, footnote 10, at pp. 349-50.

¹¹² See *supra*, footnote 8, at pp. 358-60.

¹¹³ See Appendix C., Wis. Stat. Ann, 1963, c. 247.

¹¹⁴ See M. A. Fenner and S. J. Goldberg, Family Conciliation Department (1964), 25 Gavel 13. 26057-7½

difficulties. Many who would avoid asking for help on the ground that it would be an acknowledgement of weakness may welcome the compulsory conciliation proceedings.¹¹⁵

3. *Friend of the Court—Michigan*

Since 1948 the circuit court of Wayne County was assisted by "Friends of the Court" to whom support payments must be made directly. In addition, since the 1950's the Court has been assisted by marriage counselors. In the investigation by a "Friend of the Court", the parties are informed of the marriage counseling services available. If such services are requested, this is reported to the Court which may refer the couple to its own counseling service or to a voluntary organization. In 1961 and 1962 over one-half of the couples who requested counseling and two-thirds of the couples who completed counseling were reconciled.¹¹⁶

The efforts in Wayne County proved to be so successful that in 1964 the State passed the Circuit Court Marriage Counseling Act.¹¹⁷ It is a "local option" statute which permits the board of supervisors of a circuit court in Michigan to create the office of the circuit court marriage counseling service as an arm of the circuit court provided they will appropriate it the necessary funds. Counseling is provided on a purely voluntary basis. If a spouse applies to the marriage counseling service, she will be interviewed by the director. The service is designed to supplement the purely legalistic approach of the courts and not to substitute for the voluntary organizations. Thus, a director must inform the spouse of the services offered by the voluntary organizations and refer the spouse to some of them unless the spouse specifically requests the services of the court agency. If she does,

"The circuit court marriage counseling service shall determine the sources and causes of friction and disputes between spouses, or between a spouse or spouses and other family members, and assist such persons in the resolution of the same. The director and professional staff shall provide skilled family counseling with, and advice to members of, families having marital problems with a view to restoring family harmony. Reconciliation of marital disputes are to be sought by the director and staff. They shall seek to preserve and encourage the continuation of marriages and shall give substantial consideration to the continuation of marriages as promoting the welfare of children."^{117A}

Moreover, the complaint is sufficient if it only contains statutory language. The main criticism of this type of system is that it only reaches a fraction of the spouses involved in matrimonial litigation.

4. *Conciliation Court—Los Angeles*

In 1939 California passed an Act enabling the counties to establish conciliation courts as departments of the superior courts.¹¹⁸ Los Angeles was the only one to formally establish such a court and, even then, it was not until Judge Burke was assigned to the court in 1954 that it developed into the effective agency which it is at the present time. The Code of Civil Procedure states that the purposes of a conciliation court are:

"... to protect the rights of children and to promote the public welfare by preserving, promoting, and protecting family life and the institution of matrimony, and to provide means for the reconciliation of spouses and the amicable settlement of domestic and family controversies."¹¹⁹

¹¹⁵ *Supra*, footnote 8, at pp. 359-60.

¹¹⁶ *Ibid.*, at pp. 367-69.

¹¹⁷ Mich. Comp. Laws 1964, 551-331 — 344—See Appendix D.

^{117A} *Ibid.*, 551-338.

¹¹⁸ Sections 1730-72 of the California Code of Civil Procedure.

¹¹⁹ *Ibid.*, s. 1730.

The Los Angeles Conciliation Court employs 11 experienced counselors to effect this purpose.

The procedure followed is rather unique. A spouse who is involved in a marital difficulty that may lead or has led to divorce proceedings may obtain a preliminary interview with a counselor. She may then file a petition in the Conciliation Court. If no divorce complaint has been filed, divorce proceedings cannot be commenced until 30 days after the Conciliation Court hearing. If a divorce complaint has already been filed, the filing of a petition in the Conciliation Court has no effect upon it. Upon filing a petition, a hearing date is set with a marriage counselor and the other spouse is invited to appear at such time. It is at this stage that the court authority is first invoked. The notice ends with the sentence:

"We trust that you will keep this appointment voluntarily and avoid the necessity of requiring the Court to issue a subpoena."¹²⁰

If the spouse fails to attend the conference, the counselor will inform the judge whether or not a subpoena should be issued.

When the time set for the hearing arrives, the counselor will first talk briefly to both spouses and explain the purposes of the Conciliation Court. He will then interview each spouse separately in order to determine the source of conflict. Then both spouses will be interviewed together in an effort to make them aware of where the difficulties are. If the parties refuse to consider a reconciliation, the matter is terminated. If they express a desire to attempt a reconciliation, a Husband-Wife Agreement, a 25 page document which covers practically every aspect of married life and common marital problems,¹²¹ will be explained to them. The Agreement will be tailored to meet the difficulties which a particular couple are faced with. The Agreement is signed by the couple who are then congratulated by a judge who also signs the Agreement, thereby making it a court order. The authority of the Court is also used at this stage. If a provision of the Agreement is wilfully violated, the Court may institute contempt proceedings. In fact, this is rarely done. The Court may also issue a citation to require the attendance of a third party, such as a paramour or in-laws, who may also be interviewed. The Agreement may be terminated upon the application of one of the parties.

About 75 per cent of the Court's intake results from referrals made by lawyers and judges.¹²² A pamphlet entitled "A Personal Message to Parents" is sent to all couples who file suit for divorce who have a child under 14 years of age; approximately 25 per cent of the applicants come to the Court as a result of their having read it. The Court provides only short-term marriage counselling which is usually limited to three interviews. For about one-third of the clients this is sufficient; the other two-thirds are referred to voluntary organizations. In 1963, 4,395 formal petitions were filed and, in those cases where both parties participated in a formal conference, 64.2 per cent resulted in a reconciliation.¹²³ In 1965, the reconciliation rate was 58.9 per cent.¹²⁴ Moreover, the court statistics show that in the past 8 years, three out of four reconciled couples are still living together. These high rates of success may be misleading if it is not mentioned that only a fraction of the couples involved in the 35,989 divorces in Los Angeles County in 1965 are ever referred to the Conciliation Court. In the words of Judge Pfaff,

¹²⁰ Meyer Elkin, *Short Contract Counseling in a Conciliation Court* (1962), 43 *Social Case-worker*.

¹²¹ See Pfaff *supra*, footnote 102A. The Husband-Wife Agreement form is set out in Section 2 of the brochure.

¹²² *Supra*, footnote 120.

¹²³ *Supra*, footnote 102A, Preface by Judge Pfaff.

¹²⁴ *Supra*, footnote 8, p. 366.

"Our statistics, therefore, are the product of a noncompulsory, partially selective, reconciliation-prone group of couples."¹²⁵

However, a number of other jurisdictions have adopted or are in the process of adopting a conciliation court system.¹²⁶

5. Conciliation Bureau—New York

Prior to 1966 the only provision for reconciliation in New York was found in the New York Family Court Act which provides that a spouse involved in marital dispute could petition for conciliation proceedings.¹²⁷ However, most counties refused to make use of these procedures.¹²⁸ When the divorce law came under review, one of the important elements was the need to provide conciliation services in order to prevent the breakdown of marriage. The Wilson-Sutton Bill provided for a conciliation service modelled from the Los Angeles Conciliation Court. On the other hand, the Leader's Bill provided conciliation services similar to those under the Wisconsin Family Code. The latter was adopted in the Divorce Reform Law of 1966.¹²⁹ The legal profession was opposed to this procedure and criticized it. They felt that the provision would

"...foist a cumbersome, expensive, unnecessary and unworkable system of conciliation procedures upon the court, litigants and public; indeed, ...some aspects of the conciliation procedure...will destroy rather than foster reconciliation."¹³⁰

They felt that the cost of the procedure would increase the cost of a divorce to such an extent that spouses, especially those among the lower income groups, would not resort to the New York courts at all. Thus, submissions for changes were made.¹³¹

An analysis of the conciliation provisions in the New York Divorce Reform Law of 1966 would only be helpful to know what pitfalls to avoid¹³² as they have been repealed by an Act passed in February, 1967.¹³³ The amended Act provides for the establishment of a conciliation bureau in each of the four Judicial Districts of the State of New York. The head of a bureau is a commissioner and both he and the staff, including marriage counselors, are to be appointed by the Presiding Judge of the Appellate Division of each Department.

Conciliation services are provided only after the commencement of an action for a judicial separation, annulment or divorce. Within 10 days after the commencement of an action, the plaintiff must file a notice thereof with the clerk of

¹²⁵ *Supra*, footnote 123.

¹²⁶ For further discussion on the conciliation court system see Blum, *op. cit.*, footnote 196; Louis H. Burke, *With this Ring*, MacGraw-Hall, 1958; Louis H. Burke, *An Instrument of Peace: The Conciliation Court in Los Angeles* (1956), 42 A.B.A.J. 621; Louis H. Burke, *The Conciliation Court of Los Angeles County* (1959), 40 Chi. B. Rec. 255; Louis H. Burke, *The Role of Conciliation in Divorce Cases* (1961), 1 J. Family Law 209; James Crenshaw, *A Blueprint for Marriage: Psychology and the Law Join Forces* (1962), 48 A.B.A.J. 125; Colin Howard, *Matrimonial Conciliation* (1962), 36 Aust. L.J. 148.

¹²⁷ New York Family Court Act, Art. 9.

¹²⁸ Note—Divorce Reform in New York (1966), 4 Harv. J. on Legislation 149, *op. cit.*, footnote, 37, at p. 157.

¹²⁹ Divorce Reform Law of 1966, c. 254, Art. 215.

¹³⁰ Special Committee on Matrimonial Law (1966), 23 N.Y. Co. Law Assoc. Bar Bull. 122, at p. 123.

¹³¹ See Report on Recommended Amendments to the Divorce Reform Law of 1966, Special Committee on Matrimonial Law of N.Y. Bar Assoc., pp. 1-7; Report of the Special Committee on Matrimonial Law, N.Y. Co. Law Assoc., pp. 27-40; Memorandum on Recommended Changes in the "New Divorce Law", Feb. 6, 1967.

¹³² For discussion see H. H. Foster, Jr. and D. J. Freed, *An Analysis of the Divorce Reform Law, 1966*, p. 21 ff. (a brochure to be used in conjunction with *Law and the Family*, New York).

¹³³ See Appendix E. Neither the date of enactment nor the chapter number was sent but it appears that the Act has been passed and the provisions concerning conciliation practices and procedures will come into effect on September 1, 1967.

the conciliation bureau. It appears that the initial decision as to whether conciliation proceedings are necessary is left to the parties or the judge. If the parties express no desire to have counseling and the judge is of the opinion that they would be futile, the judge may issue a certificate of no necessity and proceed with the prosecution of the action. On the other hand, if conciliation proceedings would, in the opinion of the judge, be beneficial, he may issue an order referring the action to the commissioner of the bureau who will assign it to a counselor. The initial interview is a "screening" one and is compulsory. The Act only requires this one interview but provides that the rules of the Appellate Division may require more conferences. However, the Act requires the counselor to submit a final report to the commissioner within 30 days after the matter has been assigned to him unless that time is extended by the court. If a reconciliation has been effected, the action is dismissed. If not, the commissioner will issue a certificate of termination of conciliation proceedings and the action will proceed. All conciliation records are confidential.

The new Act has made the conciliation proceedings less expensive, more flexible and a great deal less time consuming. It appears that it has also repealed the laws on connivance and condonation.¹³⁴ As many of these provisions do not come into effect until September 1, 1967, it is impossible to determine their effectiveness.

The schemes surveyed above are only illustrative of the many schemes for encouraging a reconciliation by incorporating conciliation services into the system of courts that have been established in each. A more comprehensive analysis of schemes established in the United States is made by Professor Henry H. Foster, Jr., who is Chairman of the Research Committee, Family Law Section, American Bar Association, in his article, *Conciliation and Counseling in the Courts in Family Law Cases*.¹³⁵

In summary, conciliation services in the courts have the general advantage of providing marriage counseling in cases where the parties are either unaware of the availability of such help or are not motivated to seek such aid. Recognizing this, a few family courts in Canada have begun to provide counseling services. However, they have no jurisdiction over matrimonial law and the majority of spouses seeking a judicial separation or a divorce will never come in contact with them. Judge O'Hearn has recommended that the family courts be given jurisdiction over matrimonial law in order that the techniques of investigation and conciliation may be employed in marital disputes.¹³⁶ The writer agrees that this would be beneficial but doubts whether such a reform would be acceptable in Canada at the present time.

V. CONCLUSION AND SUGGESTED REFORMS

The purpose of the above survey has been to examine in what aspects the matrimonial law of Canada may be reformed in order to prevent the breakdown of marriage by encouraging spouses involved in marital discord to attempt a reconciliation. Naturally, the reforms vary in their chances of being adopted. For example, the implementation of the breakdown of marriage theory as the sole ground for a divorce would, in the writer's opinion, most nearly achieve the ideal substantive law in this area. However, to enact such a reform at the present time would be undesirable because our society does not provide the requisite framework for a law based on the breakdown of marriage theory to operate effectively.

¹³⁴ *Ibid.*, s. 2.

¹³⁵ *Supra*, footnote 8.

¹³⁶ O. Hearn, *op. cit.*, footnote 30.

In Canada, the divorce law is based on the matrimonial offence theory in all aspects—substantive, procedural and the institutions by which the law is administered. To reform only the substantive law on the grounds for divorce by implementing the breakdown of marriage theory would result in the remaining divorce law, which is based on the matrimonial offence theory, being not only in conflict with the very basis for divorce, but also ineffective in administering it. Consequently, the entire divorce law would have to be reformed. The adversary process, which admittedly is inadequate under the present law, would be even more ineffectual under a law based on the breakdown of marriage theory. The only way to ensure that there has been a complete breakdown of the marriage would be to employ the inquisitorial procedure. The adoption of this procedure would also permit marriage counselors to determine if there is a possibility of a reconciliation. This would be the ideal. However, the inquisitorial procedure is not suited to the institutions by which the law is administered—the superior courts. One suggested alternative is to provide that a separation of one year is *prima facie* evidence of a breakdown of a marriage. It is submitted that the adoption of such a provision would not even be an improvement on the present position. In effect, it would allow all marriages to be dissolved after one year's separation because a judge has no facilities to determine whether there has been, in fact, a breakdown of the marriage. Moreover, it does not do anything to encourage a reconciliation. Thus, if the inquisitorial procedure is the only process that can be employed effectively with the breakdown of marriage theory and the inquisitorial procedure is ill-suited to the superior courts, jurisdiction over divorce would have to be transferred to family courts. Before this could be achieved, family courts would have to be established in a number of provinces and those that are in existence would have to be reformed. Furthermore, to provide the caseworkers and marriage guidance counselors that would be required by the family courts, the government would have to adopt a program to promote the training of persons in these professions. Financial assistance would also have to be given to the voluntary organizations that provide marriage counseling services in order that they could perform long term counseling.

The above discussion is only illustrative of the many items that must be taken into consideration before any reform in the divorce law may be enacted. First and foremost, it must be determined whether there are the requisite attitudes and machinery to carry out a proposed reform or whether these could be obtained at the present time. Canada can and should learn from the experience of other nations. With this experience as a basis, it is possible to determine which reforms are both desirable and possible in Canada at the present time. The suggested reforms listed below are an attempt to do just this.

(1) Implementation of the breakdown of marriage theory as, at least, one ground for divorce. It is submitted that a separation of from three to five years would provide such evidence of a breakdown that the issue could be determined under the adversary procedure.

(2) A provision whereby no action for a judicial separation or a divorce could be commenced within a two year period from the date of the marriage. A two year period should act as a sufficient deterrent against resort to the courts whenever marital discord occurs in the early years of a marriage.

(3) A provision allowing a three month trial period of cohabitation within which period nothing done by the spouses would be treated as condonation.

(4) An undertaking by the federal government to provide financial assistance to those voluntary organizations which provide marriage counseling services. Since it is unlikely that counseling will be provided in the superior courts, the government is under an obligation to ensure that, at least, it is provided by the voluntary organizations. Governmental assistance and the resultant publicity may also improve the status of the voluntary organizations so that more people will make use of these services, as was the case in Australia.

(5) A provision requiring a lawyer to discuss the possibility of a reconciliation with a client engaged in a matrimonial dispute; to advise them of the organizations providing marriage counseling services; and to file a certificate with every petition in a matrimonial case that he has done so. In the writer's opinion, lawyers will not perform this task unless they are either educated in the sociological aspects of family or are directed to do so. For example, only three per cent of the referrals to the Halifax Family Service Bureau are made by lawyers.¹³⁷

(6) A provision empowering a judge to adjourn the proceedings if there is a possibility of a reconciliation. This may be used only rarely but the mere fact that it forms a part of the law will impress upon the judge that he should look for evidence that the dispute may be conciliable.

(7) The inclusion of a general statement, in any statute relating to marriage and divorce, that it is the policy of the nation to preserve a marriage whenever possible. The social conditions in Canada differ from one area to the next to such an extent that any attempt to enact detailed conciliation proceedings that must be followed in every matrimonial case would probably be futile. Consequently, the most practical position for Parliament to take at the present time would appear to be to make a general policy statement and then to encourage localities to devise a reconciliation scheme that is most suitable to its conditions. For example, in Oklahoma City a family clinic which consisted of a panel of representatives from the legal, medical, clerical and business professions was established to hold confidential conferences with couples involved in matrimonial disputes.^{137A} A similar scheme could be employed by any community.

This list merely represents some of the more obvious reforms that should be made in the matrimonial law of Canada at the present time.

It is hoped that the citizens of Canada will be allowed to benefit from the experience of other nations. To enable them to do so, Parliament must attempt to provide the preventative medicine to treat the cause rather than merely the effect of marital discord. The suggested reforms are only a few of the media that have been utilized successfully by other nations in their endeavours to prevent the breakdown of marriage by encouraging a reconciliation of spouses. They are the reforms which, in the writer's opinion, may be implemented by Parliament at the present time. The Special Joint Committee of the Senate and the House of Commons is under an obligation to consider and recommend that such reforms be enacted as an integral part of a reformed divorce law as they are in other nations. A mere change in the substantive law on the grounds for divorce will do very little to alleviate the social problem caused by the breakdown of marriage. The history of the experience in other nations is proof that no matter what the grounds for divorce are, if a couple want a divorce they will obtain one.

"It is a horrible waste of human knowledge and resources to fail to make the effort to help troubled families. Since we have the skills and techniques to offer constructive assistance, we cannot afford to continue to maintain a wholly destructive procedure which unrealistically purports to reward virtue and to punish sin while ignoring the actual consequences to the family and society."¹³⁸

The Parliament of Canada must plead guilty to the commission of such destruction. Only Parliament can exculpate itself.

¹³⁷ 1966 statistics of the Family Service Bureau of Halifax.

^{137A} See Bliss Kelly, *Preventing Divorces; Oklahoma City's Family Clinic* (1957), 45 A.B.A.J. 566; Anna Bacon Stevenson, *Memorandum on the Oklahoma City Family Law Clinic*, Family Law Project, Ontario Law Reform Commission, December 8, 1965.

¹³⁸ *Supra*, footnote 8, at p. 381.

APPENDIX A

Matrimonial Causes Act, 1959 (Aust.), No. 104

PART II—MARRIAGE GUIDANCE ORGANIZATIONS

Grants to Approved Marriage Guidance Organizations

9. The Attorney-General may, from time to time, out of moneys appropriated by the Parliament for the purposes of this Part, grant to an approved marriage guidance organization, upon such conditions as he thinks fit, such sums by way of financial assistance as he determines.

Approval of Marriage Guidance Organizations

10.—(1) A voluntary organization may apply to the Attorney-General for approval under this Part as a marriage guidance organization.

(2) The Attorney-General may approve any such organization as a marriage guidance organization where he is satisfied that—

- (a) the organization is willing and able to engage in marriage guidance; and
- (b) marriage guidance constitutes or will constitute the whole or the major part of its activities.

(3) The approval of an organization under this section may be given subject to such conditions as the Attorney-General determines.

(4) Where the approval of an organization has been given subject to conditions, the Attorney-General may, from time to time, revoke or vary all or any of those conditions or add further conditions.

(5) The Attorney-General may, at any time, revoke the approval of an organization where—

- (a) the organization has not complied with a condition of the approval of the organization;
- (b) the organization has not furnished, in accordance with the next succeeding section, a statement or report that the organization was required by that section to furnish; or
- (c) the Attorney-General is satisfied that the organization is not adequately carrying out marriage guidance.

(6) Notice of the approval of an organization under this section, and of the revocation of such an approval, shall be published in the *Gazette*.

Reports, &c., by Approved Marriage Guidance Organizations

11.—(1) An approved marriage guidance organization shall, not later than the thirty-first day of December in each year, furnish to the Attorney-General, in respect of the year that ended on the last preceding thirtieth day of June—

- (a) an audited financial statement of the receipts and expenditure of the organization, in which receipts and expenditure in respect of its marriage guidance activities are shown separately from other receipts and expenditure; and
- (b) a report on its marriage guidance activities, including information as to the number of cases dealt with by the organization during the year.

(2) Where the Attorney-General is satisfied that it would be impracticable for an organization to comply with the requirements of the last preceding

sub-section or that the application of those requirements to an organization would be unduly onerous, he may, by writing under his hand, exempt the organization, wholly or in part, from those requirements.

Admissions, &c., Made to Marriage Guidance Counsellors

12.—(1) A marriage guidance counsellor is not competent or compellable, in any proceedings before a court (whether exercising federal jurisdiction or not) or before a person authorized by a law of the Commonwealth or of a State or Territory of the Commonwealth, or by consent of parties, to hear, receive and examine evidence, to disclose any admission or communication made to him in his capacity as a marriage guidance counsellor.

(2) A marriage guidance counsellor shall, before entering upon the performance of his functions as such a counsellor, make and subscribe, before a person authorized under the law of the Commonwealth or of a State or a Territory to which this Act applies to take affidavits, an oath or affirmation of secrecy in accordance with the form in the First Schedule to this Act.

Application of Part to Certain Branches and Sections of Voluntary Organizations

13. A reference in this Part to a voluntary organization shall be deemed to include a reference to a branch or section of such an organization, being a branch or section identified by a distinct name and in respect of which separate financial accounts are maintained.

PART III.—RECONCILIATION

Reconciliation

14.—(1) It is the duty of the court in which a matrimonial cause has been instituted to give consideration, from time to time, to the possibility of a reconciliation of the parties to the marriage (unless the proceedings are of such a nature that it would not be appropriate to do so), and if at any time it appears the Judge constituting the court, either from the nature of the case, the evidence in the proceedings or the attitude of those parties, or of either of them, or of counsel, that there is a reasonable possibility of such a reconciliation, the Judge may do all or any of the following:

- (a) adjourn the proceedings to afford those parties an opportunity of becoming reconciled or to enable anything to be done in accordance with either of the next two succeeding paragraphs;
- (b) with the consent of those parties, interview them in chambers, with or without counsel, as the Judge thinks proper, with a view to effecting a reconciliation;
- (c) nominate—
 - (i) an approved marriage guidance organization or a person with experience or training in marriage conciliation; or
 - (ii) in special circumstances, some other suitable person, to endeavour, with the consent of those parties, to effect a reconciliation.

(2) If, not less than fourteen days after an adjournment under the last preceding sub-section has taken place, either of the parties to the marriage requests that the hearing be proceeded with, the Judge shall resume the hearing, or arrangements shall be made for the proceedings to be dealt with by another Judge, as the case requires, as soon as practicable.

Hearing when Reconciliation Fails

15. Where a Judge has acted as conciliator under paragraph (b) of sub-section (1) of the last preceding section but the attempt to effect a reconciliation has failed, the Judge shall not, except at the request of the parties to the proceedings, continue to hear the proceedings, or determine the proceedings, and, in the absence of such a request, arrangements shall be made for the proceedings to be dealt with by another Judge.

Statements, & c., Made in Course of Attempt to Effect Reconciliation

16. Evidence of anything said or of any admission made in the course of an endeavour to effect a reconciliation under this Part is not admissible in any court (whether exercising federal jurisdiction or not) or in proceedings before a person authorized by a law of the Commonwealth or of a State or Territory of the Commonwealth, or by consent of parties, to hear, receive and examine evidence.

Marriage Conciliator to Take Oath of Secrecy

17. A marriage conciliator shall, before entering upon the performance of his functions as such a conciliator, make and subscribe, before a person authorized under the law of the Commonwealth or of a State or a Territory to which this Act applies to take affidavits, an oath or affirmation of secrecy in accordance with the form in the First Schedule to this Act.

APPENDIX B

Report of the Subcommittee on Conciliation, June, 1961, Family Law Section, American Bar Association

(as reproduced in Ploscowe and Freed, Cases and Materials on Family Law, 1963, pp. 647-49).

II. THE RIGHT APPROACH

The following practices and procedures have been found by courts of conciliation to (1) encourage divorce-bound couples to solicit such services; (2) effect reconciliations; and (3) insure their permanence.

1. Reconciliation proceedings should be under the jurisdiction, direct control, and supervision of an interested and dedicated Judge. It should be emphasized that the Judge appointed to preside over the conciliation court is not just a mere figurehead or supervisor. He should completely control and direct the operations of the court, announcing and enforcing policies, issuing directives, holding staff conferences, signing orders, determining questions of procedure, and in required cases holding hearings where the plenary powers of the courts are required.

Whenever the marriage counseling phase of the process has been delegated to a nonjudicial social agency with only limited or indirect control by the court, the program too often has gotten out of hand and aroused widespread criticism on the part of lawyers, litigants and the general public.

2. Marriage counseling should not be performed by the Judge but by trained and experienced counselors under his direct supervision. The preferred qualifications for appointment as a court counselor should be a Master's Degree in the Behavioral Sciences and at least five years of counseling experience.

3. Although the Judge should rarely participate in any of the counseling procedures, he should see each reconciled couple, after they have been reconciled by the counselor, to congratulate them and to impress upon them the importance

of the step they have taken and that the success of their marriage is of considerable concern to the court and the community. Good public relations, as thus practices, brings the court close to the people and breeds public respect.

4. The procedure to invoke the court's services should be simple and direct.

In Los Angeles County couples can obtain a preliminary conference with a Senior Marriage Counselor without even filing a petition. In other words, a divorce-bound couple can literally walk into the court "off the street," so to speak. This often leads to the filing of a petition.

Provisions should be provided for a petition to be filed *prior to* or *after* a divorce action has been instituted. Even where parties are in court for a pendente lite order, the Judge or Commissioner refer the couple for an exploratory conference with a counselor without the necessity of filing a petition.

All of these simplified procedures, making the court readily accessible, encourages utilization of its services, promotes understanding, and results eventually in reconciliations.

The pressing marital problem of most couples, like a ruptured appendix, needs immediate attention. Too often undue delay results in the death of the marriage through further estrangement and divorce.

As heretofore emphasized, complicated procedures, in other words involved red tape, is not appealing to lawyers, whereas simplified procedures meet with approval.

5. No filing fees should be required, and no charges made for marital counseling, thus removing a further impediment to soliciting the court's assistance.

6. The court files, including the counselors' written reports, and all written and oral communications to the counselors, should be made confidential by law. Counselors maintain strict neutrality, thus providing a uniqueness and integrity to the proceedings which immediately instills confidence and trust in the parties.

7. Attorney's fees should be awarded upon proper application. This has created a favorable impression among members of the bar. There is no reason why an attorney, who devotes office conference time to the parties and prepares the petition and supporting affidavit, should not be compensated.

The policy of waiving an attorney's fee where the parties reconcile is misplaced generosity and poor psychology.

8. The Court should not engage in continued marriage counseling to a couple in need of it. This, as we view it, is beyond its scope and purpose. A cooperative and complementary relationship with the various family service agencies in the community, which take those cases needing additional counseling on a priority basis and for a nominal fee, promotes harmony between the Court and these agencies.

The Court can also be of considerable assistance to the family service agencies. Possessing no power to force a recalcitrant spouse into counseling, the social worker can suggest to the party desiring a reconciliation the filing of a petition in the Conciliation Court, which can require the appearance of the other party.

9. Considerable controversy exists in the field of reconciliation procedures as to the desirability or propriety of the use of any coercion whatever in the conciliation process. Many social workers find the use of coercion repugnant or ineffective. However, experience has proved that what might be termed "gentle judicial coercion" plays an important role in effecting reconciliations.

An embittered husband or wife, due to pride, may feel that the initiating of overtures toward "talking things over" means a loss of face, although secretly desirous of mending the marriage.

A court notice requesting an appearance of a spouse (and if refused of ordering the appearance) is a means of saving face, and in many instances is effective in saving the marriage.

10. Every effort should be made to limit the number of cases referred to counselors. No counselor should be assigned more than three or four cases per day. Marriage counseling cannot be conducted on a conveyor-belt system, and a fatigued and harassed counselor, who is forced to squeeze in five or six cases in his conference calendar each day cannot possibly hope to be effective.

11. Widespread community publicity concerning the existence of the Conciliation Court, its procedures and functions, are of great importance. In 1959, pursuant to Rule 6 of the Superior Court, in Los Angeles County each divorce complaint is required to contain the names and addresses of both parties, thus enabling the court to mail out a little pamphlet, "A Personal Message to Parents," to each party which points out the problems of divorce and facts concerning the Conciliation Court.

Utilization of this pamphlet has resulted in a 25 per cent increase in filings in the Conciliation Court.

12. A unique feature of the Los Angeles Conciliation Court is the utilisation of a written Husband-Wife Agreement, which when signed by the reconciled parties, the Counselor, and the Judge, becomes a formal court order, punishable by contempt.

The concept of reducing marital relationships to a written agreement may seem to some marriage counselors unwise and productive of little

APPENDIX C

Actions Affecting Marriage, Wis. Stat. Ann. 1963, c. 247

247.07 Causes for divorce or legal separation. A divorce, or a legal separation for a limited time or forever, may be adjudged for any of the following causes:

(1) For adultery.

(2) When either party, subsequent to the marriage, has been sentenced and committed to imprisonment for 3 years or more; and no pardon granted after a divorce for that cause shall restore the party sentenced to his or her conjugal rights.

(3) For the wilful desertion of one party by the other for the term of one year next preceding the commencement of the action.

(4) When the treatment of one spouse by the other has been cruel and inhuman, whether practiced by using personal violence or by any other means.

(5) When the husband or wife shall have been a habitual drunkard for the space of one year immediately preceding the commencement of the action.

(6) Whenever the husband and wife have voluntarily lived entirely separate for 5 years next preceding the commencement of the action, at the suit of either party.

(7) Whenever the husband and wife, pursuant to a judgment of legal separation, have lived entirely apart for 5 years next preceding the commencement of the action a divorce may be granted at the suit of either party.

(8) On the complaint of the wife, when the husband, being of sufficient ability, refuses or neglects to adequately provide for her.

247.08 Actions to compel support by husband. If any husband fails or refuses, without lawful or reasonable excuse, to provide for the support and

maintenance of his wife or minor children, the wife may commence an action in any court having jurisdiction in actions for divorce, to compel such husband to provide for the support and maintenance of herself and such minor children as he may be legally required to support. The court, in such action, may determine and adjudge the amount such husband should reasonably contribute to the support and maintenance of said wife or children and how such sum should be paid. The amount so ordered to be paid may be changed or modified by the court upon notice of motion or order to show cause by either the husband or wife upon sufficient evidence. Such determination may be enforced by contempt proceedings. In any such support action there shall be no filing fee, suit tax or other costs taxable to the wife, but after the action has been commenced and filed the court in its discretion may direct that any part of or all fees and costs incurred shall be paid by the husband.

History: 1963 c. 426

Where an ambiguous summons was issued, which the court construed as intending to start an action for support, and which was served in Texas and by publication, the court acquired no jurisdiction and had no power to amend the summons to refer to an action for legal separation. *Rosenthal v. Rosenthal*, 12 W (2d) 190, 107 NW (2d) 204.

247.081 Reconciliation effort; waiting period for trial of actions for divorce or legal separation. (1) In every action for divorce or legal separation the family court commissioner shall cause an effort to be made to effect a reconciliation between the parties, either by his own efforts and the efforts of a family court conciliation department if it exists or by referring such parties to and having them voluntarily consult the director of the town, village, city or county public welfare department, a county mental health or guidance clinic, a clergyman, or a child welfare agency licensed under ss. 48.66 to 48.73, or by other suitable means. The person so consulted shall not disclose any statement made to him by either party without the consent of such party.

(2) No action for divorce or legal separation, contested or uncontested, shall be brought to trial until the happening of whichever of the following events occurs first:

(a) A report by the family court commissioner to the court showing the result of a reconciliation effort. This report shall not be filed with or become part of the record of the case. Facts therein shall not be considered at trial unless separately alleged and established by competent evidence; or

(b) The expiration of 60 days after the filing of the complaint when the summons is served within the state under s. 247.061; or

(c) The expiration of 120 days after the filing of the complaint when the summons is served personally without the state under s. 247.062 (1); or

(d) The expiration of 120 days after the first day of publication when the summons is served by mailing and publication under s. 247.062 (2); or

(e) An order by the court, after consideration of the recommendation of the family court commissioner, directing immediate trial of such action for the protection of the health or safety of either of the parties or any child of the marriage or for other emergency reasons.

History: 1961 c. 505

247.085 Contents of complaint. (1) In any action affecting marriage the complaint shall specifically allege:

(a) The name and age of the parties, the date and place of marriage and the facts relating to the residence of both parties.

(b) The name and date of birth of the minor and dependent children of the parties.

(c) Whether or not an action for obtaining a divorce or legal separation by either of the parties was or has been at any time commenced or is pending in any other court or before any judge thereof, in this state or elsewhere, and if either party was previously divorced, the name of the court in which the divorce was granted and the time and place the divorce was granted.

(2) In an action for divorce or legal separation, the complaint or counterclaim shall state the statutory ground for the action without detailing allegations which constitute the basis for such ground. The facts relied upon as the statutory ground for the action shall be furnished in a verified bill of particulars within 10 days after a written demand therefor. Such demand shall be deemed waived unless made within 20 days after the service of the complaint or counterclaim. If the bill of particulars is not furnished within such time the complaint or counterclaim may be dismissed upon motion of any party or of the family court commissioner. Where a bill of particulars has been demanded, the time to answer or reply shall begin to run from the time such bill of particulars is furnished. The court, upon motion therefor, may order either party to furnish such verified bill of particulars, or if the bill of particulars furnished is insufficient, may require additional facts to be supplied so as to advise the other party of the facts relied upon as the statutory ground for the action.

(3) In an action for divorce or legal separation, adultery shall be pleaded as a separate cause of action and not as an instance of cruel and inhuman treatment.

(4) When the demand of the complaint or counterclaim is for a legal separation, such pleading shall allege the specific reason why such remedy is demanded. If such reason is conscientious objection to divorce, it shall be so stated.

247.09 Power of court in divorce and legal separation actions. When the court grants a judgment in any action for divorce or legal separation the kind of judgment granted shall be in accordance with the demand of the complaint or counterclaim to the prevailing party, except that a divorce or legal separation may be adjudged regardless of such demand wherever the court finds that it would not be in the best interests of the parties or the children of the marriage to grant such demand and also states the reason therefor. Conscientious objection to divorce shall be deemed a sufficient reason for granting a judgment of legal separation if such objection is confirmed at the trial by the party making such demand.

247.10 Collusion; procurement; connivance; condonation; stipulation; property rights. No judgment of annulment, divorce or legal separation shall be granted if it appears to the satisfaction of the court that the suit has been brought by collusion, and no judgment of divorce or legal separation shall be granted if it likewise appears that the plaintiff has procured or connived at the offense charged, or has condoned it, or has been guilty of adultery not condoned; but the parties may, subject to the approval of the court, stipulate for a division of estate, for alimony, or for the support of children, in case a divorce or legal separation is granted or a marriage annulled.

247.101 Recrimination, when applicable; comparative rectitude. The equitable doctrine that the court shall not aid a wrongdoer is applicable to any party suing for divorce under s. 247.07 (1) to (5), except that where it appears from the evidence that both parties have been guilty of misconduct sufficiently grave to constitute cause for divorce, the court may in its discretion grant a judgment of legal separation to the party whose equities on the whole are found to be superior.

247.11. Accomplice to be interpleaded. Any one charged as a particeps criminis shall be made a party, upon his or her application, to the court subject to such terms and conditions as the court may prescribe.

247.12 Trial procedure. In actions affecting marriage, all hearings and trials to determine whether judgment shall be granted shall be before the court except as otherwise required by s. 270.07 (1). The testimony shall be taken by the reporter and shall be written out and filed with the record if so ordered by the court.

247.125 Order for appearance of litigants. Unless nonresidence in the state is shown by competent evidence, or unless the court shall for other good cause otherwise order, both parties in actions affecting marriage shall be required to appear upon the trial. An order of the court or family court commissioner to that effect shall accordingly be procured by the party seeking the judgment, and shall be served upon the opposite party personally before the trial.

History: 1961 c. 505.

247.13 Family court commissioner (formerly divorce counsel); appointment; powers; oaths, assistants; Menominee county. (1) In each county of the state, except in counties having a population of 500,000 or more, the circuit and county judges in and for such county shall, by order filed in the office of the clerk of the circuit court on or before the first Monday of July of each year, appoint some reputable attorney of recognized ability and standing at the bar family court commissioner (formerly divorce counsel) for such county. Such commissioner shall, by virtue of his office and to the extent required for the performance of his duties, have the powers of a court commissioner. Such court commissioner shall be in addition to the maximum number of court commissioners permitted by s. 252.14. The office of the family court commissioner, or any assistant commissioner, may be placed under a county civil service system by resolution of the county board. Before entering upon the discharge of his duties such commissioner shall take and file the official oath. The person so appointed shall continue to act until his successor is appointed and qualified, except that in the event of his disability or extended absence said judges may appoint another reputable attorney to act as temporary family court commissioner, and except that the county board may provide that one or more assistant family court commissioners shall be appointed by the judges of the county. Such assistants shall have the same qualifications as the commissioner and shall take and file the official oath.

(2) In counties having a population of 500,000 or more, there is created in the classified civil service the office of family court commissioner and such additional assistant family court commissioners as the county board shall determine and authorize, who shall be appointed from the membership of the bar residing in such county by the judges of the circuit court of such county, pursuant to ss. 63.01 to 63.17. Before entering upon the performance of their duties, such family court commissioner and assistant family court commissioners shall take and file the official oath. Such family court commissioner and assistant family court commissioners shall, by virtue of their respective positions and to the extent required for the performance of their duties, each have the powers of a court commissioner. They shall receive such salary as may be fixed by the county board, shall perform their duties under the direction of the circuit judges of such county and shall be furnished with quarters and necessary office furnishings and supplies. The county board shall provide them their necessary stenographic and investigational service. When the family court commissioner is unavailable, any assistant family court commissioner shall perform all the duties and have all the powers of the family court commissioner as directed by the latter or by a judge of the family court branch. In addition to the duties of such family court commissioner as defined in ch. 247, he shall perform such other duties as the circuit court of such county may direct.

(3) Menominee county shall be attached to Shawano county to the extent of office and functions of the family court commissioner, and the duly appointed family court commissioner of Shawano county shall serve as family court com-

missioner for Menominee county with all the duties, rights and power of the family court commissioner therein; and no family court commissioner shall be appointed in Menominee county, the county not being organized for that purpose.

(4) In any county one or more retired or former judges may be appointed as temporary or temporary assistant family court commissioners by a majority of the judges presiding over a family court branch in such county. Such temporary or temporary assistant family court commissioners shall be compensated by the county for their services at the rate of \$25 per half day, but shall be considered officers of the court or courts appointing them and not employees of the county.

History: 1961 c. 495, 505.

247.14 Service on and appearance by family court commissioner. In any action affecting marriage, the plaintiff and defendant shall, either within 20 days after making service on the opposite party of any pleading or before filing such pleading in court, serve a copy of the same upon the family court commissioner of the county in which the action is begun, whether such action is contested or not. No judgment in any such action shall be granted unless this section is complied with, or unless the parties have responded to the family court commissioner's inquiries under s. 247.15 except when otherwise ordered by the court. Such commissioner shall appear in the action when the defendant fails to answer or withdraws his answer before trial; also, when the defendant interposes a counterclaim and the plaintiff thereupon neither supports his complaint nor opposes the counterclaim by proof; and when otherwise requested by the court.

History: 1961 c. 505.

247.145 Enlargement of time. After the expiration of the period specified by the statute, the court may in its discretion, upon petition and without notice, extend the time within which service shall be made upon the family court commissioner. Extension of time under any other circumstances will be governed by s. 269.45.

History: 1961 c. 505.

257.15 Default actions; family court commissioner to appear. (1) No judgment in any action in which the family court commissioner is required by s. 247.081 (1) or 247.14 to appear or otherwise discharge his duties under this chapter shall be granted until such commissioner in behalf of the public has made a fair and impartial investigation of the case and fully advised the court as to the merits of the case and the rights and interests of the parties and the public and the efforts made toward reconciliation of the parties or the reason such reconciliation attempt has not been made. Such family court commissioner is empowered to cause witnesses to be subpoenaed on behalf of the state when in his judgment their testimony is necessary to fully advise the court as to the merits of the case and as to the rights and interests of the parties and of the public. The fees of such witnesses shall be paid out of the county treasury as fees of witnesses in criminal cases are paid. The court may order that such fees be repaid to the county by one of the parties to the action, in which case it shall be the duty of the family court commissioner to enforce such order.

(2) Except as otherwise provided under ss. 247.081 (1) and 247.14, in any county having a population of 500,000 or more in any action for divorce or for the annulment of a marriage in which the defendant has appeared and has interposed an answer or an answer and counterclaim and in which one of the parties thereto informs the court that he or she will not oppose the prayer of the other party and if the court is satisfied from the facts submitted that the withdrawal of such opposition is done in good faith and without collusion, the

court may then order such action to be tried as a default without the presence or appearance of the family court commissioner.

Because the instant action for annulment was tried as a default matter in the circuit court, and no order was entered pursuant to (2) dispensing with the presence of the family court commissioner, the supreme court deems that it was proper for such family court commissioner to appear in behalf of the public in this appeal and to file a brief herein. *Masters v. Masters*, 13 W. (2d) 332, 108 NW (2d) 674.

247.16 Family court commissioner or law partner; when interested; procedure. Neither such family court commissioner nor his partner or partners shall appear in any action affecting marriage in any court held in the county in which he shall be acting, except when authorized to appear by s. 247.14. In case he or his partner shall be in any way interested in such action, the presiding judge shall appoint some reputable attorney to perform the services enjoined upon such family court commissioner and such attorney, so appointed, shall take and file the oath and receive the compensation provided by law.

247.17 Family court commissioner; salary. In counties having a population of less than 500,000, the county board shall by resolution provide an annual salary for the family court commissioner whether he is on a full or part-time basis and may furnish an office with necessary office furnishings, supplies and stenographic services and may also by resolution prescribe such other duties to be performed by him not in conflict with his duties as family court commissioner.

247.37 Effect of judgment of divorce. (1) (a) When a judgment of divorce is granted it shall not be effective so far as it effects the marital status of the parties until the expiration of one year from the date of the granting of such judgment, except that it shall immediately bar the parties from cohabitation together and except that it may be reviewed on appeal during said period. . .

APPENDIX D

Circuit Court Marriage Counseling Act, Mich. Comp. Laws 551.331—.344(1964)

[No. 155.]

AN ACT to establish circuit court marriage counseling services and to provide for their powers and duties; to provide for the employment of directors of marriage counseling and for the selection of their staffs; to provide for the confidentiality of communications between marriage counselors and clients; and to provide for payment of fees by persons counseled.

The People of the State of Michigan enact:

551.331 Circuit court marriage counseling service act; short title. [M.S.A. 25.123(1)]

Sec. 1. This act shall be known and may be cited as the "Circuit court marriage counseling service act".

551.332 Marriage counseling service; establishment, multiple-county circuits, participation. [M.S.A. 25.123(2)]

Sec. 2. For the purpose of preserving and improving marriages through competent counseling, the office of the circuit court marriage counseling service may be created as provided in this section. Upon recommendation of the circuit court, the board of supervisors may create a marriage counseling service and may appropriate such sums of money as may be deemed sufficient by the board

of supervisors for the establishment and maintenance of such service. In a judicial circuit including more than a single county, each county board of supervisors may participate in the service and make a suitable appropriation therefor or may refrain from participation and from making any appropriation. In multiple-county circuits, the various boards of supervisors may agree as to participation and as to the appropriations which each will make and such agreement may provide for varying rather than equal contributions from each county.

551.333 Same; merger with other services, separate maintenance. [M.S.A. 25.123(3)]

Sec. 3. The circuit court marriage counseling service is an arm of the circuit court. It may be merged with other court services or maintained separately, as the court may determine.

551.334 Same; director and staff, compensation. [M.S.A. 25.123(4)]

Sec. 4. The chief executive officer of the circuit court marriage counseling service is the director. He shall be qualified by training and experience to render family counseling service and shall be employed by, and serve at the pleasure of, the circuit court. The compensation of the director and his staff shall be fixed by the board of supervisors and paid from the general fund of the county. In multiple-county circuits the compensation shall be fixed by the participating boards of supervisors and paid from the general funds of the participating counties as the same may be appropriated.

551.335 Same; professional and clerical staff, merit system. [M.S.A. 25.123 (5)]

Sec. 5. The director of any circuit court marriage counseling service may hire professional and clerical staff with the approval of the circuit court, and within the funds appropriated by the board or boards of supervisors: Provided, however, That in counties having a merit system, the board of supervisors shall have the power to place employment of clerical employees under the merit system.

551.336 Same; eligibility for counseling, priority. [M.S.A. 25.123(6)]

Sec. 6. The circuit court shall prescribe rules and standards of eligibility for counseling. First priority for service shall be given to domestic relations actions in which a complaint or motion has been filed in the circuit court. A family is eligible for counseling by the marriage counseling service if at least 1 of the spouses has the residential requirements to file a complaint or a motion in a domestic relations action in the court.

551.337 Same; referral of spouses to outside services; conciliation conferences. [M.S.A. 25.123(7)]

Sec. 7. The director shall advise spouses fully of the existence of qualified marriage counseling services outside the court so that they may freely make an informed choice of such outside service. In order to assure maximum use of community resources, referrals to agencies outside the court shall be made unless otherwise requested. The marriage counseling service may hold conciliation conference with the spouse, spouses or members of the family, or may refer parties to other qualified marriage counselors or marriage counseling agencies, family agencies or social welfare agencies, religious agencies or advisors, physicians, psychiatrists, private agencies, or other persons qualified to assist in reconciling the spouses. Such referrals shall be made, whenever in the judgment of the director, the interest of the family would thereby be as well or better served.

551.338 Same; determination of causes of friction; reconciliation. [M.S.A. 25.123(8)]

Sec. 8. The circuit court marriage counseling service shall determine the sources and causes of friction and disputes between spouses, or between a spouse

or spouses and other family members, and assist such persons in the resolution of the same. The director and professional staff shall provide skilled family counseling with, and advice to members of, families having marital problems with a view to restoring family harmony. Reconciliations of marital disputes are to be sought by the director and staff. They shall seek to preserve and encourage the continuation of marriages and shall give substantial consideration to the continuation of marriages as promoting the welfare of children.

551.339 Same; privileged communication; director's report. [M.S.A. 25.123(9)]

Sec. 9. A communication between a counselor in the marriage counseling service and a person who is counseled is confidential. The secrecy of such a communication shall be preserved inviolate as a privileged communication which privilege cannot be waived. Such a communication shall not be admitted in evidence in any proceedings. The same protection shall be given to communications between spouses and counselors to whom they have been referred by the court or the court's marriage counseling service: Provided, That in cases counseled in the court's service the director of the marriage counseling service may submit to the circuit court a written evaluation of the prospects or prognosis of a particular marriage without divulging facts or revealing confidential disclosures. Attorneys representing spouses who are the subject of such an evaluation shall have the right to receive a copy of the same under terms and conditions prescribed by the court.

551.340 Same; fee schedule, approval; payment to outside agencies. [M.S.A. 25.123(10)]

Sec. 10. The marriage counseling service may charge fees for its counseling in accordance with a fee schedule prescribed by the circuit court with the advice and consent of the board of supervisors. The board of supervisors may designate any committee of its members to act in its stead in approving such fee schedule. The schedule may be based on ability to pay and may be waived by the court, the presiding judge, or the judge to whom the case may be assigned, for good cause shown. Revenues from fees shall be paid into the county general fund. In multiple-county circuits revenues shall be returned to counties in accordance with their proportionate contributions to the creation and maintenance of the service. The board of supervisors or its designated committee of its members may make provision for payment to agencies outside the court for marriage counseling services rendered to spouses in impecunious cases.

551.341 Same; research, educational efforts, public information service. [M.S.A. 25.123 (11)]

Sec. 11. The marriage counseling service may engage in such research, educational efforts, public information service, or other endeavor related to the purpose and policy of this act as may be approved by the circuit court.

551.342 Same; effect of act; condonation. [M.S.A. 25.123(12)]

Sec. 12. Nothing in this act shall change or affect grounds for divorce, separation or other statutory provisions relating to domestic relations actions. Conferences or interviews with marriage counselors or any persons or agencies to whom parties may be referred shall not be considered as condonation by either spouse of the conduct of the other spouse.

551.343 Multiple-judge circuit, majority of judges. [M.S.A. 25.123(13)]

Sec. 13. In a multiple-judge circuit any act, decision or recommendation by the circuit court, provided for by this act, shall be deemed accomplished by a vote of a majority of the judges of the circuit.

551.344 Act not compulsory on any person. [M.S.A. 25.123(14)]

Sec. 14. The provisions of this act shall not be construed to require any person to submit to marriage counseling who objects thereto.

Approved May 19, 1964.

APPENDIX E

An Act to Amend the Divorce Reform Law
of 1966, New York, February, 1966

An act to amend the domestic relations law and the estates, powers and trusts law, in relation to procedures governing matrimonial actions and repealing sections two hundred fifteen, two hundred fifteen-a, two hundred fifteen-b, two hundred fifteen-c, two hundred fifteen-d and two hundred fifteen-e of the domestic relations law relating thereto.

The People of the State of New York, represented in Senate and Assembly do exact as follows:

§5. Section two hundred fifteen of such law is hereby REPEALED and a new section two hundred fifteen is added thereto to read as follows:

§215. Conciliation Bureau. It is the policy of the State of New York to preserve the marriage state wherever possible. To that end there is hereby created and established a conciliation bureau of the State of New York in each of the four Judicial Departments. The commissioner or head of such bureau in each Judicial Department and such assistants and staff as may be necessary and conciliation counsellors shall be appointed and be removable by the Presiding Justice of the Appellate Division of such Judicial Department. Appointments and transfers to such bureau shall be consistent with the Civil Service Law. The Appellate Division may enter into agreements with public, religious and social agencies to provide conciliation counsellors, and may by rule in addition to or in place thereof provide for the utilization of the appropriate facilities of the Family Court.

Standards and qualifications of the personnel in such bureau shall be established by the Administrative Board.

The appropriate Appellate Division shall establish rules and regulations for the method of conciliation.

§6. Sections two hundred fifteen-a, two hundred fifteen-b, two hundred fifteen-c, two hundred fifteen-d and two hundred fifteen-e of such law are hereby REPEALED and a new section two hundred fifteen-a is hereby added thereto to read as follows:

§215-a. Conciliation proceedings after commencement of an action.

a. Within ten days after the commencement of a matrimonial action, the party-plaintiff in such action shall file with the clerk of the conciliation bureau in the Department where the action was started a notice of the commencement of such action. Failure to file such notice shall be deemed a discontinuance of the cause of action.

Such notice shall contain:

1. the names, ages and addresses of the parties to the marriage;
2. the names, ages and addresses of all children of the parties and those who are minor, handicapped or incompetent;
3. the nature of the action and the date on which it was commenced;
4. the duration of the marriage;
5. whether the husband is supporting the wife and children and who has custody of the children;
6. any attempts made at reconciliation.

After the filing of such notice and upon any information available to the court the court wherein the action is pending upon motion of either party or upon its own motion shall determine whether it shall issue a certificate of no necessity or call for a conciliation conference.

The court shall then either enter an order that conciliation proceedings are not necessary and that plaintiff is entitled to proceed immediately with the further prosecution of the action or refer the action to the commissioner of the bureau for conciliation proceedings.

Upon the filing of such an order, the commissioner of the bureau shall forthwith assign the matter to a conciliation counsellor.

The counsellor shall then hold at least one conciliation conference at which both parties may be compelled to attend and such other conferences as may be provided by the rules of the Appellate Division.

The final report of the conciliation counsellor must be filed with the commissioner within thirty days after the matter has been assigned to him unless the time is extended by the court.

If the counsellor has effected a reconciliation of the spouses, the action shall be dismissed. If he has been unable to effect a reconciliation, the commissioner shall thereupon issue a certificate of termination of conciliation proceedings and the action shall proceed accordingly.

§7. Section two hundred fifteen-f of such law as added by chapter two hundred fifty-four of the laws of nineteen hundred sixty-six is hereby amended to read as follows and renumbered two hundred fifteen-b:

§215—[f] b. Records to be confidential. [The records of the conciliation bureau] All conciliation records shall be confidential and shall be available only to employees of the bureau or such agency to which the matter has been referred. [the parties to the proceeding and their attorneys.] and such records and any statements made by the parties during a conciliation conference shall not be admissible in evidence for any purpose in any proceeding.

§8. Section two hundred fifteen-g of such law, as added by chapter two hundred fifty-four of the laws of nineteen hundred sixty-six, is hereby amended to read as follows: and renumbered two hundred fifteen-c:

§215—[g] c. Stay of [action for divorce] matrimonial actions.

No action for divorce annulment or separation shall be brought to trial until:

[(1) a final report has been filed by a conciliation commissioner with the supervising justice of the conciliation bureau in the judicial district in which the action is to be tried; or]

(1) a conciliation proceeding has been concluded as provided in section two hundred fifteen and section two hundred fifteen-a hereof; or

(2) [one hundred twenty] sixty days have elapsed since the filing of a notice of commencement of [an] the action [for divorce] as herein provided.

APPENDIX "87"

A Submission to the
SPECIAL JOINT COMMITTEE
of the
SENATE AND HOUSE OF COMMONS
ON
DIVORCE
from the
MINUS ONE CLUB, RED DEER
Red Deer, Alberta

Prepared by: a committee composed of a cross-section of the club members.

Elsie Easton—President—divorced

Jack Watt—Treasurer—separated

Eileen Uganetz—Committee Chairman—separated

Harold Davies—separated

Margaret Swainson—divorced

George Smith—widower

Joyce Frazer—separated

Stan Robinson—widower

Millie Schwab—separated

April 3, 1967

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3. Criticism of present divorce law.
4. Marriage breakdown—a ground for divorce
5. Marriage conflict and children
6. Implications of legislation based on marriage breakdown as a ground for divorce.

SUMMARY AND CONCLUSIONS

Because we are deeply concerned with the divorce problem since we and our children are directly affected, we submit that:

1. the present divorce laws are archaic and unrealistic.
2. the legal theory which assumes that one person alone is guilty of a marriage offence, and that no collusion takes place is not based on fact.
3. the law governing the domicile of the woman be altered to provide that a divorce action be commenced by either party in the province of their last matrimonial home.
4. we support the "marriage breakdown" theory of divorce and not just a broadening of the grounds. Legislation should be enacted to permit the dissolution of a marriage which has collapsed to a point where it cannot be salvaged. A proven breakdown of two years, should be grounds for a divorce.

5. it is the conflict preceding a divorce, rather than the divorce, itself, which has a detrimental effect upon children.
6. that the social climate is now ready to accept changes in our present divorce legislation and that such changes will be beneficial to society at large.

INTRODUCTION

The Minus One Club of Red Deer, Alberta, is a club formed by and for persons twenty-one (21) years of age or older whose marriages have been disrupted by death, divorce or separation. It is affiliated with the Y.M.C.A. and registered under the Societies Act.

The Minus One Club is a social club with far reaching effects in terms of human happiness. As a minority group, its members face problems similar to those of other minority groups, in that they can not participate fully in our society. Since they do not "fit in" with the married society, the club provides through its "esprit de corps", personal adjustment with resulting happiness which a "sense of belonging" brings. In short, it helps persons redefine their roles and particular identities.

CRITICISM OF PRESENT DIVORCE LAW

We live in a rapidly changing world and certainly the laws must change to adapt to the needs of the society in order to keep pace. We live in a civilization which is becoming more and more complex—one which gives rise to new situations and new perplexities—all calling for new solutions and new adjustments.

Life today is much different from what it was one hundred years ago when our present divorce laws were enacted. During this time the society and family definitions have changed. Urbanization and industrialization have removed the economic basis of the home, and removed small family groups away from the influence of the larger kin groups and in so doing, have made the conjugal family (consisting of parents and children) into a very fragile unit.

The specialization of services within an industrialized society make it possible for a man to purchase the services or goods he needs even if he has no wife. A wife is no longer needed in the same way she was one hundred years ago. Similarly, changes in society have altered the roles played by women. Today they can support themselves even if they have no husband. This independence and lack of role definition removes one of the solid bricks upon which a marriage was built. When common goals and interests no longer hold a marriage together it is subjected to more pressure and may crack, wither and die.

The conjugal family also carries a much heavier emotional burden when it is removed from the larger kin group. The social controls exerted by the kin group are less exacting and effective in today's world. Formerly the interaction among the kin members was much greater and the pressures exerted by them served to strengthen a weakening marriage. The conjugal family unit, when it exists independently, requires that the husband and wife must obtain most of their emotional solace from each other. When the husband or wife fails to find emotional satisfaction within the unit, there are few other sources of satisfaction and few other bases for common living.

The results of urbanization, the removal of the dependence upon kin groups, and the egalitarian ethos (equal rights for women) which redefines the sex roles, combined with the ideal of marriage based on love with personal happiness the end result, means that there are bound to be more conflicts between husbands and wives now than there were a century ago; and that when such conflicts do arise, individuals feel that the primary aim of marriage has not been achieved.

Since the only common enterprise is now the family itself, when this fails to yield the expected personal satisfactions, it cannot be surprising that the likelihood of divorce is greater today than it formerly was.

Because of the pressures exerted by our way of life, divorce must play a very real part in our society. When two persons have lost all common interests, goals and need for each other, the marriage is a farce. When the marriage contract is all that exists and neither party contributes to its fulfilment, a realistic means must be provided for its dissolution. It is our belief that a marriage does not exist merely because it lasts. A divorce should therefore be granted to dissolve the legal contract if the marriage is dead.

In Canada, with the exception of Nova Scotia which includes the ground of cruelty, adultery has been the only ground on which one could possibly escape from the tensions existing in such a marriage.

Our legal procedure requires that the offended party bring suit against the offender and prove that the offender has committed a marriage crime. By the same token, the suing party is innocent. The fallacy in such logic is apparent—both parties have contributed to the marriage breakdown and one has chosen to take all the blame in order to be released from the marriage contract. Dissension and dissatisfaction on the part of both persons lead to the eventual collapse of the marriage. The fact that adultery or desertion occurs is rather a culmination of a long series of relatively minor maladjustments, difficulties and disagreements. It is the slow dragging out of the conflict which telescopes the conflicts into a situation which is intolerable for one or both parties. It is this conflict process, the contribution which both husband and wife make to the eventual divorce, which makes the present legal theory of divorce so hollow. The legal theory also assumes that there is no collusion between the spouses in obtaining a divorce. Both these elements fail to reflect the facts. In every divorce both parties are offenders even when one party has offended more than the other and in practically every divorce both husband and wife agree to the terms of the divorce beforehand.

Our present legislation forces one marriage partner either to commit adultery or commit perjury, both of which are morally degrading. The falsifying of evidence makes a mockery of our law and law courts. It is on these bases we submit that the present divorce laws are archaic and unrealistic and no longer meet the needs of our present day society.

We also submit that the present law regarding the domicile of the female spouse is unfair and should be changed so that a divorce action may be commenced by either party in the province of their last matrimonial home.

MARRIAGE BREAKDOWN—A GROUND FOR DIVORCE

Our society has never denied the existence of marriage conflict but it has allowed separation, legal or otherwise, as its only solution. Separation removes one from the conflict area but it denies remarriage or the rebuilding of one's life with a new partner in a dignified manner and according to one's conscience. At present the marriage contract binds many persons to a lonely life because one partner is not guilty of a "said" marriage offense. Herein lies the factor of enlarging the grounds. There are not enough grounds available to meet every situation in which a divorce should be granted. The danger in enlarging the grounds still presupposes that one party is guilty of an offense or a breach of the marriage contract.

"Marriage breakdown" as put forward in other briefs is in our opinion the best solution for the divorce problem. It can cover any number of grounds but it hinges on the fact that the marriage cannot be salvaged. It has failed. In order to obtain a divorce because of marriage breakdown, one would have to prove that the marriage was dead by living apart for at least two years. This waiting period

of at least two years before the breakdown of marriage (legal separation or cessation of cohabitation) and the granting of the divorce would prove that the marriage could not be saved; and also prevent quickee divorces and a hasty remarriage. The marriage breakdown ground for divorce would prevent one party from denying, indefinitely, out of spite, a divorce when the marriage is dead and the spouses living apart.

Implicit in the "marriage breakdown" ground for divorce would be the grounds of adultery, mental and physical cruelty, desertion, chronic alcoholism, and the cruelty occasioned thereby, incurable insanity and constant criminality. In the case of proven desertion the time of waiting would not be nullified by the reappearances of the deserter provided co-habitation did not result from the reappearance.

In deciding whether a marriage had broken down the courts would review the overall situation as well as specific matrimonial offenses. The court judges, in whom the decisions for acceptance or rejection of evidence lie, would have the final power to decide whether a marriage had broken down unless a legal separation had been procured.

The adoption of the marriage breakdown ground for divorce would eliminate a great deal of unhappiness and erase a lot of hopelessness for a great many persons.

MARRIAGE CONFLICT AND CHILDREN

18. Our institutional pattern which encourages keeping a marriage together for the sake of the children does not necessarily make happier children. "It seems likely that a family in which there is continued marital conflict or separation is more likely to produce children with problems of personal adjustment than a family in which there is divorce or death. In general separation and continued conflict may have a greater disorganizing effect upon children than divorce, and divorce a greater effect than death because the degree of intimate acceptance, love, support, and control given by the parent or substitute parent is likely to be greater in that same order: separation and conflict, divorce and death. It is the quality of the childhood experience, not the mere fact of divorce, which is crucial."

19. "Parents in conflict, therefore must face a critical choice. They can choose not to divorce, but they cannot by conscious decision create the happy home that would be the most healthful environment in which to rear their children. Their choice usually has to be between a continuing conflict or a divorce and the evidence so far suggests that it is the conflict of divorce, not the divorce itself, that has an impact on children."

IMPLICATIONS OF LEGISLATION BASED ON MARRIAGE BREAKDOWN AS A GROUND FOR DIVORCE

20. The adoption of "marriage breakdown" as the sole ground for divorce would have widespread effects. Many persons, now living common-law could legalize their relationships and others would be discouraged from entering into such a union.

21. Once free of the legal ties, persons could reconstruct their own lives to fit in with society's moral code and according to their own consciences. They could remarry and no longer be restricted from full participation in our society. They could create a new home situation for themselves and for their children. Contrary to popular opinion, second marriages are more likely to be successful than first marriages. This is probably a result of experience gained in the first marriage. Look magazine, February 8, 1966, p.39 states that an analysis of the 1960 U.S.A. census indicates 90 per cent of all divorced people stay married the second time around.

¹ Contemporary Social Problems, by Merton-Nisbet, p. 455-456, Children in Marital Disorganization.

22. In granting divorces on the ground of marriage breakdown, neither spouse would be entirely guilty. This will reduce the inner conflict experienced by the children involved relating to their parents. They will not be forced to reconcile, within themselves, the guilt stigma attached to one of their parents.

23. The easing of the divorce laws may well be seen in an increased divorce rate. In fact, it is to be expected that it will be very high until the present "back-log" of separated persons obtain their divorces. However, this will level off, and we submit that a higher divorce rate will not indicate a lower marriage morality, or the existence or creation of more unhappy marriages, but rather will indicate that more unhappily married persons will seek a divorce. Again we reiterate that a marriage is not necessarily good just because it lasts.

24. It is our contention that the easing of the divorce laws will not change the attitudes toward marriage. No one will enter marriage any less seriously because of the change. No one planning to marry is looking for an escape from it but rather all newly-weds have every confidence that their marriage will be a success.

25. In conclusion the tragedy of a divorce is not so much the breakup of a marriage as it is the apparent destruction, spiritually, morally, emotionally and mentally of all the persons involved in the conflict preceding it.

26. However, "it is a fact, that in spite of the great number of divorces and the large segment² of the population hurt by marital disorganization, almost every person who is widowed or divorced tries marriage once more, and even the children who had unhappy experiences in their own families grow up with enough faith to try marriage themselves when they are grown."

² p. 458—Contemporary Social Problems

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